

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

APR 01 2019

Honorable G. Thomas Cooper, Jr., Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001499

WILLIAM O. DICKERSON PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

APPENDIX
VOLUME 12 OF 22

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(10)(c): **Applicant was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the appellate phase of his trial.**

(11)(c): **Supporting facts:** Counsel's performance on direct appeal was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel's acts or omissions included, but are not limited to, the following:

- 1) Appellate counsel rendered ineffective assistance of counsel by failing to present, for appellate review, defense counsel's motion to dismiss the death penalty due to the unconstitutionality of South Carolina's proportionality review.
- 2) Appellate counsel rendered ineffective assistance of counsel by failing to present, for appellate review, defense counsel's motion to bar the death penalty based on race.
- 3) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's *Batson* challenge.
- 4) Appellate counsel rendered ineffective assistance of counsel by failing to present, for appellate review, defense counsel's objections to the admission of both Devon "Dutch" Keeling and Armon Dickerson's statements into evidence.
- 5) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs 141, 153 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335 and 336.
- 6) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the DNA sample obtained from William Dickerson and, in fact, did not have a copy of the hearing at the time the appeal was perfected since it was not in existence until present counsel ordered it from the court reporter.
- 7) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether Dickerson "knew right from wrong" at the time of the killing.

(10)(d): **Applicant's death sentence was obtained in violation of the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution.**

(11)(d): **Supporting facts:** The capital sentencing scheme in South Carolina violates the Constitution because its methods for the imposition and review of capital punishment suffers the same infirmities as the statute rejected as unconstitutional by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972).

1) South Carolina's capital sentencing statute, as written by the legislature and construed by the South Carolina Supreme Court, does not perform the constitutionally mandated narrowing function.

2) South Carolina's sentencing system permits discrimination on the basis of race.

3) The South Carolina Supreme Court consistently fails to fulfill its statutory and constitutional obligation to conduct meaningful proportionality review in capital cases.

4) The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose.

(10)(e) Applicant was improperly sentenced to both murder and kidnapping in violation of S.C. Code Ann. §16-3-910.

(11)(e) South Carolina law prohibits sentencing for kidnapping when someone is also sentenced for murder pursuant to S.C. Code Ann. §16-3-20. *See also Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (see also numerous case cited therein); *State v. Stroman*, 281 S.C. 508, 514 316 S.E.2d 395, 400 (1984); *State v. Copeland*, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982); and *State v. Vick*, 384 S.C. 189, 202-203, 682 S.E.2d 275, 281-82 (Ct. App. 2009).

(10)(f) Applicant was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

(11)(f) Supporting facts: The Ninth Circuit Solicitors Office committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire.

12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief or a petition for a writ of habeas corpus in either state or federal court.

13. Not applicable.

14. The grounds set forth in (10) above have not previously been presented to this or any other court, state or federal.

15. Not applicable.

16. These grounds rely on facts beyond those set forth in the record that was before previous courts.

17. Applicant was represented by counsel during trial and appeal.

18. Counsel:

a. Name and address of each attorney who represented Applicant:

- i. Jeffrey P. Bloom, Esquire
1911 Pickens Street
Columbia, South Carolina 29201-2631
- ii. Drew Carroll, Esquire
Carroll Law Firm, LLC
440-C Markfield Drive
Charleston, South Carolina 29407
- ii. Robert Dudek
South Carolina Commission on Indigent Defense, Appellate Division
1330 Lady Street, Ste. 401
Columbia, South Carolina 29201
- iv. Kathrine Hudgins
South Carolina Commission on Indigent Defense, Appellate Division
1330 Lady Street, Ste. 401
Columbia, South Carolina 29201

b. Proceedings at which each attorney represented Applicant:

- i. Trial counsel
- ii. Trial counsel
- iii. Appellate counsel
- iv. Appellate counsel

19. Applicant seeks relief from his conviction and sentence.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

E. CHARLES GROSE, Jr.
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

ELIZABETH A. FRANKLIN-BEST
Blume Norris & Franklin-Best, LLC
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By: DAF 31
COUNSEL FOR APPLICANT

Columbia, SC.
7/13/15

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

WILLIAM O. DICKERSON, SK6030)
Applicant,)

v.)

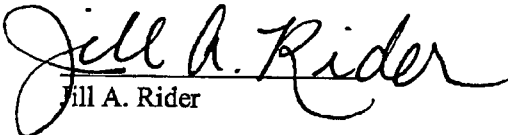
THE STATE OF SOUTH CAROLINA.)
Respondent.)

IN THE COURT OF COMMON PLEAS
CA No. 12-CP-10-3216

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Applicant's Third Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 13th day of July, 2015, upon the following:

Melody Brown
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill A. Rider

2015 JUL 15 PM 2:20
JILL A. RIDER
CLERK OF COURT
BY



ALAN WILSON
ATTORNEY GENERAL

September 28, 2015

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Ste. 106
Charleston, SC 29401

Re: William O. Dickerson v. State
2012-CP-10-3216

Dear Ms. Armstrong:

Enclosed for filing in the above-referenced case, please find Respondent's *Motion to Strike and or in the Alternative to Dismiss Claim Not Cognizable in Post-Conviction Relief* with certificate of service. Also, enclosed is a copy and self-addressed stamped envelope to return a clocked-stamped copy to me.

Thank you for your assistance.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosures

cc: The Honorable G. Thomas Cooper, Jr. (with enclosure)
E. Charles Grose, Jr., Esquire (with enclosure)
Elizabeth Franklin-Best, Esquire (with enclosure)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

William O. Dickerson, #6030,

☐ Plaintiff

v.

State Of South Carolina

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2012-CP-10-3216

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Charles Grose, Jr. Esquire, Bar No. 66063
Address:
404 Main St, Greenwood, SC 29646
phone: 864-538-4466 fax: 864-538-4405
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Defendant's Attorney:
Melody J. Brown, Esquire, Bar No. 14244
Address:
Post Office Box 11549 Columbia SC 29211-1549
phone: (803) 734-3742 fax: (803) 734-4035
e-mail: mbrown@scag.gov other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Strike/Dismiss

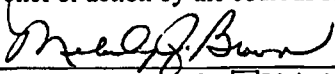
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

September 28, 2015

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

C/A No. 2012-CP-10-3216
(Capital PCR)

MOTION TO STRIKE AND OR IN
THE ALTERNATIVE TO DISMISS
CLAIM NOT COGNIZABLE IN
POST-CONVICTION RELIEF

Petitioner's final amendment was filed on July 15, 2015. Petitioner raises a free-standing claim that this Court has previously found is not cognizable in this action. Thus, Respondent moves to strike the claim and additionally or alternatively to dismiss the claim pursuant to S.C. Code § 17-27-70 (summary dismissal procedure); Rule 12 (b) (6), SCRCP (failure to state facts sufficient to constitute a cause of action); and the Simmons Doctrine (*Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975)). In support of this motion, Respondent would respectfully show the Court:

1. On July 15, 2015, Petitioner filed his final amended application and raised a claim styled as a denial of "due process and equal protection" alleging that the Solicitor "committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire." (July 2015 Amended App. p. 5). A "due process and equal protection" claim regarding jury strikes is simply a *Batson* claim.¹ *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712

¹ To the extent Applicant would assert his claim differs as it is a claim styled "due process and equal protection," he fails to cite an independent constitutional ground to show jurisdiction. See generally S.C. Code § 17-27-20 (limitations of jurisdiction). Indeed, he has referenced the use of strikes which can only be logically interpreted as a *Batson* claim. To allow recasting of the claim as separate claim in order to allow Applicant to litigate anew would render meaningless the statutory limitations that PCR is not a substitute for trial or direct appeal remedies and the long-standing Simmons Doctrine preventing issues from being raised again without a claim of ineffective assistance. At any rate, Applicant has failed to show such an "independent" claim, if any, could not have been raised at trial. It is still barred.

(1986) (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”); *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007) (“The Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibits the striking of a venire person on the basis of race or gender.”).

2. Applicant raised a *Batson* motion at trial. (ROA p. 2028; Tr. p. 1836). As a matter of state law, Applicant may not raise this claim again. S.C. Code § 17-27-20 (b) (“This remedy is not a substitute for nor does it affect any remedy incident to the proceeding in the trial court, or of direct review of the sentence or conviction.”); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“The *Simmons* rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”).

3. This Court has already ruled that such a claim may not be raised. (Order Denying Motion to Compel Solicitor’s Work Product, filed September 10, 2014, p. 6). The Court, therefore, should strike the claim from the amended application.

4. Additionally or alternatively, the claim should be dismissed under S.C. § 17-27-70 (summary dismissal procedure); Rule 12 (b) (6), SCRPC (failure to state facts sufficient to constitute a cause of action); and the Simmons Doctrine (*Simmons v. State, supra*), as the claim is not cognizable. *See, for example, Alkebulanyahh v. State* (C/A 2007-CP-07-715) (Capital PCR where issue summarily dismissed as not cognizable) (Attached at p. 41-42). Moreover, dismissal of the claim does not impair the litigation of the ineffective assistance of counsel claim in regard

to the *Batson* issue. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 (“Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief *absent a claim of ineffective assistance of counsel.*”) (emphasis added). The only limitation is that inherent in the claim itself— that it is counsel’s representation that must be evaluated and such representation must be evaluated in light of the facts and circumstances at the time of trial. *See, e.g., Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (“The United States Supreme Court has cautioned that ‘every effort be made to eliminate the distorting effects of hindsight’ and evaluate counsel’s decisions at the time they were made.”) (*quoting Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984)).²

WHEREFORE, Respondent respectfully requests based on the foregoing argument, that this Court strike and/or summarily dismiss claim 11(f) on page 5 of the Final Amended Application filed July 15, 2015.

Respectfully submitted,

² This Court held a hearing on September 18, 2015 on a motion to compel information from the solicitor in unrelated matters which included requests for items generated years after the 2009 trial at issue here. Respondent notes, as it did at the hearing, that none of that information could possibly lead to relevant information in the review of counsel’s decision at the time of the 2009 trial. Discovery limitations should be exercised here to prevent abuse as they are in other civil cases. *See generally Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 380, 388-89, 692 S.E.2d 920, 924-25 (2010) (cautioning against “the merits of a claim ... being relegated to secondary status” and vacating discovery orders “not remotely relevant to a resolution of the issue...”); Rule 1, SCRCP (“These rules govern the procedure in all South Carolina courts in all suits of a civil nature ... They shall be construed to secure the just, speedy, and inexpensive determination of every action.”); Rule 71.1 (a), SCRCP (“The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.”). Again, as it did at the hearing and as it has previously in response to other overly broad and irrelevant discovery requests within this action, Respondent objects to discovery requests within this action that could not possibly be relevant or legally useful to the claim and that clutters the records and delays the proceedings. The action should be limited to Applicant’s claims that are cognizable in post-conviction relief.

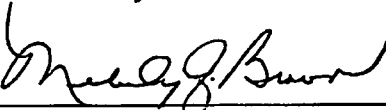
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By: 
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September 28, 2015.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
Abdiyyah ben Alkebulanyahh, #6012	)	C/A No. 2007-CP-07-0715
Applicant,	)	
v.	)	ORDER OF DISMISSAL WITH PREJUDICE
The State of South Carolina,	)	
Respondent.	)	

2008 SEP 17 PM 2:11
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, SC

This matter is before me on the application for post-conviction relief (APCR) filed by Abdiyyah ben Alkebulanyahh¹ ("Applicant") and dated March 12, 2007, and the Amended APCR filed by Applicant through his appointed counsel dated February 7, 2008. For the following reasons, I deny and dismiss the application with prejudice.

I.

Procedural History

In March of 2002, the Beaufort County Grand Jury indicted Applicant on two charges of murder for the shooting deaths of two Beaufort County Sheriff's Deputies (02-GS-07-0369 & 0370). {R. 4534-35}. The State gave notice of intent to seek the death penalty and served its notice of evidence in aggravation.

Applicant represented himself at his jury trial, but Attorneys Gerald Kelly and Sean Thornton remained throughout the trial to assist. *Voir dire* in the case began on October 6, 2003 before Judge Daniel F. Pieper. Trial began on October 10, 2003. {R. 1316}. On

¹ Mr. Alkebulanyahh was formerly known as Tyree A. Roberts but has since legally changed his name.

October 21, 2003, Applicant's jury convicted him of both charges. {R. 3472-73}.

The sentencing phase of his trial began on October 22, 2003. Judge Pieper submitted the following aggravating factors to the jury:

(1) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(2) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

{R. 3847; 4529}. The following mitigating factors were submitted to the jury:

Whether the existence of any non-statutory mitigating circumstance was supported by the evidence.

{R. 3851; R. 4529}.

On October 22, 2003, Applicant's jury found the existence of the aggravating factors ~~and recommended a sentence of death on the murder counts.~~ That same day, Judge Pieper sentenced Applicant to death. {R. 3861-68; 3873; 4533}.

A timely Notice of Appeal was filed with the South Carolina Supreme Court. Applicant was represented on direct appeal by Joseph L. Savitz, III, and Robert M. Dudek, of the South Carolina Office of Appellate Defense, after the South Carolina Supreme Court denied Applicant's motion to proceed on direct appeal *pro se*. State v. Roberts, 364 S.C. 583, 614 S.E.2d 626 (2005). On March 7, 2006, Applicant submitted a Final Brief of Appellant to the South Carolina Supreme Court, in which he raised the following issue:

The judge erred by refusing to allow appellant to waive his right to be present at the sentencing phase, instead confining him to a holding cell attached to the Courtroom in which he was visible to the jury, particularly since appellant's absence during sentencing was his *pro se* trial strategy and the State advanced no countervailing reason for requiring him to be present.

The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent on February 17, 2006. Oral argument was held before the South Carolina Supreme Court on May 24, 2006. The South Carolina Supreme Court issued an opinion dated July 24, 2006, affirming the sentence. State v. Roberts, 369 S.C. 580, 632 S.E.2d 871 (2006).

Following a Petition for Stay of Execution by Applicant and a Return by the State, the South Carolina Supreme Court issued an Order dated September 7, 2006, which stayed the execution so that Applicant could file a Petition for Writ of Certiorari with the United States Supreme Court. Applicant filed his Petition dated November 9, 2006, in which he raised the following issue:

-----May a capital defendant waive his right to be present at the sentencing phase of his trial, where his absence during sentencing is the product of his trial strategy and the prosecution advances no countervailing reasons for requiring him to be present?

The State, through Assistant Attorney General S. Creighton Waters, filed a Return to the Petition for Writ of Certiorari, dated February 5, 2007. The United States Supreme Court denied the Petition for Writ of Certiorari by Order dated March 19, 2007.

Applicant filed a *pro se* Application for Post-Conviction Relief dated March 12, 2007. Following a Petition for a Stay of Execution, the South Carolina Supreme Court issued an Order on May 4, 2007, assigning Judge Roger Young continuing jurisdiction over the matter. In August of 2007, Judge Young signed an Order appointing Glenn Walters, Esquire, and Carl Grant, Esquire, as attorneys for Applicant, and giving them until February 8, 2008, to file an Amended Application. The State filed an initial Return, Motion to

Dismiss and/or Motion for Summary Judgment on October 15, 2007. Applicant followed with his Amended Application on February 7, 2008, to which the State responded with an Amended Return on March 21, 2008.

An evidentiary hearing in the case was held before Judge Young on October 13 and 14, 2008. Applicant was present and represented by his counsel Walters and Grant; the State was represented by S. Creighton Waters and Alphonso Simon. Applicant called himself to testify; the State called Sean Thornton, Esquire. Further, the parties agreed to submit into evidence the depositions of: Chief Appellate Defender Joseph Savitz, III, Deputy Appellate Defender Robert M. Dudek, Dr. Donna Schwartz-Watts; Gerald Kelly, Esquire; Sean Thornton, Esquire, and Solicitor I. McDuffie Stone, III.

Subsequently, the South Carolina Supreme Court, by Order dated December 17, 2008, reassigned continuing jurisdiction of this case to me for review of the evidence and a determination on the merits.

I have reviewed the testimony and the record and rule as follows.

II.

Brief Statement of Facts

Applicant was convicted and sentenced to death for murdering two police officers who responded to a domestic call at his home. Applicant testified that two others were in the room when the shooting happened, and that he did not shoot anyone. He did not present a case in mitigation.

III.

Grounds for Relief

This Court has had the opportunity to review the record in its entirety, including the testimony and arguments presented at the PCR hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-160(D).

None of Applicant's grounds for relief are sufficient for relief. A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992).

A. Ground One

In his amended application for relief, Applicant first contends the trial court failed to make the proper inquiry and failed to ensure that Applicant knowingly, intelligently, and competently waived his right to counsel.

1. Events at trial

At a pre-trial hearing before Judge Perry M. Buckner on November 12, 2002, Applicant stated to the judge that he filed a motion to dismiss his attorneys as he felt they were sabotaging his case. The Solicitor requested that the competency evaluation be done by a certain date, and when Counsel Thornton indicated he had no objection - Applicant stated he did object to it. {R. 3888-91}.

At a pre-trial hearing before Judge Pieper on July 23, 2003, there was an extensive colloquy on Applicant's motion to represent himself. Applicant noted he had finished high school and had taken some college coursework, and had also self-educated himself on the criminal justice system by studying the Constitution, PCR materials, trial proceedings, and

statutes. He pointed out he had done PCR work for other inmates and filed numerous motions in his own case. He stated he thought his lawyers were incompetent and lazy, and complained about them withdrawing his speedy trial motions. Applicant also complained that his lawyers hired an expert to make him look like he had a mental problem when the State expert found him competent – and he thought the State expert was far more professional and qualified. Applicant noted his lawyers had given him a document on the dangers of self-representation, and the appointed defense lawyers agreed that if Applicant was found to be competent he could, in fact, represent himself. The trial court discussed the fact that by waiving counsel Applicant was waiving it for the entire case, and he might find himself shocked and dazed when faced with proceeding with the penalty phase if the jury returned a guilty verdict. The Court also warned Applicant that his failure to properly raise issues at trial would preclude them on appeal and he would be unable to raise inadequate representation as grounds for Post Conviction Relief. Despite this, Applicant continued to indicate his desire to represent himself, and the Court specifically noted Applicant was very coherent. After Applicant reiterated his free, knowing, and intelligent decision, the Court indicated its intent to allow Applicant to proceed *pro se*, pending a Blair hearing. {R. 3900-3945}.

As the hearing progressed and various housekeeping and logistical matters were discussed, Applicant listed for the Court a relatively long list of people he wished to subpoena, including law enforcement personnel, DSS employees, and other witnesses. {R. 3951-55}. The Court accepted as a Court's Exhibit the document setting forth the dangers of *pro se* representation that counsel Kelly had given to Applicant. {R. 3955-56}.

The Court inquired again if Applicant understood everything that transpired, and after Applicant indicated he did, the Court gave him an additional week to think over *pro se* representation. The Court also noted that if the case was to go forward as soon as possible, such as Applicant desired, Applicant would need to be prepared for the hearing the following week to argue any motions he may have. {R. 3955-58}. Before the hearing concluded, Applicant and Judge Pieper discussed some expert witnesses he wished to pursue, including Applicant's very cogent explanation to Judge Pieper why he wished to have a psychological expert on false statement testify at trial in the face of the Judge's questioning on why cross-examination would not be sufficient. {R. 3958-64}.

A Blair hearing took place on August 1, 2003. Defense-retained psychiatrist Dr. Donna Schwartz-Watts felt that Applicant was not competent to represent himself based on her assessment of his paranoia, psychosis, and the reasoning he provided on why he wished to defend himself. Specifically, Dr. Schwartz-Watts stated that at their third interview Applicant was psychotic and not in touch with reality, and he had since refused to see her. She felt Applicant did not have the capacity to assist his attorneys because he thought they were conspiring with the Solicitor. She also felt he did not have the capacity to look at different decisions about how to defend himself because he refused to consider any kind of mental health mitigation. She admitted, though, that she could not give an opinion as to his competency at that moment since he had refused to see her again {R. 3971-90}.

On cross-examination by the Applicant, personally, Dr. Schwartz-Watts agreed that while he initially consented to having the interviews taped, he forgot it was recording, and

was very angry that Dr. Schwartz-Watts might disclose the tape to other people. {R. 3991-95}.

On cross-examination by the Solicitor and questioning by Judge Pieper, Dr. Schwartz-Watts stated Applicant's intelligence was sufficient, but she was concerned – not with the decisions he makes but with the reasoning behind them – given that he thought he could do better than his attorneys, and his belief that his attorneys were Masons who were conspiring with the Solicitor to deny him a fair trial based on his religious beliefs. She also thought his mental illness precluded him from considering issues in mitigation. However, she stated she thought some of Applicant's decisions about experts were "brilliant." Further, she stated to the judge that if Applicant decided to accept the opinion of another expert who thought he was competent that could be considered a rational decision, unless he was only doing so because of his illness. Ultimately, she stated Applicant had some "good" and "strong" ideas about how to defend his case, but she questioned the reasoning with which he arrived at those ideas. Dr. Schwartz-Watts stated it would not be unusual for him to be mistrusting since he was accused of killing two police officers, but she felt he "crossed the line" with his belief that his attorneys were part of a conspiracy. {R. 3997-10}.

The defense psychologist, Dr. Jeffrey R. McKee, stated Applicant refused to see him, and he had elevated scores on a portion of a psychological test which indicated defensiveness and underreporting of symptoms. On cross-examination by Applicant, he agreed Applicant had average intelligence, no neuropsychological deficits, and no indications of malingering. {R. 4011-21}.

The Court's psychiatrist and psychologist both found Applicant competent to stand

trial and criminally responsible. The psychiatrist, Dr. Richard Frierson, diagnosed Applicant as having a personality disorder with narcissistic and anti-social traits – but noted that was not a major mental illness. He stated he would expect Applicant to have elevated scores on the Personal Assessment Inventory Test ("PAI") because Applicant tries to present himself in best light. {R. 4022-26}.

On cross-examination, Dr. Frierson testified he scheduled another meeting with Applicant after viewing Dr. Schwartz-Watts' videotape of the interview. He discussed in detail these issues with Applicant and concluded Applicant's thoughts about the Masons and the Court system were not delusional but an ideology shared by a number of people. Dr. Frierson found information on the Internet about books written on the Masons, and Applicant agreed he had read some of those books. Since Applicant's beliefs were similar to what other people believe about these organizations, Dr. Frierson found it to be a cultural belief that may be false – rather than a delusion that was caused by mental illness. While Dr. Frierson certainly agreed Applicant displayed narcissism and might overestimate his abilities, he saw no evidence Applicant ever had a major depressive or manic episode. {R. 4026-33}.

The Court's psychologist, Dr. Jeffrey E. Musick, examined Applicant four times and also agreed he was competent to stand trial. He noted Applicant did show elevated scores on the positive impression management scale of the PAI test – meaning Applicant was unwilling to disclose minor shortcomings to which others might admit. However, since Applicant was presenting himself in the best light, Dr. Musick found the unwillingness was not surprising. {R. 4036-40}.

On cross-examination by Thornton, Dr. Musick agreed that where there are scores on the positive impression management scale similar to Applicant's score, the PAI manual cautions that the other scores might underestimate any psychopathology. Dr. Musick noted he compensated for any discrepancy by spending a lot of time in the interviews addressing any symptoms Applicant might have. Similar to Dr. Frierson, Dr. Musick also did not think Applicant's belief about the Masons was a delusion but rather, believed it was a cultural or subcultural belief, partly because Applicant agreed he did not know if what he had read about Masons was true, and partly because there was information on the Internet and in books reflecting similar views. {R. 4040-48}.

On cross-examination by Applicant, Dr. Musick stated that none of Applicant's tests indicated he was mentally retarded. Dr. Musick agreed that while Applicant did have some suspiciousness and distrustfulness, that did not necessarily make one abnormal, and noted Applicant was well aware of his rights. Dr. Musick also agreed with Applicant's questioning that simply because one tried to portray himself in a positive light or did not admit to minor annoyances did not necessarily mean he was hiding larger issues, and agreed that one would not be delusional if he believed in the existence of the Ku Klux Klan, Free Masonry, or "enemies." {R. 4049-52}.

The Court found, based on the Court Examiner's testimony as well as its own observations and interaction with Applicant, Applicant was competent, stating:

THE COURT: I have watched the defendant in court; I gave the defendant the opportunity to ask questions in these proceedings for the very purpose of evaluating the defendant's demeanor, his behavior, whether the defendant is rational, whether he has an appreciation of these proceedings. The defendant asked some questions when he was addressing the witnesses, the questions were pertinent. I think the defendant listened to the testimony,

he referenced some of that testimony in his questions and there is evidence in the record from the psychiatric testimony that the defendant is competent to so proceed and the Court upon review of all of these -- with the entire record finds that defendant does have such a rational understanding of these proceedings and does have the ability to present his defense, that I find that he is competent to proceed.

{R. 4054-55}.

The Court then held another colloquy with Applicant on his desire to represent himself, and engaged in a detailed and lengthy discussion with Applicant on the responsibilities, dangers, and issues with *pro se* representation, particularly in a capital case. Indeed, the judge even advised Applicant not to represent himself, and told him he would be overwhelmed by the prospect of a sentencing phase if he were convicted. Applicant held firm to his desire to represent himself. {R. 4055-61}.

The discussion then moved to standby counsel. Applicant noted he had requested different counsel, but he understood that trial was approaching and he wanted a speedy trial so, he stated he would accept Kelly and Thornton as standby counsel rather than no counsel at all. The judge pointed out that there was no obligation to appoint standby counsel, and that even if standby counsel were appointed there would be no hybrid representation. Applicant specifically stated he did not expect his standby attorneys to be able to assist in presentation, and the judge agreed to allow Kelly and Thornton to remain in that capacity. After one final colloquy on Applicant's decision to represent himself, Judge Pieper accepted Applicant's request, finding it to be a free, voluntary, and intelligent decision. Again, the judge noted that in reviewing Applicant's motions and discussing the case with Applicant, the judge believed Applicant "does seem to have the ability to proceed and handle his defense in this case." Appointed counsel Kelly and Thornton were ordered

to remain as standby counsel to assist Applicant with advice and logistical support. {R. 4061-73}.

For the remainder of that pre-trial proceeding, Applicant was able to make and logically discuss a number of motions. While at least some of them might not have been made by a formally trained lawyer, none of them were rambling or nonsensical but rather, they were at least somewhat appropriately related to a valid principle of law. These motions included a motion for bond; withdrawal of motion to change venue; motion to dismiss indictments for use of Applicant's former name; motion to dismiss indictments based on 4th Amendment issue; motion for a speedy trial; motion for release from segregation; motion to dismiss based on a conspiracy between judge, prosecutor and detention officials; motion to dismiss because arrest warrant is false based on error in one of the deputy's names; motion for voir dire; motion to sequester jurors; motion to dismiss based on false testimony allegedly being presented to the Grand Jury; motion to dismiss because of the failure to include aggravating circumstances in the indictment; motion based on the lack of representation of minorities on the grand jury; motion to preclude the State from using any information gleaned during the competency evaluation; a motion to allow his investigators to examine the evidence, and a motion for a room wherein the defense team could meet during the trial. {R. 4074-4220}. In *ex parte* proceedings, Applicant then cogently discussed his requests for experts, including a false memory expert, a forensic evidence expert, a jury selection expert, and a firearms expert. Some of these requests were granted. {R. 4222-4255}. An additional pre-trial hearing was held on October 1, 2003, at which Applicant raised a number of other appropriate motions, as well

as conducted an evidentiary hearing on his Fourth Amendment claims. {R. 4259-4451}. Applicant handled motions to quash in opposition to his subpoenas as well as *voir dire* issues at the pretrial hearing on October 3, 2003. {R. 4455-4523}.

When trial commenced on October 6, 2003, Applicant successfully conducted extensive capital *voir dire* without any significant incident, asking a number of questions that were probative of the jurors as to race, involvement with law enforcement, and the death penalty. He engaged in jury selection, made a motion for a Batson hearing, and discussed parameters of the opening statement with Judge Pieper. {R. 54-1364}.

Applicant then gave a long opening statement – and while it was not perhaps as focused as other experienced lawyers' arguments might be, it was pertinent, logical, and relevant to the issues in the case. Applicant argued: the prosecution's opening statement ~~was not the truth; that some of the witnesses were going to be lying; that some witnesses~~ would be intimidated by officers; that Kimberly Blake kept changing her story; that he was shot and fled but was not the shooter of the officers; that the officers were not following the law and proper procedure when they searched the house; that the jury should not overlook lies, discrepancies, and inconsistencies in making its decision; that the case was not about race because injustice could happen to any citizen; and that he was being falsely characterized as some sort of "radical guy, some Jamaica guy, or some poor black, racist-type, militant type of guy." Applicant concluded by appropriately thanking the jury, and reminding them of their promise to be impartial and give him a fair trial. {R. 1385-1414}. By no means would I characterize Applicant's argument as the irrelevant ramblings of an incompetent. Further, his argument to the jury might be the best indication of Applicant's

competence because it is a long unprompted exposition coming straight from Applicant himself.

Without now recounting from this large transcript every witness and every time Applicant did something "right," or even clever, Applicant also engaged in lengthy arguments and examinations of witnesses in an emotionally charged case. A reading of the guilt phase shows that while Applicant may have occasionally had trouble with Rules of Evidence and Rules of Civil Procedure, he had no trouble whatsoever during the guilt phase in maintaining proper demeanor in the Courtroom and displaying proper respect for the Court, opposing counsel, and the witnesses. Indeed, Applicant repeatedly expressed his appreciation and respect to the trial court throughout the entirety of the guilt phase process. See, e.g. {R. 1914; 1976-79; 1991; 3456}. Thus, this is not a situation where a defendant requested to represent himself and misbehaved the whole time or repeatedly... showed an inability to follow basic courtroom decorum.

As shown by the record, the only serious issue developed after closing arguments were completed in the guilt phase, while the jury was still in the deliberation. The Court noted that while it had honored Applicant's desire to represent himself, and even appointed stand-by counsel to help Applicant, Applicant apparently said he did not intend to participate in sentencing and did not even intend to appear in the courtroom. Applicant stated that he did not intend to present anything in mitigation. The Court highlighted the importance of a case in mitigation, but Applicant remained firm, stating that it would make no difference for him. {R. 3448-3450}.

Applicant stated he wanted to continue to represent himself, but that he would not

be attending the sentencing. When the judge said that he would need to be present, Applicant replied he "wouldn't be able to sit there and attend that proceeding," and then proclaimed he "waive[d] all the rights to any objections to anything in the event that I'm found guilty." The judge engaged in another colloquy on Applicant's right to give a statement to the jury, but Applicant was adamant he did not want to present any case in mitigation. {R. 3450-54}.

The judge then held a meeting with just the defendant and his stand-by attorneys. Applicant stated that he did not want to participate in sentencing because:

[I] wouldn't have no bearing on me, because if I'm in prison for life, that's death to me. I can never accept that. You know, I don't find [a life sentence] as a easy or something positive or good in my situation. Death would be more preferable than life until I die in -- in prison.

{R. 3455-56}.

Applicant went on to say he did not want to be sentenced to death but that life in prison was a form of death itself. Applicant also told the Court he did not want counsel appointed for sentencing, and stated that it was a decision he had thought long and hard about. {R. 3454-58}.

After the meeting, the Court found Applicant's decision to be voluntarily and knowingly made with regard to his sentencing phase rights but said Applicant was going to remain present during the sentencing phase. In response, Applicant said he would probably be "unruly" and would have to be restrained if he were forced to attend. The Court stated that Applicant was not going to be unruly and that he would be restrained if need be, and lamented that Applicant had not caused any other problems up to that point. The Court admonished, "You asked to represent yourself, and you'll need to follow that

through." {R. 3460-63}.

Applicant continued to make guilt phase motions and otherwise represent himself even after a verdict the next morning, but he, again, reaffirmed his intention not to offer anything in sentencing. {R. 3463-82}. As the parties discussed logistics, Applicant again stated that he had no intention of sitting in the Courtroom listening to the case, and while he would not be violent, he would be unruly. The Court responded that it had honored Applicant's request to represent himself, and that a capital case required the defendant's presence during the sentencing phase. {R. 3482-83}.

Applicant reaffirmed his waiver of his sentencing phase rights, even reciting them himself – but warned that he would make a statement whenever he wanted to if he was in the presence of the jury. According to Applicant, he did not care for the jury to know ~~anything about him because he had already presented everything he wanted to present in~~ the guilt phase. Applicant declined the Court's suggestion that he sit in the back room where he could observe the proceedings. {R. 3484-88}.

As the conversation continued, Applicant said that from the beginning he had instructed his stand-by attorneys and investigators that there would be no mitigation witnesses called. The Court decided to break for lunch but warned Applicant that his presence may be required, and the Court would deal with any misconduct. {R. 3490-92}.

Before the break, Applicant's standby attorneys conferred with him and reported their conversations with the Judge. According to them, Applicant (1) did not want to be supplanted as attorney of record, (2) did not want to put up evidence but did not care if standby counsel objected to or examined witnesses during the state's case, and (3) did not

want to be present, but felt it was going to be up to the judge whether to put him in the back room. They then discussed the possibility of standby counsel representing Applicant in a limited capacity during the sentencing phase. The Court reviewed some cases, and standby counsel proposed that, consistent with Applicant's wishes, counsel be limited in action to three things: to make objections, to give argument, and to stipulate. Applicant expressly refused to comment. {R. 3494-3505}.

After lunch, the Court again took up the issue, phrasing it as an attempt to balance Applicant's right to represent himself with his right not to present evidence or testify. Applicant again said he would be a disruption if forced to remain. {R. 3512-14}.

When the Court asked Applicant how he planned on being disruptive, Applicant said "just verbally . . . [but] not any profanity or anything like that, or disrespectful." Applicant said he did not want to see any of the witnesses, and again stated that he wanted to "waive any defense in reference to that proceeding, "and wanted to "waive my right to not even be there" He stated he was "respectfully" ready to accept the jury's sentence when the time came. {R. 3516-18}. Applicant had no problem with standby counsel handling the witnesses and the objections, and he freely and voluntarily waived his right to be present. {R. 3518-20}.

The Court then discussed with the lawyers whether they had to wait for Applicant to be disruptive to exclude him. Standby counsel asserted that Applicant could waive his right to be present. {R. 3521-23}. The Court stated that was the question at issue but pointed out that Rule 16 of the South Carolina Rules of Criminal Procedure seemed to require a capital defendant's presence. {R. 3523-30}.

Ultimately, the judge concluded that Rule 16 required Applicant to be present. The Court offered to allow Applicant's father to sit at counsel table with Applicant, but Applicant declined. The Court then directed that the trial proceed, and stated it would continue to honor Applicant's desire to represent himself. {R. 3532-36}.

The next morning, after a detailed colloquy, Applicant again stated he still wanted to continue to represent himself, but he agreed that standby counsel could make objections and give a closing statement. {R. 3538-42}.

After an opening charge by the judge, the State began its sentencing phase case. As soon as the Solicitor asked his first question, Applicant stood up and recited, "Blessed be Yahweh, el Shaddai, Jehovah, God Almighty, the God of Abraham, Isaac, Ishmael, Jacob, and Jesus." The Court asked Applicant to take a seat, which he did, and the Solicitor tried to ask the question again. Applicant stood up a second time and recited the same religious phrase. At this point the Court ordered the jury to step out. {R. 3548-51; 3553}.

Applicant told the judge that he intended to continue to interrupt the proceedings. The Court noted that he had already warned Applicant about misbehavior, but was going to warn him one last time and that if he continued to misbehave, he would be removed from the Courtroom and placed in the back room. {R. 3551-53}. When the jury returned, the Court immediately gave a curative instruction. {R. 3555}.

Again, when the Solicitor started questioning, Applicant stood up and recited the same religious phrase. The Court ordered the jury out of the Courtroom, and put on the record that since Applicant repeatedly refused to behave, he would be put in the back room where there was a glass partition allowing him to see the proceedings and hear the

testimony. The Court noted that Applicant had authorized his counsel to make objections and give a closing statement. Applicant requested that the sound be turned off in the back room, but the judge said he could not do that – Applicant could cover his ears if he wanted. Again, Applicant asked to be "exempted from" or to "waive" the proceeding, but the Court denied his request, stating the rules required his presence. {R. 3555-60}. When the jury returned, the trial court gave another curative instruction. {R. 3566-67}. The sentencing phase then began.

After a couple of witnesses testified, the lunch recess was taken. The judge offered to let Applicant sit back at the counsel table, but Applicant told the Court he would rather remain in the back. Applicant said he could hear everything, and he would raise his hand if he could not. {R. 3596-97}.

After a number of further witnesses, the Court again invited Applicant to return to counsel table. Applicant again declined, saying he was "fine" in the back, that he could hear and see everything, and that he did not mind standby counsel operating on his behalf in a limited fashion. {R.3681}. Witnesses continued for the rest of the day.

The next morning, the trial court asked Applicant if he would make outbursts if placed in court, and Applicant said he would. Applicant said he preferred to stay in the back room, and again said that he had no problem with standby counsel representing him in the limited fashion consistent with his desire not to present a case in mitigation. {R. 3738-40}.

Finally, at the close of the state's case, the Court gave Applicant one last chance to present a case in mitigation, testify or give a closing statement. Applicant declined to present a case or testify, but agreed his counsel could argue in closing. {R. 3760-63}.

Upon inquiry, Applicant again stated he would not return to the front of the Courtroom without making outbursts. {R. 3765}.

During the state's closing argument, Applicant apparently decided to participate again by twice making objections through his counsel. Despite these actions, Applicant still declined to return to counsel table, stating that he preferred to remain in the back. {R. 3789-90; 3795-97}. Applicant ultimately decided to return to the Courtroom – where he gave a fairly lengthy closing statement to the jury in which he personally apologized to the victim's families. Like his other arguments, the closing argument Applicant gave was logical, appropriate and relevant to the issues. After finishing his argument, Applicant returned to counsel table for the rest of the case. {R. 3829-40}. Applicant remained calm and coherent after the sentencing phase verdict, renewing his motions, apologizing to the family, and thanking the trial judge. {R. 3871-73}.

2. Direct appeal

Applicant also showed no difficulty in expressing himself to the Courts in the direct appeal proceedings. Unsatisfied with the efforts made by his appellate defender, Applicant filed a *pro se* "Motion to file an Amended *Pro se* Initial Brief," received by the South Carolina Supreme Court on April 5, 2005, in which he set forth eight issues he wanted to raise on appeal. Like his trial performance, all of the issues listed were at least somewhat appropriately raised issues on direct appeal, including claims of error as to the Batson motion, denial of the directed verdict motion, and introduction of inadmissible evidence. Applicant also filed a "Motion to Proceed *Pro se* on Direct Appeal in All Matters," dated

April 25, 2005.² The South Carolina Supreme Court denied Applicant's motion to represent himself on appeal by Order dated June 3, 2005. State v. Alkebulanyahh, 364 S.C. 583, 614 S.E.2d 626 (2005).

3. The inquiry at trial as to the waiver of counsel was sufficient and provides no basis for relief.

Applicant next attacks the sufficiency of the Court's inquiry into his desire to represent himself, as well as the Court's determination that Applicant's decision to waive counsel was knowingly and intelligently made. Freestanding claims as to waiver have been addressed in both direct appeal and PCR contexts. In the capital case of State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998), the Court on direct appeal found the judge did not err in accepting waiver of the right to counsel where the trial court informed the defendant of the dangers over several hearings, but the defendant held firm. In an earlier case, the South Carolina Supreme Court, on direct appeal, remanded the case back to the trial court for a determination of whether the waiver of counsel was intelligently made. The case of State v. Dixon noted that the issue "could have been, and perhaps more properly should have been raised by way of post conviction relief," but decided to order a remand. See State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977).³

² These documents were also entered into evidence at the PCR hearing as Defendant's Exhibits 3 and 4.

³ Other cases have addressed waiver of counsel by conduct on direct appeal in situations where the defendant was tried *in absentia*. In State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007), the Court on direct appeal rejected a defendant's claim that he was denied the right to counsel, finding the intelligent and experienced defendant had waived it by conduct, including his refusal to cooperate with his attorney, his filing of *pro se* motions, and his dilatory tactics. See also State v. Pride, 372 S.C. 443, 641 S.E.2d 921 (2007) (defendant waived counsel by conduct where he failed to cooperate with public defender,

Consistent with Dixon, the issue has also been addressed in the PCR context, in cases where the record from trial was insufficient to show the proper inquiry had been made, or that the defendant had been appropriately advised of the dangers of self-representation. Thus, the PCR court (or the South Carolina Supreme Court on PCR appeal) had to look to the defendant's background and the PCR testimony to determine whether the defendant was adequately warned and advised from some other source. See, e.g. Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001) (plea judge made no effort to advise defendant of dangers of *pro se* representation, and nothing in record or background showed that defendant was advised by some other source); Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) (PCR case finding record did not demonstrate defendant was made sufficiently aware of the dangers of *pro se* representation); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990) (PCR case finding insufficient inquiry at trial and nothing in the PCR testimony or about defendant's background that would lead to conclusion that he was apprised of his rights by some other source); Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (record shows trial judge gave defendant no warning of dangers of self-representation, and there is no other evidence in the record showing the defendant was aware of the dangers some other way).

Thus, for PCR, I must look at two issues – first, the sufficiency of the record at trial, and second, any new evidence presented at PCR but not at trial that might have an effect

told public defender a private attorney would represent him, and failed to appear for trial). However, in recent months the South Carolina Supreme Court issued an opinion in which it noted that the Farretta requirements were inapplicable in a situation in which the defendant failed to appear for trial despite adequate notice. State v. Roberson, — S.E.2d —, 2009 WL 982249 (2009).

on whether Applicant made a knowing and voluntary waiver. As set out below, I find the inquiry conducted at trial by Judge Pieper was more than sufficient, and this case is more akin to the Court's determination in Reed.

As documented in detail before, Judge Pieper engaged in repeated and extensive inquiries on the issue of *pro se* representation with Applicant. At the first hearing in which this issue was discussed in detail on July 25, 2003, Applicant noted his background, which included some college as well as a self-education process over the years about the criminal justice system. Additionally, Applicant had been provided a detailed packet by counsel containing information on the dangers of self-representation, and he admitted he had reviewed it.⁴ The judge warned Applicant of the "major consequences" of his decision {R. 3900}, explained to him the advantages a lawyer could provide with regard to procedural and substantive matters, pointed out the benefit of having a more objective viewpoint from the lawyer, recited the old adage that "a person who represents himself has a fool for a lawyer," and cautioned Applicant that he would have to abide by court procedures and handle every aspect of the case without help from the judge. {R. 3905-10}. As previously stated, the judge also explained to Applicant that he may be shocked and dazed by a guilty verdict but regardless, he would have to continue on with sentencing, and further, pointed out that Applicant would not have anyone to blame in PCR for his own decisions if they were erroneous. {R. 3934-40}. Applicant affirmed his desire to proceed despite the advice from the judge and the advice contained in the packet of information he was provided. {R. 3945}.

⁴ It was marked and introduced at that hearing as Court's 1 and is part of the record before this Court. {R. 3955-56}.

At the August 1, 2003 hearing, after the Blair hearing was concluded and the judge found Applicant competent, Applicant continued with his desire to represent himself, despite yet another lengthy discussion from the trial court in which the judge noted *pro se* representation was disfavored, and reiterated that Applicant might find himself overwhelmed, that he would not have the access to individuals a lawyer might, and reminded Applicant he would have to address a capital sentencing phase as well as the initial trial in the event he was found guilty. {R. 4055-61}. Applicant then participated in a discussion of the limited role of standby counsel, demonstrating his understanding of the task of acting as his own lawyer. {R. 4061-69}. Finally, the judge gave Applicant one more chance to decide not to proceed *pro se* before finding that Applicant was freely and intelligently giving up his right to counsel, and he did so with an understanding of the judicial system and the task he was facing. {R. 4071-73}.

Having reviewed the record that Judge Pieper developed in this case, it is apparent that Applicant was more than adequately advised of the dangers of self-representation. Judge Pieper found that Mr. Alkebulanyahh's waiver was knowing and voluntary, the inquiry Judge Pieper conducted was sufficient under the law, and Judge Pieper came to that conclusion after extensive colloquies with, and observations of, Applicant. It is also a well-known principle that the transcript of the plea proceeding is generally conclusive of any claims of misconceptions, see Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes that applicant could not have had misconceptions regarding sentencing).

4. Nothing presented at PCR calls into question the

validity of the waiver at trial.

The only way Applicant could succeed on grounds that the waiver was invalid is if there was something new presented that would call into question the record from the trial. However, after a review of the testimony at trial and PCR hearing, this Court finds no such evidence.

In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se* with "eyes open" then, the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. See Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001). As noted by the South Carolina Supreme Court in Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993), "[t]here is a difference in the standards between competency and a knowing and intelligent waiver." Id. (discussing Godinez v. Moran, 509 U.S. 389 (1993)). Godinez explained the distinction as follows:

The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.

509 U.S. at 401 n.12 (citations omitted).

It is also important to remember that determining whether a decision is "knowing" or "intelligent" does not mean the Court is to decide whether a decision is a good one. See State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) (waiver of counsel "can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one").

Here, a review of the record from trial and the PCR proceeding confirms that

Applicant's waiver of counsel was knowing and voluntary. As set forth above, the colloquies by Judge Pieper were extensive and sufficient as to the waiver; thus, Applicant must overcome the solemn admissions and statements he made on the issue during trial proceedings. See, e.g. Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity," and "representations of the defendant . . . at [plea] hearing[s] . . . constitute a formidable barrier in any subsequent collateral proceedings"); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (transcript of guilty plea hearing will be considered to determine whether any alleged erroneous information from counsel was cured by information the trial judge conveyed at plea proceeding, and applicant indicated to the judge that he understood the possible sentences and the terms of the plea agreement); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994) (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes that applicant could not have had misconceptions regarding sentencing).

a. Waiver of counsel was knowing and intelligent.

Here, the PCR record confirms that the waiver of counsel was knowing and intelligent. As previously stated, Applicant has a high school education and has taken some college course work. Applicant has had fairly extensive prior experience with the criminal justice system as a result of his prior convictions and incarcerations, and stated he studied criminal law during his previous stays in prison – even claimed to have done PCR work for other inmates. He described these efforts at the PCR hearing, and stated that he had the assistance in prison of older inmates who were mentoring younger inmates as to the law. {R. 3900-05; PCR Tr. 182-99}. The competency evaluation found Applicant was

of average intelligence with no neuropsychological deficits (R. 4019; 4049), which was reflected in the manner in which Applicant conducted the trial and discussed legal issues with Judge Pieper.

Further, a review of Applicant's various *pro se* motions submitted into evidence at the PCR hearing – as Applicant's 1, Applicant's 7, and Respondent's 1 through 4 – shows that Applicant could discuss legal issues and express his positions in writing in a fairly accurate manner, even if those positions were not necessarily the precise positions a trained lawyer would take. Applicant was able to file the original PCR application, which raised a number of constitutional issues. At the hearing, Applicant had a stack of documents relating to this case, which he had organized and from which he was able to access information and documents during his testimony. {PCR Tr. 187-89}. At the PCR hearing, Applicant admitted his understanding of the limited role of standby counsel and the prohibition against hybrid counsel once someone proceeds *pro se*; and acknowledged his understanding that issues that could have been raised on direct appeal cannot be raised in PCR – both of which confirm his knowledge of the task he faced. {PCR Tr. 67-69; 209-11; 240-41}. Accordingly, there is nothing about Applicant's background or intelligence that would preclude him from understanding Judge Pieper's repeated colloquies on the nature of the right to counsel and the significance of waiving that right and proceeding *pro se*.

Further, Counsel Thornton testified at his deposition that he and Applicant disagreed on the interpretation of the law and the validity or strategic viability of Applicant's legal defenses. Counsel stated ultimately, Applicant just decided to present the case he wanted to present and noted that he, too, discussed the dangers of *pro se* representation with

Applicant. {Thornton Dep. 11-12; 28-29; 35-36}.

Thornton echoed these sentiments as to his discussions with Appellant on legal issues at the PCR hearing, and stated that while he did not often agree with Applicant's interpretation of the law, the discussions were logical and he saw no loss of contact with reality or lack of understanding. {PCR Tr. 288-290; 294-96; 300; 302-04}. Counsel pointed out that he and Kelly sat down and talked with Applicant about the dangers of self-representation, but Applicant believed he could handle the case better than either of his appointed counsel. {PCR Tr. 309}.

Counsel Kelly testified similarly in his deposition, stating both attorneys discussed with Applicant the dangers of self-representation, but Appellant had made up his mind to represent himself. Kelly also stated that while he might have disagreed with Applicant's interpretation of the law, Applicant was competent and able to represent himself. {Kelly Dep. Pp. 8-9; 11-12}.

This Court finds the testimony of trial counsel credible. Particularly in the context of the extensive record developed at trial, any suggestion from Applicant that he did not know what he was facing when he decided to represent himself is not credible. Nothing presented at PCR would conflict with or call into question the decision made at trial that Applicant's waiver of his right to counsel was knowing.

b. The waiver of counsel was voluntary.

Most of Applicant's complaints at PCR were aimed at a claim his waiver was not voluntary. However, again, Applicant has a difficult burden to overcome his statements in the trial record, and there is nothing in the PCR record which would cause this Court to discount Applicant's repeated statements to Judge Pieper that his decision was voluntary

and without coercion. {R. 3907-08; 4061; 4069-70}.

At the PCR hearing, Applicant testified he dismissed his counsel in desperation, because he felt railroaded through the system. He dismissed his first set of appointed attorneys because of affiliations with law enforcement. After Kelly and Thornton were appointed, he did not trust Kelly because Kelly allegedly told him "if this was 25 years ago, you would not make it in a courtroom." Applicant complained that he was insulted because Kelly told the mental health examiners to go easy on Applicant because he was "retarded," and Applicant disagreed with Kelly's statement that insanity was the only possible defense. Applicant told his counsel there was nothing wrong with him and felt betrayed by them for having him evaluated by Dr. Schwartz-Watts. {PCR Tr. 22-27; 38-49}.

Applicant claimed he felt it was not really his decision to represent himself, and he wanted a third set of attorneys. He admitted he knew he could not pick his attorneys based on race, but he was hoping for an African-American one. He claimed he thought members of such organizations as the Klan, the Masons, and the Shriners would conspire to prevent him from getting a fair trial. {PCR Tr. 31-36}.

Applicant testified he ultimately felt he needed to represent himself after some members of his family were accosted by a protester on the way to the Courthouse and after Kelly told him his argument that the officers violated the law in entering the house was not a good one. Applicant also saw on television the officers being inducted into the national memorial before he was tried, which he thought was improper since they had acted unlawfully in entering his house. He felt hopeless and compelled then to represent himself -- although, he said he would not have minded had the Court appointed new counsel a third time. {PCR Tr. 55-60}.

Applicant also complained that he felt he had to represent himself because his attorneys had done no investigation as to his claims about the unlawful activities of the slain officers. He thought they should have conducted depositions or taken statements from witnesses while memories were still fresh. He felt his attorneys had presumed him guilty and would not present any defense other than insanity, and this "terrified" him. {PCR Tr. 61-67}.

As his testimony progressed, Applicant claimed the Court's evaluator, Dr. Richard L. Frierson, told him if he did not cooperate he would be forcibly medicated, and this also "terrified" him. He claimed he then tried to act as bright and intelligent as he could to avoid this. {PCR Tr. 77-79}.

This Court finds Applicant's testimony not credible and rejects any contention that the careful, on-the-record waiver conducted by Judge Pieper at trial was anything but voluntarily made. A number of factors support this conclusion.

First, trial counsel refuted any of Applicant's claims about the inadequacy of the course of the representation chosen by counsel or any allegations of racism or biased representation. Counsel agreed that Applicant was very concerned about racism and counsel assured him they were going to do everything they could to protect his rights. Thornton told Applicant he did not care what color he was, and pointed out to Applicant that he was in private practice with an African-American attorney. Thornton denied he or Kelly ever threatened or intimidated Applicant, and denied that he or Kelly ever told the mental health examiners Applicant was retarded or to go easy on him during the mental examination because he "wasn't all there." {PCR Tr. 283-85}.

Thornton also refuted a claim that he did no investigation, stating that he had a

couple of bankers' boxes of information, and that they hired two investigators in the course of their representation. Counsel never refused to show any discovery to Applicant. {PCR Tr. 285-88}. Thornton did agree that he told Applicant he did not think Applicant's Fourth Amendment defense would be a viable defense before the jury, and stated the attorneys discussed with Applicant the idea that mental health issues could be used to get a deal or a verdict for life in prison instead of death. However, Applicant was insistent that he wanted no part of mitigation or any mental health defense and was insistent that his Fourth Amendment defense would exonerate him. Thornton felt the attorneys' disagreement that a Fourth Amendment defense would be successful was the "straw that broke the camel's back" – and after that, Applicant wanted to handle the case himself. {PCR Tr. 288-91; 296-97; 299}.

As to the evaluation, Counsel stated they explained to Applicant they felt they needed to have a defense evaluator examine him since the Court was having one done, and also felt they needed to have a Blair hearing despite Applicant's misgivings since there were conflicting reports. Counsel believed there needed to be at least some judicial determination of the issue. {PCR Tr. 296-97; 299-300}.

Ultimately, counsel stated Applicant continued to believe in his Fourth Amendment defense, and was able to discuss it logically with counsel, but counsel simply did not agree with his conclusions. Counsel noted Applicant was not the first client he had who thought he knew more than the lawyer, and believed that Applicant wanted to represent himself because Applicant thought he could do a better job than his attorneys. {PCR Tr. 300-04}. Thornton testified similarly in his deposition as to Applicant's desire to present the case the way he wanted to present it. {Thornton dep. 11-13; 28-32}.

Kelly felt that Applicant was competent to represent himself, and felt Applicant presented the case as he wanted despite Kelly's disagreement with Applicant's views on the law. {Kelly Dep. 8-12}.

This Court finds counsel's testimony credible and finds it refutes much of Applicant's claims as to the course of events leading up to self-representation.

Second, much of Applicant's testimony on the issue is simply not credible in and of itself. For example, while Applicant claimed he thought Kelly had deceived him because defense expert Dr. Schwartz-Watts had been associated with the State in the past, and claimed that Dr. Frierson had terrified him by the suggestion of forced medication, Applicant knew Dr. Frierson worked for the State but told Judge Pieper at the trial that he thought Frierson was far more "unbiased" and "professional" than the defense experts. {Tr. 2943; PCR Tr. 219-23}. While Applicant complained at PCR his lawyers were not communicating with him, and denied he ever refused to see them, his lawyers told Judge Pieper he was refusing to see them or cooperate with them, which Counsel Thornton testified to at PCR, as well. {Tr. 3912; PCR Tr. 260; 268-69; 297}. More importantly, Applicant was examined at PCR on the fact that he did not mention many of his complaints at PCR, including his distrust of Counsel Kelly based on the alleged comments made to Applicant – such as the comment that 25 years ago Applicant would not have made it into court and that he was "retarded" – to Judge Pieper as bases for his motion to represent himself. {Tr. 3908-09; PCR Tr. 260-65}. Applicant *did* tell Judge Pieper he wanted to represent himself because he thought the attorneys were lazy and incompetent and he could do "a much, much better job than they would be able to" {Tr. 3909}. This is nearly identical to the complaint he made against both his appellate attorneys and his PCR

attorneys in his attempts to get them relieved. {PCR Tr. 265-73; Defendant's 3 & 4}. Applicant has attempted to fire his appellate attorneys and his PCR attorneys for similar reasons, which arguably refutes any contention that he was forced against his will to fire his trial attorneys.

This Court finds and believes that Applicant's decision to represent himself was voluntary and driven by his desire to present the case exactly the way he wanted, as well as Applicant's belief that he knew better than his attorneys. As Applicant told Judge Pieper, he was trying for a year to proceed *pro se* before he was finally allowed to do so – this was hardly a decision made at the last minute or with insufficient time for reflection. {PCR Tr. 4062-63}. There is, of course, no question that Appellant had some issues with Kelly and to a lesser extent Thornton. But this Court finds that there is nothing counsel did that was improper or would have caused a coercive environment such that Appellant's decision to represent himself would not be voluntary. Indeed, none of Applicant's complaints would even create a coercive environment such as would vitiate the decision he made on the record. The fact that counsel gave Applicant their best professional opinion – that his Fourth Amendment defense would not work – and the fact that counsel suggested a mental health defense or focus on mitigation, does not amount to coercion but good, honest, and principled representation. See, e.g. United States v. Lagrone, 727 F.2d 1037 (11th Cir. 1984) (when a defendant pleads guilty relying on his counsel's best professional judgment, he cannot later argue that the plea was due to coercion by counsel).

Accordingly, this Court finds Applicant's decision to represent himself was knowing and intelligent, and nothing credible in the trial or PCR record disputes this.

5. There is no basis for relief as to competence to represent himself, even following *Indiana v. Edwards*

The final issue this Court must address in this regard is the Applicant's contention as to his competence to stand trial and represent himself. This Court again finds nothing which calls Judge Pieper's decision at trial into question.

"[T]he Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment."

Faretta v. California, 422 U.S. 806, 807 (1975). However, due to our system's respect for the individual, a person may waive the right to counsel as long as the waiver is knowing, voluntary, and intelligent. *Id.* at 835; State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). Faretta allows a defendant to waive his right to counsel if the following

~~conditions are satisfied: (1) the accused is advised of his right to counsel, and (2) he is~~ adequately warned of the dangers of self representation. Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990). In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se*, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. See Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001).

Prior to the United States Supreme Court's decision in Indiana v. Edwards, 128 S.Ct. 2379 (2008), it was clear that a defendant found competent to stand trial had an absolute right to waive counsel. Our South Carolina Supreme Court has noted that there is no difference between the level of competence required to stand trial and the level required to waive the right to counsel, as long as the waiver is knowing and voluntary. Sims v.

State, 313 S.C. 420, 438 S.E.2d 253 (1993) (discussing and quoting Godinez v. Moran, 509 U.S. 389 (1993)). And, in State v. Brewer, 328 S.C. 117, 492 S.E. 2d 97 (1997), the South Carolina Supreme Court reversed the decision of the trial judge to prevent a capital defendant from proceeding *pro se*. In that case, the judge believed the defendant understood the dangers of self-representation, but "for whatever reason . . . failed to accept it." The Court noted that "a determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial." Thus, the Court concluded that the trial judge violated the defendant's Sixth Amendment right to proceed *pro se*.

Brewer, Sims, and Godinez were all in existence at the time of Applicant's trial and direct appeal. However, just this past year, the United States Supreme Court issued Edwards, which called into question the efficacy of the single competency standard and the absolute nature of the right of a competent defendant to represent himself. In Edwards, an initially incompetent defendant was given mental health treatment and ultimately found competent to stand trial. He wanted to represent himself, but the trial court denied the request. The judge there found that while the defendant was competent and could cooperate with his attorney, his delusional disorder and schizophrenia precluded him from staying focused enough to represent himself. However, the Indiana appellate courts reversed the decision, noting that they were bound by Godinez's single competency standard, and Faretta's statement that a state may not "constitutionally hail a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." Edwards v. State, 854 N.E.2d 42, 46 (Ind. Ct. App. 2006) (quoting Faretta, 422 U.S. at 807). See also Edwards, 128 S.Ct. at 2382-83.

The United States Supreme Court reversed the Indiana appellate court and upheld the trial court's ruling that the defendant was competent to stand trial but not competent to represent himself. Formulating the question before it as whether there was a "mental-illness-related limitation on the scope of the self representation right," the Court began by noting that the competence standard itself refers to the ability to consult with a lawyer, and also that Faretta did not deal with the issue of the relationship between mental competency and self-representation because the defendant there had no such issues. The Court rationalized away Godinez's expression of a single competency standard by stating:

Godinez involved a State that sought to permit a gray area defendant to represent himself. Godinez's constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may deny a gray area defendant the right to represent himself - the matter at issue here.

Edwards, 128 S.Ct. at 2383-85.

The Court concluded that while the "dignity and autonomy of [an] individual underlie self-representation" - there may be times where a defendant meets the competency standard for going to trial but lacks the ability to "carry out the basic tasks needed to present his own defense," and noted that allowing for self-representation in such situations would do nothing for the dignity of the individual, may compromise the defendant's right to a fair trial, and would call the integrity of the system into question "insofar as a defendant's lack of capacity threatens an improper conviction or sentence . . . [which] undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." Thus, Edwards held:

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States

to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

128 S.Ct. at 2385-88.

Therefore, this Court interprets Edwards as only allowing a State to force representation on a "grey area" defendant incapable of conducting trial proceedings – not as requiring the State to do so. And, of course, Edwards was not issued until after this trial, and Brewer's admonition as to the absolute nature of the right to represent oneself was the law the trial court was bound to follow. However, even if Edwards was applicable to these proceedings, even though it was decided after this trial, it would provide no basis for relief for Applicant.

Due process prohibits the conviction of a person who is mentally incompetent. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992). The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003).

First, any challenge to competence to stand trial is procedurally barred in PCR. No additional expert evidence of incompetency other than that presented at trial was given to this Court. No new mental health expert testified, nor did Applicant ever allege in his testimony that he did not understand the proceedings or have the ability (as opposed to the

desire) to consult with his counsel. A freestanding claim of competency can be a direct appeal issue. See State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003); Sims v. State, 313 S.C. 420, 438 S.E.2d 253 (1993). And, issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). Additionally, "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel." Faretta, 422 U.S. at 834, fn. 46.

Here, the issue was fully litigated at trial, and the filing of a PCR is not an opportunity for this Court to relitigate and review *de novo* Judge Pieper's decision to find Applicant competent after an extensive Blair hearing at trial. Indeed, a trial court in deciding Blair issues can believe one expert over another, and also can rely on its own observations of the defendant. State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002).

Typically, in PCR the Court is reviewing new evidence of incompetence, and the PCR judge has the duty to weigh the credibility of the doctors who have testified as to the defendant's competency to stand trial. See, e.g. Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). The South Carolina Supreme Court has upheld courts which determined competency where there was conflicting evidence, Hall, supra, and Weik, supra, and additionally, has reversed a PCR court that granted relief on incompetence where "(1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not

affect his mental state." Hall, *supra*, (discussing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003)).

Here, the testimony surrounding the issue has been extensively set forth in subsection (1), *supra*. The expert testimony was more than sufficient to support a finding of competence, but on top of that, Judge Pieper had discussions with and observations of Applicant, which this Court agrees confirm his competence to stand trial. Additionally, Applicant showed he was competent to represent himself. As detailed before, while he may not have raised issues or interpreted the law in the manner a lawyer might (such as the Fourth Amendment defense), he was reasonably well-argued with his claims, and was able to examine witnesses, logically discuss issues with the Court, make arguments, and assert legal claims throughout the trial. He had studied the law in prison, and at the PCR hearing was able to convey and articulate his claims from a large stack of documents and a huge record. {PCR Tr. 184-93}. Further, he was able to file motions and reassert his claims on appeal and PCR. {PCR App. 193-200}. He was able to give logical explanations for his trial decisions, such as his desire for the memory expert, and his cross-examination of Blake on her treatment by police and her issues with DSS. {PCR Tr. 200-06}. He discussed very cogently why he withdrew his motion to change venue, which was based on the fact that he ultimately decided he had a better chance with the community he knew. {PCR Tr. 230-33}. Counsel indicated they thought Applicant was competent and they had no problem communicating with him. Their discussions were logical, despite disagreements on the law. {PCR Tr. 292, 299-300, 302-04; Kelly Dep. 8, 11-12; Thornton Dep. 31; 34}.

The only issue that arose after Judge Pieper's Blair determination that requires further discussion is Applicant's outburst at the beginning of the sentencing phase. However, as described, this was an intentional decision, not an example of mental illness or psychosis. Applicant told the judge beforehand he was going to disrupt the proceedings and why. Counsel and the Solicitor all stated that Applicant did not suddenly go psychotic or lose touch with reality, but merely stood up and calmly recited a religious phrase. {PCR Tr. 295-96; Kelly Dep. 8, 11-12; Thornton Dep. 24-25; Stone Dep.}. This Court finds Applicant's action was a peaceful, yet certainly disruptive, protest against the judge's decision to require him to remain for sentencing, rather than any evidence of mental illness, psychosis, or incompetence to either stand trial or represent himself at trial.

Therefore, this Court finds no credible evidence that Applicant was incompetent to either stand trial or to represent himself *pro se* under an Edwards analysis, and therefore, the issue is denied.

B. Ground Two: Directed Verdict Issue

Applicant has alleged that he was entitled to a directed verdict for several reasons. First, he alleges there was insufficient evidence to support his conviction for the murder of Deputy Coursen because the evidence at trial indicated that a bullet from Deputy Tate's gun hit Deputy Coursen in the back of the head. {PCR Tr. 85}. Second, he alleges he was entitled to a directed verdict because the identification testimony and evidence were insufficient to support the charges. {PCR Tr. 110}. Third, Applicant asserts there was generally insufficient evidence to support his convictions. {PCR Tr. 145}.

These directed verdict claims should be dismissed. These directed verdict claims are not viable claims for relief in PCR and should be dismissed as a matter of law. As

freestanding claims, they are not proper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel). See also S.C. Code Ann § 17-27-20(b) (Rev. 2003) (PCR is not a substitute for remedies available at trial or on direct review). Indeed, the PCR statute specifically precludes "collateral attack on the ground that the evidence was insufficient to support a conviction." S.C. Code Ann § 17-27-20(a)(6) (Rev. 2008).

C. Ground Three: Batson issues

Applicant raised two claims regarding jurors at the evidentiary hearing. First, he asserted that an African-American male juror, Matthew Young, was improperly dismissed during jury selection because the State claimed the juror knew a defense witness. {PCR Tr. 87-88, 128-35}. The witness the juror knew was actually one of the State's potential witnesses. {PCR Tr. 87-88, 128-35}. Second, Applicant asserted that the State failed to provide an adequate reason for its strike of an African-American female juror, Edrth Owens. {PCR Tr. 128-35}. Applicant asserted the trial court was wrong in finding that Owens and a white female juror were similarly situated for the purposes of deciding whether the State's explanation for the use of its strike was pretextual. {PCR Tr. 128-35}. At trial, Applicant raised these same claims in his Batson motion after the jury was selected. {R. 1339-49}.

These Batson claims should be dismissed. Batson claims are not viable claims for relief in PCR and should be dismissed as a matter of law. As freestanding claims, they are not proper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application

absent a claim of ineffective assistance of counsel). See also S.C. Code Ann § 17-27-20(b) (Rev. 2003) (PCR is not a substitute for remedies available at trial or on direct review).

D. Ground Four: Ineffective assistance of Appellate Counsel

Applicant asserted that his appellate counsel were ineffective in their representation. Specifically, Applicant alleged that appellate counsel did not communicate with him regarding his direct appeal. At the evidentiary hearing, Applicant testified that he only recalled hearing from appellate counsel once, four months after his death sentence. {PCR Tr. 88}. He recalled asking Robert Dudek if he would assist him in requesting a mattress and some clothes. {PCR Tr. 88-89}. At the time, Applicant claims he was being held in a cell in a paper gown, and he was forced to sleep on the concrete floors because there was no mattress. {PCR Tr. 89-90}. According to Applicant, Dudek informed him that he would look into those concerns, but Applicant never heard from him again until after the South Carolina Supreme Court decided his direct appeal. {PCR Tr. 90}. Applicant further complained that appellate counsel never visited him, never submitted a form for him to contact them, and he never had the opportunity to contact them. {PCR Tr. 90}. Applicant also noted that he was not pleased with the brief submitted on direct appeal because it did not include any issues from the guilt phase of the trial. {PCR Tr. 95}.

Both of Applicant's appellate counsel were deposed in this case. Robert Dudek, the Deputy Chief Attorney for Capital Appeals, testified that he has handled approximately twenty-five death penalty cases on appeal. {Depo. Dudek 7}. He noted that he did not meet with Applicant in person, but he recalled speaking with him on the telephone

approximately three or four times. {Depo. Dudek 8-9}. Only one issue was raised on appeal, which was whether Applicant should have been allowed to excuse himself from the sentencing phase of the trial. {Depo. Dudek 10}. Dudek also testified that the fact that Applicant represented himself made it difficult to find preserved issues for the direct appeal. {Depo. Dudek 16}. Dudek did not recall any appealable issue other than the one that was raised in the brief. {Depo. Dudek 17}.

At his deposition, Joseph Savitz testified that he did not recall meeting with Applicant in person. {Depo. Savitz 8}. However, he did believe that he had spoken with Applicant on the phone, and that Applicant had written him. {Depo. Savitz 8}. Savitz recalled that he had assigned the brief to himself and Dudek because they had the most experience handling capital cases. {Depo. Savitz 10}. He remembered there were two other cases he had handled where the defendant acted *pro se* at trial. {Depo. Savitz-10}. Savitz noted that Applicant waived a lot of issues by representing himself. {Depo. Savitz 14}. He did not recall seeing any preserved issues in the transcript {Depo. Savitz 14}, but thought the issue they raised in the direct appeal was a good issue. {Depo. Savitz 14}. Overall, Savitz did not believe that Applicant represented himself effectively at trial. {Depo. Savitz 19}.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as

"[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present, significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ... he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

This Court finds that the testimony of both of Applicant's appellate counsel was credible. Furthermore, this Court finds the testimony of Applicant in regards to these claims was not credible. Applicant's claim that appellate counsel was ineffective in not contacting SCDC about obtaining a mattress for Applicant's cell and clothing for Applicant is dismissed. In this claim, Applicant has failed to assert a deficiency in counsel's

performance that has resulted in Applicant's unlawful confinement. Furthermore, Applicant has failed to show that he was prejudiced by appellate counsel's inaction in regards to his request for a mattress and clothing. Clearly, he cannot show that the physical conditions of his confinement had any effect on the merits of his appeal. Since Applicant has failed to establish that appellate counsel was either deficient in their performance or that he was prejudiced in his appeal as a result, this claim of ineffective assistance of appellate counsel must be dismissed. Southerland, supra.

Similarly, Applicant's claim that appellate counsel failed to communicate with him regarding his direct appeal is dismissed because it lacks merit. On this matter, this Court finds the testimony of appellate counsel credible. While appellate counsel did not meet with Applicant in person, both Savitz and Dudek testified that they spoke with Applicant several times during the pendency of his direct appeal. {Dudek Depo. 8-9, Savitz Depo. 8}. This Court finds there was sufficient communication between appellate counsel and Applicant. This Court also finds that Applicant has failed to establish that appellate counsel were deficient in communicating with him. Applicant has also failed to establish that he was prejudiced by any lack of communication between appellate counsel and him. At the evidentiary hearing, Applicant testified that he was disappointed in the initial brief filed in his direct appeal because it did not contain any issues involving the guilt phase of the trial. {PCR Tr. 95}. However, he has failed to point out any preserved, meritorious issues that he would have requested appellate counsel brief in his direct appeal. As pointed out by both appellate counsel, it was extremely difficult to find preserved, meritorious issues in the guilt phase of trial because Applicant represented himself, and he did not properly preserve issues for direct appeal at trial. {Dudek Depo. 16; Savitz Depo. 14}. As a result, this

Court finds that appellate counsel was not ineffective in its communication with Applicant. See Southerland, *supra*. Therefore, this claim is dismissed.

Third, Applicant has failed to establish that appellate counsel was ineffective for not challenging the guilt phase of the trial. In support of this argument, it appears that Applicant is asserting there were preserved, meritorious challenges that could be made on what he calls his Fourth Amendment claim. Specifically, Applicant asserts that neither he nor his wife gave consent for the two deputies to search his bedroom. {PCR Tr. 99}. Appellate counsel need not raise matters not preserved for appellate review. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. Applicant has failed to establish that he would have prevailed on appeal had these claims been raised. Thus, Applicant has failed to establish that appellate counsel was ineffective in their representation of Applicant. This claim is dismissed.

E. Ground Five: Fourth Amendment claims

At the evidentiary hearing, Applicant raised what he asserted were Fourth Amendment claims. Applicant asserted that the two deputies violated his Fourth Amendment rights by entering his private bedroom without consent. He asserted they had no warrant, no probable cause, and no exigent circumstance for their entry. {PCR Tr. 99}. He claimed that Brenda Smith did not have the authority to grant consent to a search of the house, and specifically Applicant's bedroom. {PCR Tr. 99-100}. He further argued there was no evidence at trial that indicated the officers had a right to enter his home. {PCR Tr. 100}. According to Applicant, since the officers did not have authority to enter the bedroom, he was entitled to shoot them because he was acting in self-defense. {PCR Tr.

101}. In support of this argument, Applicant asserted that Kimberly Blake testified at a pretrial hearing she did not recall hearing the officers ask Ms. Smith for consent to search the trailer. {PCR Tr. 117}. Applicant also claimed there was no evidence that the officers asked Blake any questions before entering the bedroom. {PCR Tr. 118-19}. In support of his firing shots at the officers, Applicant cited to State v. Hewitt, 31 S.E.2d 257, and State v. Davis, 51 S.E.2d 86. {PCR Tr. 119-20}. Applicant also asserted that Ms. Smith, as the landlord, did not have authority to consent to a search of the trailer under State v. Lawton and U.S. v. Whitfield, 939 F.2d 1071. {PCR Tr. 120-21}. Second, Applicant raised a Fourth Amendment claim on the assertion that he was unlawfully arrested after the search. {PCR Tr. 164-65}. This claim is based upon his belief that he, or someone acting in his defense, lawfully shot the two deputies after they allegedly unlawfully entered his bedroom. {PCR Tr. 165}.

All of Applicant's Fourth Amendment claims are denied. At the close of Applicant's case at trial, the trial court denied his motion to dismiss based on his claim that his Fourth Amendment rights were violated by the deceased deputies. These claims are not viable claims for relief in PCR and should be dismissed as a matter of law. As freestanding claims, they are not proper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

F. Ground Six: Speedy Trial claims

Applicant initially raised claims that he was denied a speedy trial. Those claims were withdrawn by Applicant at the end of his direct testimony at the evidentiary hearing. {PCR Tr. 180}. Since Applicant has withdrawn these claims, this Court dismisses them

accordingly.

G. Ground Seven: Third-party Guilt Evidence

At the evidentiary hearing, Applicant asserted that the trial court unlawfully restricted him from presenting evidence that he believed indicated a third-party was guilty of the murders. Specifically, Applicant wanted to present evidence that Bobby Rigby was the shooter. In support of his argument, Applicant claimed that Rigby was apprehended minutes after the shooting, he fit the description of someone seen at the scene trying to jump on the back of a pickup truck, and he was the only one who was not subjected to testing for gunshot residue and forensic evidence. {PCR Tr. 137-38}. Applicant alleged that the trial court prevented him from presenting evidence that Rigby had confessed to others that he was involved in the shooting, that Rigby was at the shooting, and that Rigby saw what happened that day. {PCR Tr. 138}. Applicant also asserted that his constitutional rights were violated as a result of the trial court's ruling that he could not ask law enforcement officials questions pertaining to third-party guilt {PCR Tr. 139-42}.

These claims are not viable claims for relief in PCR and should be dismissed as a matter of law. As freestanding claims, they are not proper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993).

H. Ground Eight: Newly discovered evidence

At the evidentiary hearing, Applicant asserted that he had newly discovered evidence that incriminated Bobby Rigby of the murders. {PCR Tr. 152-54}. Specifically, Applicant claimed that while he was on death row, he obtained a handwritten statement from someone whom he believed to be Eddie Brown. {PCR Tr. 154}. He could not positively identify Brown as the writer of the statement and the statement was not signed or

notarized. {PCR Tr. 152-54}. According to Applicant, Brown and Rigby were roommates when this crime occurred. {PCR Tr. 153}. Before trial, Applicant claims Brown gave him a handwritten statement which implicated Rigby as the shooter. {PCR Tr. 152}. Applicant asserted that he believed this second, unsigned statement was also from Brown because the handwriting was similar. {PCR Tr. 152}.

Applicant has failed to show that he was entitled to a new trial because of newly discovered evidence. This issue is dismissed as a matter of law. The standard for addressing motions for a new trial due to after-discovered evidence is as follows:

Applicant must show that the after-discovered evidence: (1) is such that it would probably change the result if a new trial were granted, (2) has been discovered since the trial, (3) could not have been discovered prior to trial in the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.

Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001).

First, Applicant has not properly presented any alleged newly discovered evidence. There was some discussion at the evidentiary hearing concerning a note that he discussed during his testimony. However, this note was neither marked nor introduced as an exhibit at the hearing. {See PCR Tr. 155}. Thus, there was no new evidence presented at trial to support this claim. Second, even if the document Applicant alleges was newly discovered was properly tendered to the Court, Applicant's testimony about the document clearly indicates it was inadmissible hearsay and it was not properly authenticated. As already noted, Applicant asserted the document was from Brown and that it was a statement that implicated Rigby as a possible suspect, but the statement was not notarized or signed. Third, Applicant has failed to establish that this document warrants a new trial. The presentation of this note would probably not result in Applicant's acquittal if a new trial were

granted. At best, this note was inadmissible hearsay, and based on Applicant's description of its contents, it was also inadmissible as improper evidence of third-party guilt because it does not present any information that was inconsistent with Applicant's guilt in the murders. Based on Applicant's testimony, it appears that the document only recounts the same information provided to Applicant in a document he received from Brown before trial.

Furthermore, it appears that the note was not material to Applicant's defense. The note did not indicate that Brown witnessed the shooting, or that he had any firsthand knowledge of anyone's involvement in the shooting. Based on Applicant's testimony at the evidentiary hearing, the note was cumulative to one that he received from Brown before his trial. Applicant testified that he had received a note with similar handwriting from one of Rigby's roommates, Eddie Brown. He indicated that Brown may have implicated Rigby as having some involvement in the shooting. A review of the record clearly indicates that Applicant was aware of Brown's allegations before trial. At the July 25, 2003 pre-trial hearing, Applicant informed the trial court that he wanted to subpoena Eddie Brown for trial. {R. 3954}. Considering Applicant's testimony that he received the first note before his trial, Applicant was on notice of the allegations made by Brown. Clearly, this new document was cumulative to what Applicant knew before his trial commenced. Overall, Applicant has failed to present any newly discovered evidence. To the extent that he attempted to offer such evidence at the evidentiary hearing, this Court finds that he has failed to establish that he is entitled to a new trial based upon that evidence. The evidence would not have led to a different result at trial; it was not material evidence. The alleged evidence was also cumulative to information available to Applicant before trial. As a result, this claim is dismissed.

I. Ground Nine: Miranda Violation

At the evidentiary hearing, Applicant alleged that the police violated his Miranda rights. Specifically, he asserted that the police extracted a statement regarding the location of the murder weapon from him by putting a gun in his face and questioning him without reading him his Miranda rights. {PCR Tr. 155-57}. He further alleged that he raised this claim at trial in his motion to suppress the introduction of the SKS assault rifle at trial. {PCR Tr. 156-57}.

This Court finds this claim should be dismissed. This Miranda claim is not a viable claim for relief in PCR and should be dismissed as a matter of law. As a freestanding claim, it is not proper for PCR. Drayton v. Ewalt, 312 S.C. 4, 430 S.E.2d 517.

J. Ground Ten: South Carolina Department of Corrections has interfered with Applicant's Access to the Courts

Applicant has alleged that the South Carolina Department of Corrections ("SCDC") has interfered with his right to access to the Courts. Specifically, Applicant alleges that SCDC has deprived him of his legal materials, forced him to sleep on concrete with no mattress, refused to mail documents on his behalf, and continually interfered with his ability to proceed *pro se* in his direct appeal. {PCR Tr. 169-175}. This claim is dismissed. It is not a viable claim for relief in PCR under the Uniform Post-Conviction Procedure Act, as codified in S.C. Code Ann. § 17-27-10 et seq.:

Any person who has been convicted of or sentenced for, a crime and who claims:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

- (2) That the Court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy...

S.C. Code Ann. § 17-27-20(a) (2008).

Applicant's complaints about SCDC do not fall within any of these bases for relief. Therefore, it is dismissed as a matter of law. Furthermore, to the extent that Applicant has asserted that SCDC's actions interfered with his fundamental right to act *pro se* in his direct appeal, Applicant's claim lacks merit. In addressing Applicant's request to proceed *pro se* on direct appeal, the South Carolina Supreme Court held that Applicant did not have either a federal or a state constitutional right to proceed *pro se* on direct appeal. State v. Roberts, 364 S.C. 583, 588-589, 614 S.E.2d 626, 629 (2005). Using its discretion, the Supreme Court declined to grant Applicant permission to proceed *pro se*. Thus, Applicant's claim that his fundamental right to proceed *pro se* on direct appeal was interfered with has no legal basis. This claim is dismissed.

K. Ground Eleven: Denial of Eighth Amendment, Fourteenth Amendment, and First Amendment rights when trial court did not allow him to exercise his religion during the course of the trial

Applicant asserted the trial court denied his First Amendment right to exercise his religion by holding Applicant's trial on Saturdays during the course of the proceedings.

{PCR Tr. 178}. Applicant noted that Saturday is the Holy Sabbath. He asserted that had he been allowed to practice his religion, he would have been more effective in preparing his defense because he would have been spiritually whole and more accountable mentally in the Courtroom. {PCR Tr. 178}. This claim is dismissed as a matter of law. It is not a viable claim for relief in PCR under the Uniform Post-Conviction Procedure Act, as codified in S.C. Code Ann. § 17-27-10 et seq., *supra*. Reiterating the statutory language as previously stated, this claim does not fall within the parameters of the Uniform Post-Conviction Relief statute. As a result, Applicant's claim is denied and dismissed.

L. Ground Twelve: Box of bullets were inadmissible

Applicant appears to state that the trial court improperly allowed certain evidence to be introduced at trial. Specifically, he contends that a box of bullets that was not listed on the return to the search warrant was improperly admitted into evidence. {PCR Tr. 108}. This evidentiary claim is dismissed. Admissibility of evidence claims are not viable claims for relief in PCR and should be dismissed as a matter of law. As freestanding claims, they are not proper for PCR. Drayton v. Ewalt, 312 S.C. 4, 430 S.E.2d 517 (1993).

IV.

CONCLUSION

For the foregoing reasons, Applicant's Application for Post Conviction Relief is denied and dismissed with prejudice.

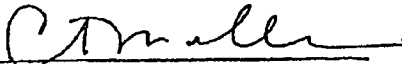
Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's

attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The application for post-conviction is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina

This 17th day of September, 2009.


Carmen T. Mullen
Circuit Court Judge-----

Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)
)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent.)

C/A No. 2012-CP-10-3216
(Capital PCR)

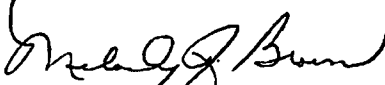
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's *Motion to Strike and or in the Alternative to Dismiss Claim Not Cognizable in Post-Conviction Relief* was served on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, to each counsel addressed as follows:

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
Greenwood, SC 29646

Elizabeth A. Franklin-Best, Esquire
Blume, Norris & Franklin-Best, LLC
900 Elmwood Ave., Ste. 200
Columbia, South Carolina 29201

This 28th day of September, 2015.


MELODY J. BROWN
Senior Assistant Attorney General

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
William O. Dickerson, #6030	)	Cases Number: 2012-CP-10-3216
	)	
v.	)	
	)	Memorandum in Response to State's Motion
	)	to Strike and or in the Alternative to Dismiss
State of South Carolina,	)	Claim no Cognizable in Post-Conviction
Defendant	)	Relief

The applicant, William O. Dickerson, Jr., responds to the State's motion to strike and/or in the alternative to dismiss a claim the State contends is not cognizable in post-conviction relief cases.

I. Introduction.

In his third amended application for post-conviction relief, William Dickerson alleges a violation of due process and equal protection because "[t]he Ninth Circuit Solicitor's Office committed prosecutorial misconduct by striking qualified African-Americans from the jury venire." The State's motion to strike this claim is its latest ploy in an ongoing effort to impede Dickerson's factual development of a constitutional violation that entitles him to a new trial. Additional factual development is necessary to support the claim that Solicitor Scarlett Wilson knowingly misrepresented facts to the trial court judge which counsel is prepared to show at the evidentiary hearing scheduled to commence on October 19, 2015.

It also merits repeating that the AG's office has itself engaged in a strategy of preventing Dickerson for developing his claim by arguing the Solicitor's juror notes are "privileged" without even personally reviewing them, and despite the fact that juror notes

have been disclosed in other capital cases in Georgia and North Carolina and are currently under scrutiny in the United States Supreme Court.

II. Factual and Procedural History.

On November 19, 2012, Dickerson served a subpoena to obtain “a complete copy of the Ninth Circuit Solicitor’s Office file” to include “any and all materials that relate to jury selection of the trial of William Dickerson.” As this Court is well aware, this subpoena generated hotly contested litigation after the Solicitor chose to withhold over 2,100 pages of her file and Dickerson moved to compel production.

When the Solicitor’s office failed to produce a privilege log, the prior judge assigned to preside over this capital post-conviction relief case not only instructed the Solicitor to prepare a privilege log but also required the Solicitor to supplement the initial log to provide more details about the materials withheld.

This Court scheduled a hearing on Dickerson’s motion to compel on August 12, 2014. Despite claiming not to have a position concerning the Solicitor’s privilege claim, the Attorney General, on the day of the hearing, submitted a memorandum of law on the work product privilege, opposing Dickerson’s motion to compel.

When this Court asked the Attorney General to prepare a proposed order denying the motion to compel, that order mischaracterized Dickerson’s *Batson* claim as a “Freestanding *Batson* Claim,” despite the fact that, at the time, Dickerson was raising this claim only under the rubric of ineffective assistance of counsel.

Dickerson moved to reconsider the order denying his motion to compel and additionally moved for this Court to order disclosure of the criminal histories of the jurors called to serve in Dickerson’s trial. This Court convened a hearing on these motions on

February 2, 2015. The Attorney General opposed this motion, again attempting to limit Dickerson's factual development, arguing that this Court should limit Dickerson to only the information made available to the public by the South Carolina Law Enforcement Division (SLED), knowing full well that the SLED information was not the same information possessed by the Solicitor when she exercised her preemptory challenges. The SLED information would not contain any out of state arrests or convictions and most likely would not contain information about South Carolina arrests not resulting in convictions.

During an in chamber meeting prior to the February 2nd hearing and during the hearing itself, the Attorney General continued to mischaracterize Dickerson's *Batson* claim as a "Freestanding *Batson* Claim," despite the fact that, at the time, Dickerson was raising this claim only under the rubric of ineffective assistance of counsel. By emails dated February 3 and 4, 2015, copies of which are attached, counsel for Dickerson asked the Attorney General to correct this mischaracterization with the Court. To date, the Attorney General has not done so.

In his third amended application for post-conviction relief, served on July 13, 2105, Dickerson added the claim of prosecutorial misconduct that is the subject of the Attorney General's current motion. This motion, once again, mischaracterizes Dickerson's claim as a "Freestanding *Batson* Claim."

Before turning to legal argument, it is worth noting that at a motions hearing on September 18, 2015 the Attorney General once again attempted to limit factual development of Dickerson's post-conviction relief claims. Dickerson had subpoenaed juror information from Solicitor Wilson for fourteen cases she tried as a prosecutor in the

Ninth Judicial Circuit. The Solicitor moved to quash this subpoena. The Charleston County Attorney's Office represented her at the hearing. Once again, while claiming not to have an interest in the motion, the Attorney General addressed the Court and opposed Dickerson request for this information.

III. Argument.

The Uniform Post-Conviction Relief Act provides a remedy for a " person who has been convicted of, or sentenced for, a crime and who claims [t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State." S.C. Code Ann. § 17-27-20(A)(1). Yet, the Attorney General wants this Court to deny Dickerson his right to present his meritorious Constitutional claim, by taking the extraordinary position that prosecutorial misconduct claims cannot be asserted in state post-conviction relief proceedings. *But see Riddle v. Ozmint*, 369 S.C. 39, 48, 631 S.E.2d 70, 75 (2006) (granting post-conviction relief and ordering a new trial because "Petitioner's trial was rendered fundamentally unfair by prosecutorial misconduct.").

The Attorney General, disingenuously, states that this Court has already ruled on the issue, but it has not. This Court has never held (and could not hold) that Dickerson is not allowed to raise this claim in his post-conviction relief action. To support the State's position, the Attorney General cites this Court's order filed September 10, 2014 denying Dickerson's motion to compel. As already seen, when the Attorney General drafted the order for this Court, Dickerson was asserting the *Batson* claim as ineffective assistance of

counsel claim.¹ What the Attorney General continues to consistently ignore is the fact that this *Batson* claim can be (and now is being) raised as *both* an ineffective assistance claim and a prosecutorial misconduct claim. It is not a “free-standing” claim no matter how many times the Attorney General calls it one.

The Attorney General, in footnote one of the motion, states that this claim could have been raised at trial, but of course it could not have been because the Solicitor had (and continues to have) a policy of not allowing defense counsel to have access to juror criminal rap sheets. Defense counsel could not argue facts at trial that were in the sole possession of the Solicitor. During the *Batson* hearing at trial, the Solicitor had in her possession information that was material to the trial court judge’s ruling on the *Batson* motion that she did not disclose to the judge or Dickerson’s counsel. Dickerson is prepared to demonstrate these facts at the evidentiary hearing.

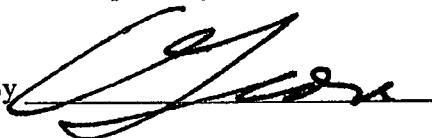
Finally, the Attorney General relies on an order in *Alkebulanyah v. State*, Case No. 2007-CP-07-715. As the Attorney General already knows, Alkebulanyah represented himself at trial and so of course he could not raise an ineffective assistance of counsel claim. This pleading has absolutely no relevance to the issues presented in Dickerson’s application for post-conviction relief.

¹ Mischaracterizing his *Batson* claims is not the first time Dickerson has complained about the orders drafted for the Court by the Attorney General. *See*, most recently, exceptions to the order dated June 22, 2015, captioned Order Granting in Part and Denying in Part Applicant’s Motion to Amend Scheduling Order and to Continue Evidentiary Hearing.

IV. Conclusion.

Reliance on the summary dismissal provision of S.C. Code §17-27-70, Rule 12(b)(6), SCRCP, and the *Simmons* doctrine to dismiss a properly raised allegation of prosecutorial misconduct would deny Dickerson his right to develop a factual record to prove that his conviction and sentences violate the Fifth and Fourteenth Amendments of the United States Constitution. This Court, therefore, should deny the State's motion to strike.

Respectfully Submitted,

By 

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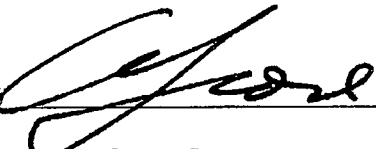
Elizabeth A. Franklin-Best
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September 30, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
William O. Dickerson, #6030	)	Cases Number: 2012-CP-10-3216
	)	
v.	)	
	)	
	)	
State of South Carolina,	)	
Defendant	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

Melody J. Brown, Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

By 
E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

September 30, 2015
Greenwood, South Carolina



ALAN WILSON
ATTORNEY GENERAL

October 8, 2015

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Ste. 106
Charleston, SC 29401

Re: William O. Dickerson v. State
2012-CP-10-3216
CAPITAL PCR

Dear Ms. Armstrong:

Enclosed for filing in the above-referenced case, please find Respondent's *Reply to Response to Motion to Strike and or in the Alternative to Dismiss Claim Not Cognizable in Post-Conviction Relief* with certificate of service. Also, enclosed is a copy and self-addressed stamped envelope to return a clocked-stamped copy to me.

Thank you for your assistance.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

MJB/mv
Enclosures

cc: The Honorable G. Thomas Cooper, Jr. (with enclosure)
E. Charles Grose, Jr., Esquire (with enclosure)
Elizabeth Franklin-Best, Esquire (with enclosure)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)

C/A No. 2012-CP-10-3216

(Capital PCR)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)
_____)

REPLY TO RESPONSE TO
MOTION TO STRIKE AND OR IN
THE ALTERNATIVE TO DISMISS
CLAIM NOT COGNIZABLE IN
POST-CONVICTION RELIEF

Applicant objects to Respondent's motion to strike and/or in the alternative to dismiss a claim which is not cognizable in this action. This brief reply to Applicant's argument in opposition follows. Respondent would respectfully show the Court:

1. Applicant fails to acknowledge that jurisdictional limitations for these actions are a matter of statutory law. Jurisdiction is set out in S.C. Code Ann. Section 17-27-20(a), which provides:

- (a) Any person who has been convicted of, or sentenced for, a crime and who claims:
 - (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
 - (2) That the court was without jurisdiction to impose sentence;
 - (3) That the sentence exceeds the maximum authorized by law;
 - (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
 - (5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or

- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. *Provided, however*, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(emphasis in original).

Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."

Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

Applicant's position to the contrary is defeated by these clear statutory provisions. Respondent submits these limits as set in place by the legislature and case law are controlling.

2. Applicant also fails to acknowledge discovery limitations by rule and case law. Discovery limitations should be exercised here to prevent abuse as they are in other civil cases. *See generally Oncology and Hematology Associates of S.C., LLC v. South Carolina Dept. of Health and Environmental Control*, 387 S.C. 380, 388-89, 692 S.E.2d 920, 924-25 (2010) (cautioning against "the merits of a claim ... being relegated to secondary status" and vacating

discovery orders “not remotely relevant to a resolution of the issue...”); Rule 1, SCRCP (“These rules govern the procedure in all South Carolina courts in all suits of a civil nature ... They shall be construed to secure the just, speedy, and inexpensive determination of every action.”); Rule 26(a), SCRCP (discovery may be limited by the court); Rule 71.1 (a), SCRCP (“The South Carolina Rules of Civil Procedure shall apply to the extent that they are not inconsistent with the Act.”).

Applicant’s position to the contrary is defeated by the case law and court rules. Respondent submits the case law and court rules are controlling.

3. To the extent Applicant contests the limitations in collateral actions authorized by the PCR statute, it is well-established that procedural bars and limitations are necessary to the orderly administration of justice. *See, e.g., Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517 (1997) (“A State’s procedural rules are of vital importance to the orderly administration of its criminal courts...”). There is no error in relying on such limitations. Respondent again submits the limits as set by statute, case law, and court rules are controlling.

4. To the extent Applicant now claims he is not raising a free-standing *Batson* claim, and Respondent is in error, Respondent relies on Applicant’s own phrasing in his Memorandum, dated December 17, 2012, where he writes “petitioner has raised a *Batson* claim in his application for post-conviction relief....” Further, Respondent relies on Applicant’s “Memorandum in Support of Motion to Compel,” dated August 11, 2014, at p. 1, which reflects: “William Dickerson intends to prove to this Court at his post-conviction hearing that Scarlett Wilson improperly removed qualified black jurors from his venire, violating his right to a fair and impartial jury and the juror’s rights under the Equal Protection Clause. *See Batson v. Kentucky*, 476 U.S. 79 (1986).” Applicant’s assertions that Respondent has misrepresented his position are unfounded. If there is a necessity for explanation and/or clarity, that responsibility

rests on Applicant. At any rate, as argued previously in Respondent's motion, to accept recasting of the *Batson* claim as separate claim in order to allow Applicant to litigate anew would render meaningless the statutory limitations and the long-standing Simmons Doctrine. If so, though, Applicant has also failed to show such an "independent" claim, if any, could not have been raised at trial. It is still barred.

5. Applicant's attempt to distinguish similar dismissal of a free-standing claim in *Alkebulanyahh v. State* (C/A 2007-CP-07-715) (Capital PCR where issue summarily dismissed as not cognizable) is unpersuasive. He asserts that Mr. Alkebulanyahh represented himself at trial and could not have raised an ineffective assistance of counsel claim. That is correct. However, this offered distinction makes the point. It would have been arguably *more* critical to allow the freestanding claim in such a case, but the statutory limitations and case law simply do not allow such a claim to be raised.

6. Applicant's argument Respondent unfairly argued for a limitation in discovery at the September 18, 2015 hearing similarly lacks merit. Respondent argued in regard to Applicant's most recent discovery requests seeking materials from unrelated cases spanning a timeframe of 2002 to 2013 that Applicant is bound to the cognizable claim of ineffective assistance — that it is counsel's representation that must be evaluated and such representation must be evaluated in light of the facts and circumstances at the time of trial. *See, e.g., Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) ("The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made.") (*quoting Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984)). Materials after the 2009 trial would not have been available for trial counsel's potential use. Thus, the requested discovery (letter and subpoena dated August

27, 2015) is overly broad and seeks irrelevant materials that could not, under *Strickland*, support an ineffective assistance of counsel claim.

7. Lastly, while Applicant argues he is entitled to complete access to the Solicitor's file because the Supreme Court has granted certiorari in a case where such notes were provided, see *Foster v. Chatman*,¹ Docket No. 14-8349, set for argument on November 2, 2015, Respondent would note that just last term the Supreme Court affirmed no relief was due where the *Batson* challenge at trial was held *ex parte* in part. *Davis v. Ayala*, ___ U.S. ___, ___, 135 S. Ct. 2187 (2015). Of particular note, the Court underscored the great deference due the trial judge:

In *Batson*, this Court adopted a procedure for ferreting out discrimination in the exercise of peremptory challenges, and this procedure places great responsibility in the hands of the trial judge, who is in the best position to

¹ The exact question presented is:

Did the Georgia courts err in failing to recognize race discrimination under *Batson* in the extraordinary circumstances of this death penalty case?

(Brief of Petitioner, p. i). The Petitioner also wrote, in his Statement of Case:

Timothy Tyrone Foster, an eighteen-year-old African-American, was charged in 1986 with killing Queen Madge White, an elderly white woman, in Rome, Georgia. At Foster's capital trial the following year, the prosecutors used four of their nine peremptory strikes to remove all four black prospective jurors, resulting in an all-white jury to try this racially charged case....

(Brief of Petitioner, p. 2).

Respondent Warden presents the question as follows:

Prior to trial, Petitioner Timothy Foster challenged the array of the jury venire based on race and made it known that he would be mounting a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge if the State struck *any* black prospective juror. The question presented is:

Did the state habeas corpus court commit clear error in finding that Foster failed to show that the State's strikes were based on purposeful discrimination when the State identified and took notes on black prospective jurors to prepare for those defense challenges?

(Brief of Respondent, p. i).

determine whether a peremptory challenge is based on an impermissible factor. This is a difficult determination because of the nature of peremptory challenges: They are often based on subtle impressions and intangible factors. In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight.

Davis v. Ayala, 135 S. Ct. at 2208.

Here, we have the trial court record that shows a motion was made, and reflects the Solicitor's recorded responses. There is no need to start the *Batson* three-step inquiry anew in order to obtain the Solicitor's explanations. Further, there is no need to speculate on the ruling based on those explanations. This issue has already been raised and ruled upon. Consequently, the PCR statutory restrictions limit the review available.

Again, Respondent submits Applicant's position to the contrary is defeated by these clear statutory provisions and case law.

WHEREFORE, Respondent maintains its request, based on the foregoing argument and the argument in the motion to strike and/or dismiss, that this Court strike and/or summarily dismiss claim 11(f) on page 5 of the Final Amended Application filed July 15, 2015.

Respectfully submitted,

ALAN WILSON
Attorney General

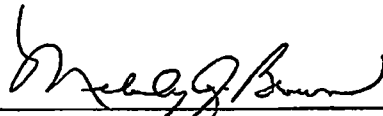
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October 8, 2015.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)
)
)
Applicant,)
vs.)
)
State of South Carolina,)
)
Respondent.)
_____)

C/A No. 2012-CP-10-3216
(Capital PCR)

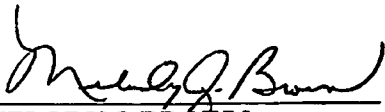
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's *Reply to Response to Motion to Strike and or in the Alternative to Dismiss Claim Not Cognizable in Post-Conviction Relief* was served on counsel for Applicant by depositing one copy of same in the United States mail, postage prepaid, to each counsel addressed as follows:

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This 8th day of October, 2015.



MELODY J. BROWN
Senior Assistant Attorney General

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	2012-CP-10-3216
	)	
	)	
William Oliver Dickerson	)	)
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina	)	)
<u>DEFENDANT</u>	)	July 15, 2014
		Columbia, South Carolina

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

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

ELIZABETH FRANKLIN-BEST, ESQ.
E. CHARLES GROSE, JR., ESQ.
ATTORNEYS for the Applicant

MELODY J. BROWN, ASSISTANT ATTORNEY GENERAL
Attorney for the State

KESHIA REED
Official Court Reporter

I N D E X

(WHEREUPON, no witnesses were called.)

1 THE COURT: Mrs. Franklin, your motion.

2 MRS. FRANKLIN-BEST: Yes, thank you, Your Honor.
3 Good afternoon.

4 THE COURT: Good afternoon.

5 MRS. FRANKLIN-BEST: If it please the Court,
6 obviously today we're here on our motion to be allowed to
7 proceed pro se in-camera in our funding and expense
8 requests in connection with the case of William Oliver
9 Dickerson. The Court, I believe, is in receipt of our
10 pleading on the issue. This morning we ask to supplement
11 with additional authority that being Canon 3 of Rule 501
12 Code of Judicial Conduct. We're just -- point you, Judge,
13 to the judicial responsibilities, (7)(e) commentary to
14 that particular provision. The commentary regarding ex
15 parte communications clearly contemplates defense counsel
16 to communicate with the judge in an ex parte manner,
17 issues relating to fees and expenses in indigent capital
18 defendants. It cites to the statute that the attorney
19 general now hold does not mean what it says. And so we
20 would rely on that authority as well.

21 The AG also has cited that particular authority
22 in its pleading with the proposition that a judge may
23 engage in ex parte communications, but our position is
24 that it's a bit of a red herring because the Canon
25 ambiguously recognizes that ex parte communications in

1 funding issues related to capital defendants is expressly
2 authorized by law and that's the real issue here.

3 THE COURT: Is that the real issue?

4 MRS. FRANKLIN-BEST: I'm sorry.

5 THE COURT: Is that the real issue?

6 MRS. FRANKLIN-BEST: I believe so because the
7 attorney general's position now appears to be that we do
8 not in fact have a legal right to proceed in this manner.

9 THE COURT: Well, they take the position this is
10 a civil matter and everything that you're referring to
11 deals with criminal matters.

12 MRS. FRANKLIN-BEST: And, Your Honor, if I may
13 address that, I will be addressing that.

14 THE COURT: Sure. I just see that as a primary
15 issue any way. Go ahead.

16 MRS. FRANKLIN-BEST: I mean, that's our
17 position. There is a long history in the state for
18 proceeding ex parte in-camera and that is relating to
19 funding. And now the attorney general as it does on
20 occasion advances the argument that no one has ever been
21 entitled to proceed in this manner. This has to be their
22 argument that they claim that section 17-27-160 is to be
23 narrowly construed and really only refers to attorney
24 compensation, but it is important to note number one that
25 they never advance this position until Judge Dickson sua

1 sponte unsealed our funding request. And before that
2 time, they conceded our client's request to proceed in
3 this traditional fashion and our pleading outlines the
4 numerous occasions on which they conceded this right.

5 THE COURT: I've read that.

6 MRS. FRANKLIN-BEST: And two, by the plain
7 language of section 17-27-160, the provisions of 16-3-26
8 are incorporated. Certainly, the legislature did not
9 intend that they could be so. They have had ample
10 opportunity to clearly correct this situation since it has
11 been the law since June 18th of 1996. The attorney
12 general's office wants to treat capital PCR's like regular
13 PCR's, but that ignores the clear legislative intent of
14 the bill. Section 17-27-160 is part of the South Carolina
15 Effective Death Penalty Act of 1996, according to House
16 Bill 4469, which was ultimately approved and became the
17 law. So these two statutory provisions ought to be read
18 together and signal a unifying legislative intent. And
19 this legislative intent allows us to proceed ex parte and
20 in-camera according to 16-3-26 (c)(1). As further proof
21 of their uncaring intent look at the fact that section
22 16-3-26(i) was expressly excluded from the PCR statute.
23 Clearly, if the legislature intended to provide ---

24 THE COURT: Say that again? Say that again?

25 MRS. FRANKLIN-BEST: I'm sorry. The fact that

1 16-3-26(1) is expressly ---

2 THE COURT: One.

3 MRS. FRANKLIN-BEST: I'm sorry I.

4 THE COURT: One or I? You said 1. You said I.

5 MRS. FRANKLIN-BEST: I can't read. I need my
6 reading glasses.

7 THE COURT: Well, don't read so fast.

8 MRS. FRANKLIN-BEST: I'm sorry, Your Honor, I'll
9 slow down. But that particular provision has been
10 expressly excluded from the capital PCR statute. Now,
11 clearly if the legislature intended to provide for a
12 different funding regime for capital PCR's, they knew how
13 to do it?

14 THE COURT: But they didn't do it.

15 MRS. FRANKLIN-BEST: They haven't done it.

16 THE COURT: Right.

17 MRS. FRANKLIN-BEST: Which means that 16-3-26
18 controls. The AG's argument that defendant versus
19 applicant represents a fundamental difference in how the
20 legislature contemplates how it characterizes these
21 inmates has no basis. I mean, again if the legislature
22 really intended for capital PCR applicants to be treated
23 differently, they could have been less obscure in making
24 that distinction. We would also point to the recent
25 United States Supreme Court case where Martinez vs. Ryan

1 where the defendant is used throughout that opinion in a
2 case that clearly addressed initial review collateral
3 proceedings, putting the nail in the coffin.

4 THE COURT: Have you handed that up? Have you
5 submitted that?

6 MRS. FRANKLIN-BEST: We have not submitted a
7 copy of that case. The citation to it is a brief and I
8 can give that to you right now as well.

9 THE COURT: All right. If it's in the brief,
10 that's all I need.

11 MRS. FRANKLIN-BEST: But, again, it makes no
12 sense to argue that the semantic difference somehow means
13 that the legislature intended to pull the capital PCR
14 statute from the greater 1996 Effective Death Penalty Act
15 legislation.

16 I would like to address... The State has
17 advance the position that Tims controls this particular
18 situation and we argue that it does not. Tims frankly
19 happened before the legislature adopted the 1996 act. The
20 proposition that the AG wants to use it for, a capital
21 defendant don't have a right to proceed ex parte in-camera
22 was never even briefed in that case. There really is no
23 basis to suppose that Tims applies to the situation at all
24 and we have provided a briefing for Tims to Your Honor.

25 The AG's reliance on that case is really an

1 unsuccessful attempt to shoehorn a very factually
2 different situation into our state's capital litigation
3 regime. And, again, the Supreme Court, South Carolina
4 Supreme Court meant to attach a different interpretation
5 onto that legislation. They might have chosen a stronger
6 view to do so in a footnote. But we know that's not the
7 reasoning of the report because Chief Justice Toal's 2002
8 order which we also provided to Your Honor assumes
9 implicitly 17-27-160 incorporates 16-3-26(j), which, of
10 course, it does put the statute together constituted South
11 Carolina Effective Death Penalty Act of 1996 per the
12 language of that bill.

13 So we made additionally a number of
14 constitutional arguments on behalf of our client, but it
15 really kind of all comes down to this. We would not be
16 having this argument if William had money. If William
17 could finance his own defense, there be no question that
18 the State would not be entitled to see what he was
19 developing by way of particular claims. The State argues
20 that they should be allowed to peek into these activities
21 to make sure that counsel is giving Your Honor the real
22 factual background. But in addition to being offensive
23 since it suggest that defense counsel intends to violate
24 our duty candor to the tribunal, it also share how
25 accurate that argument really is because that same

1 argument could be made by any defendant, in any court and
2 for any crime. And the fact is they're not allowed a
3 sneak peek into the defendant's case. And there attempt
4 to do so for an indigent defendant violates his rights to
5 due process and to equal protection under the law. In
6 other words, they would not be making this argument if we
7 were representing one of Jack Swerling's clients.

8 So lastly no other judge has gone along with an
9 AG's position. The attorney general has tried to ride
10 this horse before, but it has been consistently denied.
11 And despite his denials, there has not been any
12 legislation action on the issue. The legislature would
13 agree that the historical manner in which these issues
14 have been addressed is working and had they not -- they
15 had 18 years to fix it. In other words, Your Honor -- I'm
16 sorry, were you about to ask me a question?

17 THE COURT: No, I just coughed.

18 MRS. FRANKLIN-BEST: I'm sorry, Your Honor. But
19 in other words, I mean, the best course of action for this
20 court to take would be the same course of action that's
21 been taken in every other capital PCR and that would be to
22 allow us to proceed ex parte and in-camera and that is a
23 brief argument on the issue, Your Honor.

24 THE COURT: So if everybody else jumps off the
25 clip, we're suppose to jump off it too; is that correct?

1 MRS. FRANKLIN-BEST: Well, Your Honor, I mean, I
2 would argue that the AG is asking me to jump off the
3 cliff.

4 THE COURT: Well, tell me what the -- if there's
5 been any expressed -- whether in this case or other case
6 position of the office of indigent defense when it comes
7 to capital PCR's?

8 MRS. FRANKLIN-BEST: I mean, of the particular
9 issue or the ex parte and in-camera?

10 THE COURT: Let's just start with funding.

11 MRS. FRANKLIN-BEST: Well, my understanding is
12 that there has been -- in 2007, the statute was amended to
13 allow the office of indigent defense to provide to the
14 funding.

15 THE COURT: Of?

16 MRS. FRANKLIN-BEST: Of capital cases. I mean,
17 there are charges in expert and compensation funds.

18 THE COURT: I been doing this a long time, I
19 know that. I'm talking about PCR's, post-conviction
20 relief proceedings. Have they -- what has been their
21 position in the past and whether it's in some sort of
22 writing or not in writing?

23 MRS. FRANKLIN-BEST: I think all I can say is
24 that they have ---

25 THE COURT: They always fund everything that's

1 sent in whether it's PCR or capital cases or any indigent
2 defense. Do they make a distinction?

3 MRS. FRANKLIN-BEST: Well, they not objected to
4 this procedure in other capital PCR's. Now, how it's kind
5 of worked is that sometimes they'll have questions about a
6 particular expense or an expert.

7 THE COURT: Well, that's always the case.

8 MRS. FRANKLIN-BEST: Right. And so I'm not
9 aware that they have taken a position contrary to whether
10 it's already contained in the statute as it relates to
11 capital PCR matters. Did I understand answer that?

12 THE COURT: Yes, you did. You're not aware of
13 it. All right.

14 MRS. FRANKLIN-BEST: Well, as my co-counsel
15 points out, when they have had questions about funding in
16 the past, they have not involved the attorney general's
17 office.

18 THE COURT: Well, you've received some funding
19 already in this case, have you not through OID?

20 MRS. FRANKLIN-BEST: Yes, Your Honor.

21 THE COURT: And how was that? How did that come
22 about?

23 MRS. FRANKLIN-BEST: Well, it came about we
24 submitted an ex parte motion to the judge who approved
25 that and then we started submitting bills based on that

1 order. They did have a question about our investigator.
2 We did have a hearing on it and the attorney general is
3 not present for that.

4 THE COURT: Have they paid them? I mean, have
5 they made payments?

6 MRS. FRANKLIN-BEST: Yes. Yes, Your Honor.

7 THE COURT: All right. So they have not
8 formally objected to funding capital PCR request for
9 funds?

10 MRS. FRANKLIN-BEST: No, they have not, Your
11 Honor.

12 THE COURT: Okay.

13 MRS. FRANKLIN-BEST: And they've paid for them
14 in other capital PCR's as well.

15 THE COURT: You know that or are you
16 speculating?

17 MRS. FRANKLIN-BEST: No, we know that.

18 THE COURT: All right. Ms. Brown.

19 MS. BROWN: Thank you, Your Honor. May it
20 please the Court.

21 THE COURT: She says you want me to jump off a
22 cliff.

23 MS. BROWN: I prefer that you not, Your Honor.
24 What I want to look for is what the law allows. And if I
25 may just briefly go over from the broad basis down to the

1 narrow belief because I believe that concerns can be
2 addressed, but they have to be addressed in the right way.
3 And essentially 17-27-160 went into effect to expedite
4 capital proceedings. Of course, we have some problems
5 with that, but that being beside the point. Just with
6 funding itself, the statute could have had a little
7 provision in there for ex parte. It does not. Now, we
8 have Tims vs. State from 1996.

9 This is not a new case and it's been around
10 since December of '96. It's in two law review articles.
11 It's never been overruled. It's never been modified and
12 no one is very very specific. Ex parte provisions for
13 capital and non-capital trials are not applicable in
14 post-conviction reliefs. That's the way it's set up.

15 Now, it's reference actually in some of the
16 documents that opposing council provided to you in the
17 motion and that would be the order in John Baker Ray (sic)
18 and the order in Mr. Huey's case, that's from '99 and 2002
19 respectively. So Tims has been around for quite a while.
20 Simply, Your Honor, there is no right to ex parte
21 proceedings either from that statute certainly not from
22 Tims. Certainly not from any other provision.

23 THE COURT: Is there anything that prohibits it?

24 MS. BROWN: No, sir, and that's where I want to
25 go down to the narrow basis of the relief. It prohibits a

1 certain amount and that's going back to the Canon's. The
2 Canon's would allow if it's not substitutive. It's pretty
3 much administrative scheduling, that sort of thing, and if
4 no advantage is given to one side or the other before the
5 judge and the Court, of course, notifies of the substance
6 and allow response, that's already there that provision
7 that controls the absence of specific provision in the
8 statute by statute of authority. What we would call the
9 Court's attention to is the language in the Huey order
10 from 2002, that's an attachment to the motion. And what's
11 interesting this is page two of that particular order.
12 Judge Saunders found that he would allow the request, but
13 the request had to be generic in manner, that would not
14 disclose substitutive issues or specific factual matters
15 such as the product of interviews with the potential
16 witnesses, interpretation of records and other privileged
17 matters which should not be disclosed to a fact finder in
18 an ex parte meeting and that's really the nub of the
19 argument here. What is disclosed to the fact finder.

20 Now, if the rules under the Canon's or the
21 outline under the Canon's follow, then absolutely there's
22 no problem, but if there are specific requests made with
23 interviews, with interpretation, with conclusions that we
24 do not have the opportunity to respond to at all, then
25 that will be improper and certainly not allowed.

1 In contrast, it's expressly allowed in the trial
2 provisions. It is not allowed in the non-trial
3 provisions. And that's consistent, Your Honor, with not
4 only non-capital PCR's, but also the SVP Act. There's no
5 ex parte provision in there. It's also consistent with
6 federal court that do not require ex parte. There has to
7 be a showing made to that and that's even in trial, but
8 bottom line is that we have a provision in here and that's
9 the judicial... If, Your Honor, would want to preserve
10 something that you think maybe delicate and you think that
11 you may be giving us information we're not yet entitle to,
12 there are ways to handle that, but it's not authorize by
13 17-27-160.

14 Now, just want to address a few of the things, I
15 believe, that you brought up earlier as well and that is
16 what's the prejudice in this and how has it been handled
17 so far. Well, we have not objected to ex parte hearings.
18 However, we don't know what the ex parte hearings were.
19 We don't know what was said. We would assume that the
20 judge would tell us under the Canon's if there was some
21 kind of substitutive materials that came before him that
22 he thought that we should weigh in on. So we have been
23 protected to that point based on the Canon's.

24 Now, as far as complying with the statute, I
25 don't believe we have to say by the way you can't do A, B,

1 and C because there's no provision to it, but we are
2 making an argument now you can't do it this way, but you
3 may be able to do it in a limited capacity under the
4 Canon's ---

5 THE COURT: Tell me what that -- what you
6 envision is that procedure?

7 MS. BROWN: Your Honor, what we're concerned
8 about is any kind of sensitive interviews, any kind of
9 conclusions, any kind of preliminary diagnosis attached to
10 a funding request that would essentially have one party
11 shaping the litigation, that's what we're concerned about.
12 And that would be again a Canon's issue. It's not a
13 17-27-160 issue. And now if that flows into -- I think,
14 this is may be another concern that you may be touching
15 on. If that flows into will they pay a voucher in
16 indigent defense, that's not actually in our (inaudible).
17 And that would be something between indigent defense and
18 the Court and the parties. We wouldn't weigh in on
19 whether they should be paid because of the sufficiency of
20 it. We simply do not want what Judge Saunders held in
21 2002 documents and information coming in that it's just
22 not proper before the fact finder in an ex parte
23 proceeding.

24 I would also add that we have had some release
25 of information and opposing counsel has not at this point

1 said that they are prejudice by anything that was released
2 at this time. They had request for funding for certain
3 experts that were denied. There's no prejudice in telling
4 us that and certainly we don't know of any opinions. We
5 don't know of any kind of strategy. We don't know
6 anything from that, but based on the paperwork that I have
7 before me at this point, there was nothing of substance
8 that could not have been handled ex parte and at least it
9 wasn't volitive of some prejudicial effect to us and
10 that's where we are.

11 THE COURT: You don't -- you differentiate
12 between ex parte and in-camera? You seem to be objecting
13 primarily to the ex parte method or procedure, but not to
14 an in-camera. I mean, should everything be or not be
15 in-camera?

16 MS. BROWN: I don't know that we would have a
17 specific position to that because, I think, that goes more
18 to protection of their case for the public more. I know
19 we've litigated in this particular case having the
20 courtroom open, so, I think, that that would be presumably
21 off the table. We're not talking about in-camera any
22 more.

23 THE COURT: Okay. Of course, you are not citing
24 Judge Saunders' precedent to me, are you?

25 MS. BROWN: I have not cited to it. I did not

1 read it until it was provided to me in the motion, but I
2 do think that it's correct and that's what you're worried
3 about and if you're going into details ---

4 THE COURT: I'm not going to cite it.

5 MS. BROWN: Pardon me.

6 THE COURT: I will not cite it.

7 MS. BROWN: Thank you, Your Honor. But I do
8 think he makes some relevant points there, very relevant
9 points of what we're concerned about. And that's been our
10 concern John Bay Gray (sic) Judge Saunders' case Mr. Huey.
11 It's been that way for David Mark Hill, Kenneth Simmons.
12 We've had these concerns and different judges have handled
13 it different ways, but that's our main concern is ex
14 parte.

15 THE COURT: All right. As I understand your
16 position, you're concern is not primarily as to legal
17 funding, funding of the attorneys, but other matters which
18 would necessarily or could easily be disclosed to the fact
19 finder which is this court behind closed doors, is that
20 your concern?

21 MS. BROWN: Yes, sir, without any input or
22 response from us, yes, sir.

23 THE COURT: Okay. All right. Mrs. Franklin or
24 Mr. Grose.

25 MR. GROSE: One of my initial concerns is that

1 it almost seems like they're trying to take two positions.
2 One hand in the pleadings they say we shouldn't be allowed
3 to do this because they want to make certain that we're
4 disclosing all the information that you should have at
5 your disposal in order to make an informed decision about
6 it. On the other hand, they're saying, well, as long as
7 we're not doing that, it's okay.

8 THE COURT: Well, I mean, I tend to somewhat
9 agree with that. Although, I've not been involved in this
10 case, but I'm not -- I mean, in a trial situation whether
11 it's capital or not, I'm not the fact finder. In this
12 case, I am the fact finder.

13 MR. GROSE: Well, and we would been doing this
14 type of stuff for a long time.

15 THE COURT: Well, I have to.

16 MR. GROSE: And have people been doing it for a
17 long time and what we would prefer to do was to tell you
18 that we need funding for a certain type of expert to
19 determine whether or not there's a claim there or not.
20 And you're not.

21 THE COURT: Why can't they know about that?

22 MR. GROSE: Well, because they're getting a
23 glimpse into our trial strategy.

24 THE COURT: You don't have a trial.

25 MR. GROSE: Well, our nonjury trial strategy. I

1 mean, what they know from this being unsealed. They know
2 that we been denied to be able to even interview the
3 expert witness that was consulted to review the autopsy.
4 They know that we been denied to be able to consult with
5 somebody ---

6 THE COURT: Hold it, hold it. I don't know what
7 you're talking about.

8 MR. GROSE: Well, these were the orders that
9 Judge Dickson unsealed when he denied our funding request
10 to the expert.

11 THE COURT: I thought you said it was a funding
12 request.

13 MR. GROSE: Right.

14 THE COURT: I haven't read that so...

15 MR. GROSE: We provided it to you.

16 MS. BROWN: Your Honor, may I interject just for
17 a moment please excuse me. I just want to make sure
18 there's a difference from what we have. Mr. Grose
19 provided by e-mail to us and to you, I believe, last week
20 the orders. I don't believe I have ever seen funding
21 request and I just didn't want anything to accidentally to
22 be said if it were to be sealed later.

23 MR. GROSE: The orders are the -- as you know, a
24 lot of times what we do is we submit a proposed order that
25 says we so move and orders essentially the motion, so they

1 have the motion.

2 THE COURT: So you been denied ---

3 MR. GROSE: We been denied a forensic
4 pathologist. We been denied a crime scene expert.

5 THE COURT: Hold up, wait a minute now. Denied
6 the ability to hire a forensic pathologist?

7 MR. GROSE: Yes, sir.

8 THE COURT: Well, you just told me a minute ago
9 that you denied being able to interview somebody.

10 MR. GROSE: Well, we been denied a forensic
11 pathologist that trial counsel consulted is the forensic
12 pathologist.

13 THE COURT: Do you want to hire him now?

14 MR. GROSE: We want to know what he did advise
15 trial counsel before, that is a witness in a PCR.

16 THE COURT: Oh, okay.

17 MR. GROSE: And so we've essentially been denied
18 the ability to interview a witness. And we been denied
19 the ability to investigate mental health claims. I mean,
20 even just to investigate it.

21 THE COURT: So you can't do that? So you can't
22 do that?

23 MR. GROSE: Huh?

24 THE COURT: You cannot do that?

25 MR. GROSE: Cannot do it. It was Judge Dickson

1 that denied that not OID.

2 THE COURT: You appeal that?

3 MR. GROSE: Well, we filed this motion to be
4 able to ---

5 THE COURT: You want me to overrule that?

6 MR. GROSE: Well, we want you to go back and
7 review, you know, what's already been done in this case.
8 I mean, Judge Dickson has acknowledged that his law clerk
9 had a conflict when he screened his law clerk from the
10 case. And, you know, and he didn't -- and part of it was
11 is that, you know, and it's in the motion he had told us
12 we would have an opportunity to make a showing if he was
13 going to deny anything and we've not been given that
14 opportunity.

15 THE COURT: So he made certain rulings?

16 MR. GROSE: Right.

17 THE COURT: And forgive me, but I'm in the
18 middle of a trial and you handed me 6,000 documents. Is
19 his order or are his orders accessible? I mean, easily
20 accessible.

21 MR. GROSE: We provided -- we e-mail them to
22 you. I don't have them here today. We e-mailed them to
23 you after the status conference last week.

24 THE COURT: We're printing them off. I like to
25 just focus on those for a minute.

1 MR. GROSE: Yes, sir.

2 THE COURT: I apologize, this part-time working
3 catches up with me.

4 MS. BROWN: Your Honor, if it helps, I do have
5 an e-mail from Monday the 7th around 3:26 and copies I'll
6 be happy to show to opposing counsel and hand up if that
7 would be of help.

8 THE COURT: Might would expedite.

9 MS. BROWN: May I approach, Your Honor?

10 THE COURT: Sure. All right. I've got funding
11 order number one signed by Judge Dickson. Funding order
12 number two signed by Judge Dickson. And you filed a
13 motion to reconsider. And that's it?

14 MR. GROSE: Yes, sir.

15 THE COURT: One, two and a motion to reconsider.

16 MR. GROSE: I think, the motion to reconsider
17 that you have was actually a motion to reconsider on the
18 investigator issue. The first step that we took -- quite
19 frankly when we first got the order back in the mail, we
20 thought that he had signed the proposed order that we had
21 sent in and some of our other pleadings kind of reflect
22 that. But the first step we thought was was to get a
23 handle on the procedure and how we were going to be able
24 to go forward because we had no notice he was going to
25 unseal things and deny the right to proceed ex parte. And

1 so that was one of the loose ends in the case. Once we
2 determine what the procedure is, I think the next thing is
3 is to determine what type of, you know, what we have to do
4 in order to be able to get the funding to determine
5 whether or not we're going to be allowed to essentially
6 investigate the types of claims that are traditionally
7 investigated in these types of cases.

8 THE COURT: That motion was never heard?

9 MR. GROSE: The motion to proceed ex parte?

10 THE COURT: No, the motion to reconsider.

11 MR. GROSE: Well, we have not moved to
12 reconsider because we haven't gotten a handle on what the
13 procedure in order to proceed would be.

14 THE COURT: You filed a motion to reconsider?

15 MR. GROSE: Well, I think that was ---

16 THE COURT: As to the expert, right?

17 MR. GROSE: Yes, sir.

18 THE COURT: And that was not heard or was it
19 heard?

20 MR. GROSE: Well, actually there's been proposed
21 orders submitted, but the orders on that have not been
22 signed.

23 THE COURT: Never been ruled on?

24 MR. GROSE: It's not been ruled on.

25 THE COURT: All right. And then we got recusal?

1 MR. GROSE: And we got recusal, yes, sir.

2 THE COURT: Okay. So that matter still needs
3 attention, the reconsider motion?

4 MR. GROSE: Right. The funding of the experts
5 and the investigator issue both need attention, but we
6 needed to determine what the procedure for doing that is
7 going to be before we can go any further on that. The
8 motion to reconsider on the expert issue was before
9 everything got unsealed in the chronology and so I'm not
10 sure if I'm being very clear.

11 THE COURT: No, you clear, but I see the order
12 unsealing is dated April 4th 2013 and your motion to
13 reconsider is dated April 12th 2013, some eight days
14 later.

15 MR. GROSE: Well, that's on the investigator
16 issue.

17 THE COURT: Yeah, that's what I said.

18 MR. GROSE: Right. And to be honest ---

19 THE COURT: That's the only motion to
20 reconsider.

21 MR. GROSE: Well, except that we filed a motion
22 to proceed ex parte.

23 THE COURT: That's in this court.

24 MR. GROSE: But we also filed that in front of
25 Judge Dickson and it was never heard in front of Judge

1 Dickson.

2 THE COURT: Never even argued.

3 MR. GROSE: Never even argued, yes, sir.

4 THE COURT: All right. I'm with you. I'm at
5 least a little more up to date with the procedure.

6 MR. GROSE: It's kind of a complicated history.

7 THE COURT: Love those complicated cases. All
8 right. I didn't mean to interrupt you. I think, I
9 interrupted your argument that was responding to
10 Ms. Brown.

11 MR. GROSE: I want to make sure we address
12 whatever questions that you might have today. But, I
13 think, that one of the pertinent things is that the
14 capital PCR's statute does incorporate the capital murder
15 statute.

16 THE COURT: And it says counsel shall be
17 compensated according to the cap extension. I don't think
18 the State's arguing about that.

19 MR. GROSE: Well, first of all, the capital
20 murder statute incorporates all but one section. I mean,
21 the capital PCR statute incorporates all but whether or
22 not out-of-state counsel can be involved in the case. And
23 so when you go to the capital murder statute and it talks
24 about compensating counsel, I mean ---

25 THE COURT: And it says ex parte.

1 MR. GROSE: It says ex-parte and be able --
2 counsel will be able to hire investigators and experts, I
3 argue falls under compensation. I mean, are we to pay
4 that out of our pockets if we're to have it if the State's
5 not there to provide it. I mean, we can't afford to do
6 that if that's, you know, the case.

7 One of things that we suggested in the Huey case
8 that was -- I was involved. I still represent Mr. Huey
9 today. One of the things that we had suggested in that
10 case, I don't know if it got into the order, but Judge
11 Saunders contemplated doing it if it was going to become a
12 problem was asking for a second judge to be assigned is to
13 hear matters involving expert funding. So there wouldn't,
14 you know, have any opportunity to encroach into the fact
15 finding process and we respect that. I mean, we try to do
16 the best we can in order to make, you know, whatever kind
17 of showing is required in an individual case without
18 trying to taint, you know, fact finder. You can even
19 argue that the risk there is to us because, you know, were
20 you to know that we had hired an expert and then didn't
21 use the expert, you wondering well that must have turned
22 out to be something bad. I mean, these kind of things
23 flow both ways and there's reasons why we would want to
24 proceed in a way that protects, you know, the integrity of
25 the process for everybody.

1 THE COURT: Well, I will tell you that's a
2 concern to me. That's the differentiation or the
3 difference between 326 and 27-160.

4 MR. GROSE: Well, and, you know, the suggestion
5 of how I would have to proceed is sort of like Ms. Brown
6 was talking about in what Judge Saunders did is that we be
7 able to submit an order that says, you know, that we want
8 to hire a certain type of expert without any argument.
9 And that the office of indigent defense will know because
10 after the 2007 act, they became more involved in handling
11 these cases. And if there's, you know, questions that
12 come up about whether or not this is the type expert or
13 the cost exceed, I guess, it's truly not an ex parte
14 situation at that point because they're the arm of the
15 State that interjects themselves into those cases.

16 And in an area which, I think, Ms. Brown has
17 acknowledged that they really don't have a dog in the
18 fight. And, you know, I have another capitol PCR case
19 where, you know, we've had, you know, status conference or
20 have had phone conferences involving the office of
21 indigent defense. No particular substitutive matters, but
22 just the amount and the types of things that we feel like
23 we need to do to be able to keep the case moving along.
24 We did have a hearing in this case, but it was handled
25 in-camera. There's a record of it, but it was handled in

1 a way where only the parties, you know, that had the
2 in-camera interest in it were apart of the record.

3 THE COURT: How about that, Ms. Brown? He's
4 suggesting that the Court authorize without an ex-parte
5 hearing funding subject to the approval of the office of
6 indigent defense. I don't know how that might work, but
7 the State have an objection to that proceeding --
8 procedure?

9 MS. BROWN: Do I understand just submitting a
10 request that does not have substitutive material? Is that
11 ---

12 THE COURT: Well, I don't know how it would come
13 in, but I would assume it'll say I would like to hire an
14 expert who is an expert in trace evidence. And the Court
15 says fine subject to the approval of the OID at which
16 time -- and this is sort of a punting situation. OID
17 would then determine whether trace evidence is a relevant
18 issue in the case.

19 Now, I mean, I hate to past the buck so to
20 speak, but I'm looking for a way to accommodate the
21 defense as much as I can without being tainted by the
22 process, which I see is something very likely. I'm not
23 talking about attorney funding. I'm talking about
24 whatever else they dream up they need or want.

25 MS. BROWN: I mean, I can agree with the Court

1 wholeheartedly, but all we want is just not to have the
2 information before the fact finder, that's what we are
3 requesting. We don't believe ---

4 THE COURT: Well, I would advise you -- I could
5 advise of any request they make and then let OID decide.
6 I mean, I hate to put almost a judicial function in their
7 hands.

8 MS. BROWN: There may be additional issues with
9 that that would have to come up, but to me it's not the
10 State requesting anything about funding or limiting access
11 to funding or anything to that matter. The only thing
12 that we're arguing is the method here of the request
13 before the fact finder. So there are certain areas I
14 really can't address as far as that would be sufficient
15 for indigent defense. I really don't know Your Honor.
16 I'm not sure that I have the authority to argue that.

17 THE COURT: Well, I'm not sure.

18 MR. GROSE: And I don't -- that's not exactly
19 how we proceeded in the Huey case. In the Huey case, they
20 weren't on notice of the particular -- they were on notice
21 that we were requesting money and how much we were
22 getting, but they weren't on notice as to what type of
23 expert it was.

24 THE COURT: They were?

25 MR. GROSE: They were not, not at the time. I

1 mean, they found out when we got to the hearing and we
2 talked about what we had done.

3 THE COURT: You mean the evidentiary hearing?

4 MR. GROSE: The evidentiary hearing when those
5 experts testified or talked about the experts that they
6 consulted with, but the -- you know, I think, that we need
7 to -- what, I think, would probably be the best way to
8 proceed would be -- we don't mind giving them notice that
9 we're submitting an ex parte funding request. I think
10 that's what then Judge Kittredge did in the case that the
11 order that we provided to you in that. We don't mind
12 giving them notice. We would like to be able to submit it
13 in a way that says, you know, we're requesting funding for
14 a particular type of expert without any elaboration as to
15 the facts or why. You would have that information, but
16 you wouldn't know any of the things that we're looking
17 into beyond what has been discussed with them present
18 which this point has actually been a good bit. And then
19 it would go on to the office of indigent defense and their
20 role is more to sort of, you know, monitor and make sure
21 that the amounts that we're requesting and work that's
22 being done is consistent with, you know, other types of
23 cases that are similar in nature. And if they have a
24 concern, then we come back to Your Honor. And those
25 conversations never really involve the substance, it's all

1 about the dollars.

2 THE COURT: That's ultimately what it's all
3 about.

4 MR. GROSE: Well, right. I mean, unfortunately
5 without the dollars, we can't do the investigation, you
6 know, and that's just -- I wish we could. I wish I was
7 independently wealthy.

8 THE COURT: Well, if you were, I doubt you be
9 funding these types of situations, but nevertheless --

10 MR. GROSE: I might be.

11 THE COURT: What's the -- State have anything
12 further to offer?

13 MS. BROWN: No, sir, not really. I would
14 suggest perhaps an incremental approach have an order
15 similar to Judge Saunders as he seem to cue in on the
16 exact problems that we're having here. And if things
17 cannot be generically presented, so that the fact finder
18 is not weighed down with the evidence and should not have,
19 then the fact finder may need to request additional judge
20 be appoint, so that these things can be more fairly and
21 fully litigated outside of the State's presence and see if
22 we can work from there, that would be my suggestion at
23 this point. You have keyed in exactly on our concern. We
24 just -- we believe there's no basis for in the statute and
25 we have to be careful about the factual finding and the

1 suppositions, the interviews that we all have access to.
2 So with those kind of guidelines in mind, we submit it to
3 your discretion.

4 MR. GROSE: And with the caveat that, you know
5 that section 16-3-26(c)(1) does have a reasonable and
6 necessary standard in it. And of the -- we had a
7 discussion a week ago about the scheduling order and we
8 understand, I think, we're all on the same page that it's
9 a plan. Sometimes a plan works, sometimes the plans have
10 to be amended. Our preface of what works best for us
11 investigating capital case because of the quality of work
12 we get is an incremental approach where we hire one expert
13 and then they tell us -- one expert that we have a
14 reasonable belief that we need and then they tell us it's
15 like going to the doctor. They decide whether or not you
16 need to go and have lab work done or you need to have an
17 x-ray or you need another specialty consultation. The --
18 where intention gets into these cases sometimes is if you
19 don't request everything you think you might need up
20 front, then you get into time crunches being able to do
21 it.

22 THE COURT: Any order that I issue should have a
23 fail safe provision that in the event of a loggerhead
24 somewhere, it would have to come back to the Court. All
25 right. Can you each submit a proposed order within ten

1 days?

2 MR. GROSE: Yes, sir.

3 MS. BROWN: Yes, sir.

4 THE COURT: Now, something else escape
5 everybody in the room but me.

6 MR. GROSE: What's that?

7 THE COURT: The nexus of this case to Greenwood
8 County.

9 MS. BROWN: There is none.

10 THE COURT: Judge Saunders, Mr. Grose and the
11 Greenwood County expert sitting right there.

12 MS. BROWN: I don't know how that happened
13 Charleston County case.

14 THE COURT: I understand. Thank you.

15 MR. GROSE: We use to have a lot going on in
16 Greenwood.

17 THE COURT: And some of it's not real good.
18 Thank you very much counsel.

19 END OF REQUESTED TRANSCRIPT

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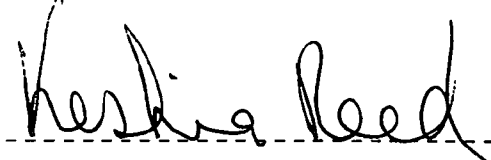
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 35, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 15th day of July, 2014.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 8th day
of March 2017.



Keshia Reed, Court Reporter

1
2 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**
3 COUNTY OF CHARLESTON) CASE NO: 2012-CP-10-3216
4 MOTIONS

5 -----
6 **B E F O R E:** The Honorable G. Thomas Cooper, Jr.

7 February 2, 2015
8 -----

9 WILLIAM O. DICKERSON,

10 Plaintiff,

11 vs.

12 STATE OF SOUTH CAROLINA,

13 Defendant.

14
15 A P P E A R A N C E S

16 Melody Brown, Esq.
17 (Attorney General's Office)
18 Attorneys for the State.

19 Elizabeth Franklin-Best, Esq.
20 E. Charles Grose, Jr., Esq.
21 Attorneys for the Defendant.

22 Official Court Reporter
23 Natalie Dahl, RPR
24
25

P R O C E E D I N G S

MS. FRANKLIN-BEST: Could we ask that the handcuffs be removed so he can take notes?

MS. BROWN: Please ask SCDC what their security protocol is; I'm not familiar with it.

MS. FRANKLIN-BEST: He's been secured in all but one hearing, that I can recall.

THE COURT: Who has Mr. Dickerson?

DEPUTY: I do.

THE COURT: I need one of his cuffs taken off so he can write, just one. We've had him in court before, doesn't mean anything, but.

Ms. Franklin-Best, you may proceed.

MS. FRANKLIN-BEST: Yes, Your Honor. May it please the Court. As the Court is aware, we made motions to have the Ninth Solicitor's Office privileged logs made -- excuse me, not the privileged log, but documents in their possession related to jury selection in William Dickerson's capital trial. We litigated that back on August 12th and we received an order denying us access. So the Court at this point has found that the 2100 pages in the Solicitor's possession is privileged in their entirety, and while we obviously disagree with that, we're not here to re-litigate that, Your Honor.

1 In this Court's order of September 10, 2014 the
2 Court found that we are not entitled to these materials
3 because we have not shown a substantial need for them,
4 and in this Court's analysis we haven't shown a
5 substantial need because we had the ability to request
6 criminal history reports from SLED, and I note the
7 order, Page 6, Footnote 2.

8 The two things I want to note here, Your Honor, is
9 that that finding was incorporated into the order,
10 proposed order, that was submitted by the Attorney
11 General's Office. We never had any evidence on that
12 particular claim. We never argued that particular
13 claim. As we have tried to go forward and prepare for
14 the evidentiary hearing, we have found that that is not
15 completely accurate.

16 What we do have access and can get at this point
17 are records from what is called the SLED Catch Program.
18 It is important to note that these are not the same
19 documents that the Ninth Circuit Solicitor's Office had
20 in their possession at the time that they were striking
21 jurors in Williams' case.

22 THE COURT: What do you believe they did have?

23 MS. FRANKLIN-BEST: The full NCIC records. I had
24 an opportunity to speak with Lieutenant Al Stuckey from
25 SLED just to discuss some of the differences between

1 those two. So, for example, the SLED Catch Program
2 only is a state-wide program. It only reveals
3 convictions in the State of South Carolina. So the
4 NCIC program, for example, has arrest and convictions
5 that are nationwide. Also, the SLED Catch Program will
6 only capture convictions, not necessarily arrests, and
7 that is important in our case, Your Honor. NCIC has
8 all of this, and this is important because Bruce
9 Durant, during his deposition, testified that they
10 looked long and hard at arrest records, even when they
11 do not result in convictions.

12 We strongly suspect a Batson violation in this
13 case based on the records that we had reviewed and
14 additional research.

15 THE COURT: Based on what?

16 MS. FRANKLIN-BEST: Our review of the records.

17 THE COURT: What does that mean?

18 MS. FRANKLIN-BEST: Based on the voir dire, the
19 record itself, the trial record.

20 THE COURT: Well, what leads you to believe there
21 was a Batson violation, or may have been? Just from
22 reviewing the voir dire?

23 MS. FRANKLIN-BEST: Sure. When you look at the
24 jury selection --

25 THE COURT: And didn't defense counsel have that

1 opportunity at that time?

2 MS. FRANKLIN-BEST: They did, but they did not
3 have the documents that we're, frankly, requesting at
4 this point. What they did was trial counsel noticed
5 that the Solicitor's Office struck -- used four of
6 their preemptory challenges to remove African-Americans
7 from the jury, so 80 percent of their strikes.

8 THE COURT: Was it challenged at the time?

9 MS. FRANKLIN-BEST: It was challenged at the time.
10 At the time, the solicitor put forth certain
11 justifications on the record. One of the
12 justifications they made was with regards to one of the
13 jurors, was that she had -- she had charges, is the
14 language in the transcript, charges for prostitution
15 and others. The judge at that point found that was a
16 race neutral reason, but this further asked did anyone
17 else who seated on the jury have any charges or
18 arrests, to which she responded, Not for those things
19 -- not that many and not for those things.

20 So we don't know who had what convictions. I
21 mean, we do know from our review of the privileged log
22 that was provided by the Solicitor's Office that they
23 were tracking juror criminal histories, and we know
24 they were using jury histories in their strategy of
25 striking particular jurors.

1 So we've looked at this particular case, and we
2 also looked at another capital case prosecuted by the
3 same Solicitor in Berkeley County, Broughton. We found
4 in that case strong evidence of racial bias for
5 excluding jurors. We have an additional case actually
6 provided to us by the Attorney General's Office where
7 this particular Solicitor had a jury struck because a
8 judge found that she engaged in a racially based
9 strategy of --

10 THE COURT: Who are you referring to as "she"?

11 MS. FRANKLIN-BEST: The Solicitor?

12 THE COURT: Yeah.

13 MS. FRANKLIN-BEST: Solicitor Scarlet Wilson, Your
14 Honor. You know, again, we have set out and got memos
15 on statistical analysis and how this all plays out.
16 What we'll be prepared to show the Court is the chances
17 of being struck if you are an African-American on
18 Mr. Dickerson's trial was 12.5 times higher than if you
19 were a white juror. So that is really the claim that
20 we plan to advance during the evidentiary hearing.

21 Part of that, we think, is necessary to look at
22 the criminal histories that the Solicitor claims they
23 relied on in making at least one of these strikes, and
24 that is why we're asking for this. What we would like
25 to ask the Court to do is reconsider the documents that

1 are currently privileged based on a finding that we
2 have shown a substantial need for them. There is no
3 other way we can get exactly what they had unless Your
4 Honor will issue a subpoena on our behalf. That would
5 be the second thing we would ask for, that we be
6 allowed to construct a subpoena, that you subpoena FBI
7 records in Clarksburg, West Virginia. Lieutenant Al
8 Stuckey suggested that that could be one way we could
9 get exactly what they had.

10 If that is not acceptable to Your Honor, we would
11 ask for a funding order so we can go ahead and secure
12 the records we need through the SLED Catch Program, but
13 understanding that that is going to be an inferior
14 product and may or may not have what we'll ultimately
15 need. If I could have just a moment.

16 (A brief pause in the proceedings.)

17 MS. FRANKLIN-BEST: We will be filing an amended
18 application for post-conviction relief, Your Honor, but
19 we filed -- we filed this one back in, I think, April
20 of 2012, that we're going to be raising a Batson claim
21 and whether or not that is couched in terms of a
22 freestanding claim, or an ineffective assistance of
23 counsel claim or a solicitor prosecutorial conduct
24 claim, or all of the above. We will be raising a
25 Batson issue.

1 THE COURT: Remind me, was there other claims
2 other than this?

3 MS. FRANKLIN-BEST: Yes, Your Honor. If you would
4 like, I've got an extra copy.

5 THE COURT: Is that the amended?

6 MS. FRANKLIN-BEST: The last amendment and
7 application.

8 MR. GROSE: October of 2012, actually.

9 MS. FRANKLIN-BEST: October of 2012, you are
10 right. If I may approach?

11 THE COURT: Mr. Brown.

12 MS. BROWN: May it please the Court. Your Honor,
13 in your order denying the motion to compel the
14 Solicitor's work product, on Page 5. We found it is
15 well settled that an applicant cannot raise a
16 freestanding claim of error, and that would be the
17 Batson claim. In the footnote, you gave some
18 cautionary advice that if you wanted to raise the
19 ineffective assistance of counsel claim, you could get
20 information from SLED Catch, and I believe we heard
21 today that that is out there, but that still has not
22 been done. What we're talking is information that
23 would have been available to counsel at the time of
24 trial, that is your basic Strickland test, what you
25 would have had available then. The supreme court,

1 South Carolina in the State versus Chiles, 1989, said
2 that defense is not entitled to criminal history
3 checks. The defense would not --

4 THE COURT: At trial?

5 MS. BROWN: At trial, correct. And they would not
6 have been entitled to it in 2009 in Mr. Dickerson's
7 trial. I have a copy of that case, if I may hand it
8 up, Your Honor?

9 THE COURT: Yes, ma'am.

10 MS. BROWN: We have filed a response, and I want
11 to hit some of the highlight for you today.

12 THE COURT: I'm not sure when you filed it. I
13 received it today.

14 MS. BROWN: Yes, sir. I mailed it for filing to
15 Charleston on January 26 with a copy to you, which may
16 be in Columbia, Your Honor.

17 THE COURT: What did you say, sorry?

18 MS. BROWN: I mailed a copy to you which may be in
19 Columbia.

20 THE COURT: Oh, in Columbia, I see. I just wanted
21 it clear for the record that I just received it, which
22 is fine.

23 MS. BROWN: Sure. Your Honor, of course we're in
24 post-conviction relief, and discovery is broad, but it
25 is not unlimited. What they are asking for at this

1 point would be 400 criminal histories to be run on
2 jurors who were randomly chosen in Charleston --

3 THE COURT: That is the entire voir dire?

4 MS. BROWN: Yes, sir, approximately 400, according
5 to the information we've shared in this case. These
6 are people that were not even qualified, certainly
7 didn't go through the individual voir dire that we're
8 talking about. We're talking about less than
9 10 percent of that number.

10 Now, I understand from opposing counsel that they
11 want criminal histories run on every single person,
12 which is in excess of 10,000. But the question is not
13 cost, it is not really information, the question is why
14 are we doing it? What information could possibly be on
15 these records. And these are privileged records, these
16 are not records that can easily be obtained by a
17 Freedom of Information Act or anything like that. I do
18 disagree with one thing that was said today about the
19 NCIC reports; if we run it today, would it be the same
20 information? I would offer it is not. It probably is
21 not, and that is because NCIC is actually a combination
22 of databases, and they are constantly updated, and
23 sometimes the information is wrong.

24 So, again, it comes back to, why? Is there any
25 claim or any defense that would be forwarded by this

1 information? Your Honor, we said it in I don't know
2 how many hearings now, if there was any information, or
3 if they want to go over the information that probably
4 would be available, based on prior arrests or prior
5 convictions, they can run the \$25 check and see if the
6 Solicitor was correct or not, that's it.

7 THE COURT: You mean the SLED check?

8 MS. BROWN: Yes, sir. You put that in your order
9 we've discussed it in numerous hearings. This, Your
10 Honor, respectfully, should be considered abusive
11 discovery, it truly is at this point. I also would
12 rely on a 2011 supreme court case Oncology and
13 Hematology versus South Carolina Department of Health
14 and Environmental Control. Our supreme court there
15 granted an extraordinary risk to talk about discovery
16 abuses and bringing it back to what the claims are and
17 what you can do with them. I would like to read one
18 sentence, and this is on 388 of the opinion: While
19 discovery serves as an important tool in the
20 truth-seeking function of our legal system, we are
21 concerned that discovery practice has become a cottage
22 industry, and the merits of a claim are being relegated
23 to secondary status. And that is what we have here,
24 Your Honor.

25 It is not information that is going to lead to a

1 viable claim. We know that you can't be a freestanding
2 Batson issue. We ask this Court to consider it an
3 abusive request, and at least -- at the very least --
4 to cut it down, but we would suggest it does not need
5 to be granted at all.

6 THE COURT: All right.

7 MS. BROWN: Your Honor, there is one thing. If
8 you would grant the information, in any portion, I
9 would ask that the claim be immediately added to the
10 application, because as you know, I am -- I cannot talk
11 to Counsel about privileged information until that
12 claim is made. Also, I would ask for an order that
13 would recognize that the privilege is raised by the
14 assertion and to compel to release all information that
15 the defense had on these jurors at the time of trial.

16 Now, Your Honor, I say that because I just
17 recently argued a case, State versus Danny Ryant, and
18 criminal histories were at issue, as were the juror
19 book in general from the Solicitor's Office. The point
20 I want to make from that is we found out during the
21 discussion of the Batson issue that the defense
22 actually had superior information to the State at that
23 point. They knew about a conviction, even the
24 sentence, and the State did not.

25 Again, that reflects on the criminal history that

1 was not accurate, obviously, or at least information we
2 had in that particular case. I say that because if
3 there is any kind of viable claim that goes to
4 information about the jurors, then we would be entitled
5 to everything that they are now claiming privilege over
6 for their own jury selection and strikes, but that is
7 in the alternative.

8 The bottom line is we don't believe this is any
9 information that can go forward and, certainly, the 400
10 is an abusive discovery request. Thank you, Your
11 Honor.

12 THE COURT: Yes, ma'am. All right, Ms. Franklin.

13 MS. FRANKLIN-BEST: Yes, Your Honor. May it
14 please the Court. We were just talking in chambers
15 about how 400 is not the number we're operating from.
16 What we're asking is roughly 100.

17 THE COURT: Where does that number come from?

18 MS. FRANKLIN-BEST: I think that is the number of
19 jurors that they pulled initially that were selected --
20 that actually went through --

21 MR. GROSE: 400 was pulled.

22 MS. FRANKLIN-BEST: 400 was pulled to come to the
23 courthouse for purposes of --

24 THE COURT: They were given questionnaires?

25 MS. FRANKLIN-BEST: Yes.

1 THE COURT: I'm trying to get to your number.

2 MS. FRANKLIN-BEST: We just want the ones who went
3 through the individual voir dire.

4 THE COURT: Do you know who they are?

5 MS. FRANKLIN-BEST: We can identify them from the
6 record.

7 THE COURT: All right. What about Ms. Brown's, I
8 guess, alternative motion that the subpoena include --
9 any subpoena include the defense counsel's knowledge of
10 the jurors?

11 MS. FRANKLIN-BEST: First, I think we already
12 provided that, but if there is anything additional, we
13 will release that as well. I mean, my understanding,
14 from my communications with Counsel, is that they tried
15 to get this information --

16 THE COURT: I mean what did they generate on their
17 own?

18 MS. FRANKLIN-BEST: Nothing. In terms of criminal
19 histories?

20 THE COURT: Yeah.

21 MS. FRANKLIN-BEST: I'm unaware of anything.

22 MR. GROSE: I'm a unaware of it also. And they
23 have a privileged log with regard to Counsel's file,
24 and we'll go back and check on that, but I don't recall
25 that we claimed privilege over anything that had to do

1 with juror criminal histories or the information. I
2 mean, we'll give it to them, but I think --

3 THE COURT: I'm familiar with the Solicitor's
4 privileged log, but.

5 MS. FRANKLIN-BEST: We've provided a privileged
6 log to them.

7 THE COURT: Is that correct?

8 MS. BROWN: Yes, sir, Your Honor. I have it, and
9 I had it available when I had to take deposition of
10 trial counsel. Trial counsel declined to talk to us,
11 even though he's entitled to under the statute. What I
12 did is I went through and asked for certain things, and
13 he declined to release them. So if we go down to voir
14 dire, it is not just running a criminal history check,
15 it is who did you talk to in the public defender's
16 office and got information, what did they have. So
17 anything that would be covered under there, we believe,
18 would be entitled to --

19 THE COURT: And you don't have it?

20 MS. BROWN: We do not.

21 MR. GROSE: And we agree that they would be
22 entitled to that. We'll double check, but I don't
23 think it exists.

24 THE COURT: Can you put that in an order?

25 MS. BROWN: Yes, sir.

1 THE COURT: And I do think the rationale for the
2 Batson claim needs to be, as we have fleshed out, put
3 in a form of an amendment, if that is what you plan to
4 do, what you plan to focus on, that needs to be in
5 whatever number.

6 MS. FRANKLIN-BEST: We can do that.

7 THE COURT: All right. Ms. Brown, you know, I
8 haven't read your response.

9 MS. BROWN: Yes, sir.

10 THE COURT: But I'm familiar with your argument,
11 and I guess if I had to err, it is going to be on the
12 side of the Applicant. I appreciate and I totally
13 agree with the quotation that you just provided for the
14 Court, but that was a civil case. It has become a
15 cottage industry, and maybe it has with defense counsel
16 too, but I learned a long time ago that death is
17 different, and I'm going to err on the side of the
18 Defendant; however, by the same token, at this point in
19 time I see no need to issue a subpoena to the Federal
20 Bureau of Prisons for the NCIC records. I, frankly,
21 have no idea how that would be received or whether
22 there would be costs associated with that. Somewhere
23 in your papers you've asserted that approximately
24 \$10,000 in funding would provide you with the SLED
25 Catch Program.

1 MS. FRANKLIN-BEST: The SLED Catch Program.

2 MR. GROSE: Probably less than that, but we'll
3 limit it.

4 THE COURT: Yeah, you're going to limit it. But I
5 will approve funding up to that amount. I think you
6 need to be very specific about the specific -- about
7 the names and the number of potential jurors that you
8 are seeking this information about.

9 MS. FRANKLIN-BEST: If I could just, Your Honor,
10 when you look at the Website for how these searches
11 have to be conducted, it has to be in exact, you know,
12 putting in the name, exact name, and all I can do is go
13 from what is contained in the records that we have.

14 THE COURT: You can assume, can you not, that if
15 there are convictions, there probably are arrest
16 records.

17 MS. FRANKLIN-BEST: No. Here is the concern, is
18 that they strike jurors base on arrests and not
19 convictions, and that those arrests are not going to
20 show up on the SLED Catch report.

21 THE COURT: You didn't follow what I said. I said
22 you can assume if there are convictions, there are
23 arrest records.

24 MS. FRANKLIN-BEST: True.

25 THE COURT: To go with the convictions.

1 MS. FRANKLIN-BEST: Right.

2 THE COURT: Right. But you are suggesting there
3 may be other arrest warrants for these individuals?

4 MS. FRANKLIN-BEST: If they are out of state,
5 we're not going to have them, or if they were arrested
6 and not convicted, we won't have them.

7 THE COURT: If you have a string of convictions,
8 you can pretty well....

9 MS. FRANKLIN-BEST: If there is a string, but you
10 know...

11 THE COURT: That is what I'm giving you. Anything
12 further?

13 MS. BROWN: If I may, Your Honor?

14 THE COURT: Yes, ma'am.

15 MS. BROWN: What I was going to mention a few
16 moments ago, and I don't know that we put this on the
17 record, but if you wanted to allow any of the discovery
18 at all, these are records that may be privileged to
19 some extent, especially Social Security numbers, dates
20 of birth, that sort of thing. So even -- I don't
21 really know what, you know, they would get from the
22 SLED report and what they would use it for, obviously,
23 so could we have some type of protection in the order,
24 Your Honor?

25 THE COURT: Sure. Yes, ma'am. Confidentiality

1 order.

2 MS. FRANKLIN-BEST: I would -- okay. I mean, I
3 would note that these are the same records that any
4 member of the public can get, and they are not
5 privileged. You know, there is nothing we're going to
6 do to violate these people's privacy, but I don't think
7 the Attorney General needs to get an order to keep us
8 from acting unethically.

9 MS. BROWN: That was not the --

10 THE COURT: No, but I'll issue an order preventing
11 you from releasing them to the press or the public.

12 MS. FRANKLIN-BEST: We wouldn't do that anyway,
13 Your Honor.

14 THE COURT: I understand.

15 MS. FRANKLIN-BEST: I don't know that we need an
16 order for --

17 THE COURT: Well, it ties the knot a little
18 tighter.

19 Now, as to your motion to reconsider, that really
20 isn't the motion in front of me today, is it?

21 MS. FRANKLIN-BEST: We do put it in there, Your
22 Honor, because there are a couple of options that the
23 Court has in granting us the relief that we've
24 requested. Motion to reconsider in your prior finding
25 that these documents were privileged.

1 THE COURT: All right. I'll reconsider it to that
2 extent; does that make sense?

3 MS. FRANKLIN-BEST: I don't know. Do we get what
4 we want?

5 THE COURT: You don't get everything you want.

6 MS. FRANKLIN-BEST: Okay.

7 THE COURT: I'll go this far, with you, that is
8 about as far as I can say at this point. I mean,
9 otherwise, it just -- well, that is my decision.

10 MS. FRANKLIN-BEST: For clarification, does that
11 mean that you are going to disclose the records
12 relating to criminal history that are in the
13 Solicitor's possession?

14 THE COURT: No.

15 MS. FRANKLIN-BEST: I'm trying to understand.

16 THE COURT: You asked in your motion -- well, if I
17 can find it, -- respectively, we ask for an evidentiary
18 hearing on the issue to develop the necessary record
19 and also to ask the Court to order our requested relief
20 so that we may continue our hearing preparation without
21 additional delay.

22 You tell me that you requested relief is that
23 either -- you told me either you wanted the SLED Catch
24 Program, or you wanted and would prefer the NCIC
25 records of 400 applicants -- now you tell me it may be

1 a hundred applicants -- of the nationwide NCIC reports.
2 I mean, if you can get -- see, you are not providing me
3 with enough facts. If you only want the hundred NCIC
4 reports, what does that cost?

5 MS. FRANKLIN-BEST: We would have to find out from
6 the FBI.

7 THE COURT: I mean, that is why we're here.

8 MS. FRANKLIN-BEST: I mean, you know, we can
9 contact the FBI. I'm not sure that there is any costs,
10 frankly.

11 THE COURT: How many names?

12 MS. FRANKLIN-BEST: Approximately a hundred.

13 THE COURT: Give me something. Get the list of
14 names.

15 MR. GROSE: We will do that.

16 MS. FRANKLIN-BEST: Okay.

17 MS. BROWN: May I offer one thing while we're
18 talking numbers, and I think we mentioned it before,
19 this is really going to strikes, then the only numbers
20 you really need are those selected and those struck,
21 because that is the comparative analysis, similarly
22 situated jurors struck or seated, that is what you are
23 looking at. So if we are, indeed, tied to the Batson,
24 we're looking at a much smaller number than a hundred,
25 I just offer that.

1 MS. FRANKLIN-BEST: In the final analysis, that
2 may be true, but there is more to a Batson analysis
3 than just that.

4 THE COURT: Like what?

5 MS. FRANKLIN-BEST: Looking how questioning
6 proceeded with additional jurors that may have been
7 struck for other reasons.

8 THE COURT: Like age 65?

9 MS. FRANKLIN-BEST: Like 865?

10 THE COURT: Age 65.

11 MS. FRANKLIN-BEST: Oh, no. That is sort of
12 general disqualifications. We are talking about people
13 who have work problems, child care issues, those sorts
14 of people.

15 THE COURT: I'm getting --

16 MS. FRANKLIN-BEST: I have a number of cases that
17 I can show that, I mean, questioning of each juror is
18 all relevant.

19 THE COURT: So a lady says she has three children
20 under the age of seven, and we're going to do a
21 criminal history on her?

22 MS. FRANKLIN-BEST: That may be a general
23 disqualifications, but I'm saying there may be some
24 person who wants to get off the jury who says I work
25 9:00 to 5:00 and I have these problems, and then the

1 Solicitor says, well, let's go ahead and let this
2 person go, those sorts of inquiries are relevant to
3 Batson inquiry under Miller L.

4 THE COURT: Then you're really going to have to
5 get specific.

6 MS. FRANKLIN-BEST: That is why I think if we go
7 through the jurors who --

8 THE COURT: You are asking for the records before
9 you even know who you want the records for.

10 MS. FRANKLIN-BEST: We know who we want the
11 records for, we haven't sat down and written down their
12 names. We want the records of the people who were
13 questioned --

14 THE COURT: I need it for the record, for this
15 record.

16 MS. FRANKLIN-BEST: Okay. We can do that.

17 MS. BROWN: If I may put a little bit of a fine
18 point on it, we're talking about Batson. Batson is not
19 a way to conduct voir dire. Batson is a way to protect
20 a juror.

21 THE COURT: I understand.

22 MS. BROWN: So we're far afield in our arguments
23 to you right now on this discovery. It doesn't get us
24 to Batson, and I just wanted to offer that.

25 THE COURT: All right. I tend to agree with

1 Ms. Brown. What you are talking about, these general
2 -- you are trying to prove prosecutorial misconduct by
3 the way in which the prosecutor let people -- release
4 people from --

5 MS. FRANKLIN-BEST: I mean, that is not exactly
6 what we're saying. Are we looking at a prosecutorial
7 misconduct claim? Yes. I mean, the way -- I mean
8 Miller L is the United States Supreme Court case on
9 this. It talks about all the different factors that go
10 into looking into your Batson inquiry, and it includes
11 questions that are asked of other members of the voir
12 dire. It is not just the people who are being struck
13 or just the people being sat, but it is a totality of
14 the circumstances inquiry that includes these
15 additional jurors. I mean, I don't know how to say
16 that other than that is what the law is.

17 THE COURT: Yes, ma'am.

18 MS. BROWN: If you will recall, Your Honor, we
19 discussed Miller L and it's a habeas case; it is not
20 post-conviction relief. There was nothing there about
21 the Simmons doctrine as we have in our jurisdiction, so
22 it really is not applicable.

23 MS. FRANKLIN-BEST: I disagree entirely, Your
24 Honor, but I suggest that maybe we can submit proposed
25 orders, and if there are any objections, we can take it

1 up at that time?

2 THE COURT: Let's do it, and soon.

3 MS. FRANKLIN-BEST: Okay.

4 THE COURT: Because this case is fast approaching.
5 How much time do you need?

6 MS. FRANKLIN-BEST: Next Monday.

7 THE COURT: Ten days? Everybody clear?

8 MS. FRANKLIN-BEST: Yes.

9 MS. BROWN: I have one request, if we're done. I
10 don't want to jump ahead.

11 THE COURT: It's all right, he's conferring with
12 the client. Go ahead.

13 MS. BROWN: Your Honor, I respectfully request
14 that a final amendment be filed no later than Thursday,
15 April 30th. As you mentioned, we have a hearing date
16 fast approaching in July. That gives me under 90 days
17 to investigate any kind of mental illness issue and
18 that sort of thing. As you will recall, the motion to
19 continue back in December was based on a doctor
20 evaluating Mr. Dickerson at the end of December to
21 January. So we were waiting for that to conclude and
22 any other additional tests, but we do need a little bit
23 of time to go back and see if we can talk to trial
24 counsel and develop our own defense to these
25 allegations. We would respectfully request April 30th.

1 MS. FRANKLIN-BEST: I mean, I can't say we have an
2 opposition to that right now. We may as we --

3 THE COURT: I'm going to grant the motion.

4 MS. FRANKLIN-BEST: Okay.

5 THE COURT: Needs to be, as I say, tied down. We
6 need to know where we're going. Anything further?

7 (A brief pause in the proceedings.)

8 MS. FRANKLIN-BEST: I think we are finished.

9 THE COURT: Thank you.

10 (Whereupon, the proceedings concluded.)
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1 CERTIFICATE OF REPORTER

2
3 State of South Carolina)

4 County of Charleston)

5
6 I, Natalie Dahl, Official Court Reporter for the
7 State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate and complete Transcript
9 of Record of the proceedings had and evidence
10 introduced in the captioned case, relative to appeal,
11 in the Court of Common Pleas for Charleston County,
12 South Carolina, on the 2nd day of February, 2015.

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

15
16 February 25, 2015.

17
18
19 _____
20 Natalie Dahl, RPR

21 Court Reporter
22
23
24
25

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
2 COUNTY OF RICHLAND) COURT
3)
4 WILLIAM O. DICKERSON,)
5) TRANSCRIPT
6 -V-) OF
7) RECORD
8 STATE OF SOUTH CAROLINA,) 2012-CP-10-3216
9 DEFENDANT.)

10

11 MAY 8, 2015

12 RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

15 HONORABLE G. THOMAS COOPER, JR, JUDGE;

16

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

18 FOR THE PLAINTIFF:

19 MR. GROSE, ESQ.

20

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22 FOR THE DEFENDANT:

23 MS. BROW, ESQ.

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I-N-D-E-X

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MOTION:

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CERTIFICATE OF REPORTER:

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REPORTER'S NOTE: (THERE WERE NO EXHIBITS ENTERED.)

1 (The following proceedings were held on
2 May 8, 2015.)

3 THE COURT: Mr. Grose, this is your motion.

4 MR. GROSE: Thank you, Your Honor. You have a
5 copy of the written motion, so I'm not necessarily going to
6 try to repeat everything that's in it. The first ground,
7 you know, has to do with the fact that we have one more
8 expert that we need to consult with and, hopefully, get some
9 testing done.

10 THE COURT: Have you identified that expert?

11 MS. BEST: Yes, Your Honor.

12 MR. GROSE: We have, yes, sir. And you have
13 signed an order for funding for that expert.

14 THE COURT: I understand. I've signed every order
15 you've asked for.

16 MR. GROSE: Yes, sir. Well, on the funding, maybe
17 not on all of substantive stuff.

18 THE COURT: Go ahead.

19 MR. GROSE: But you have. So we need some time
20 for that to happen. We've also, as you know -- and you've
21 signed this order, too. We had to switch who we were doing
22 with our mitigation investigator and we've identified some
23 additional --

24 THE COURT: That didn't take any time.

25 MR. GROSE: Right. But we do have some additional

1 interviews and we're working on that. But, also, the
2 schedules that Ms. Franklin-Best and I have for the first
3 part of this year and what is looking like is coming up for
4 the summer, we've started to address that in the motion.
5 And we can give you a little bit more information on that.
6 I'm hoping to settle --

7 THE COURT: What I'm probably more concerned about
8 is what you've done so far and what progress you've made on
9 this. Because I just have a feeling the State's going to
10 object to this continuance.

11 MR. GROSE: Well --

12 THE COURT: I have no idea how much progress
13 you've made. And I'm not asking you for a lot of specifics.
14 But you've had this case for almost a year since I got it
15 and all I have seen are, you know, motion for continuance
16 and motion for continuance. And it's a little frustrating
17 to the Court that -- to justify a continuance or an
18 extension, you've got to show me you're making some
19 progress.

20 MR. GROSE: Yes, sir.

21 THE COURT: I mean, how much time are you devoting
22 to this thing? How much priority are you giving this case
23 as opposed to all the cases you've listed in your motion?
24 Where does this case come in on the priority list? It would
25 seem to me this ought to be a first priority or, at least,

1 an equal priority to some of these other cases instead of
2 this one always getting kicked back.

3 Go ahead. I'm a little frustrated and you can
4 probably tell that.

5 MR. GROSE: I can, and I can understand that.
6 What I can tell you is is that we have had a mental health
7 expert come in and evaluate Mr. Dickerson. We do think,
8 depending upon what happens with this additional expert,
9 that is probably going to lead to an additional claim for
10 not discovering the true nature of his mental health and
11 presenting that as mitigation in the case. That is
12 something that we have to work with other people on.

13 And then to get to the Court's concern about when
14 there's going to be an end date to this, we feel comfortable
15 representing to you that if we get a continuance for six
16 months that that would be the last time. This would be a
17 final continuance and we would be prepared to go. As you
18 know, yes, it's been almost a year since you got into the
19 case, but when you got into the case, that was the first
20 time we started getting funding for the experts.

21 We, also, had where we went back and forth and we
22 -- you issued us an order to get criminal histories. We've
23 obtained that. We've advanced the ball on that. We think
24 that is going to lead to evidence that we are going to be
25 presenting at the hearing. And we feel comfortable in

1 saying that if we take the dates for the final amended
2 application and the dates for the hearing and then extend it
3 out six months that that will be when we have a hearing and
4 this case will be resolved.

5 THE COURT: What's the status of your final
6 amended application?

7 MR. GROSE: That's going to depend upon what the
8 experts tell us. That's why we're asking to -- to extend
9 that out as part of the order. And the additional
10 mitigation, we expect that will be a claim for
11 ineffectiveness of counsel for failing to effectively
12 investigate, develop and present mitigation that might have
13 led to a lighter sentence or it probably would have led to a
14 lighter sentence.

15 THE COURT: Has the second expert been retained?

16 MR. GROSE: Yes.

17 THE COURT: Or --

18 MR. GROSE: We've had to go back and --

19 THE COURT: Identified?

20 MR. GROSE: The person is identified and we should
21 know by next week when they can come in and do some testing.

22 THE COURT: How long does this take, this testing
23 take? Seriously, I mean, examination for a mental health
24 expert, a day, two days, three days?

25 MR. GROSE: I would imagine that it would probably

1 take a better part of the day, but it would probably be done
2 over a couple of days, two days.

3 THE COURT: Sure.

4 MR. GROSE: Ms. Franklin-Best has worked with this
5 expert in another case. She's telling me it would be two
6 days. I'm sorry, she said -- maybe I should let her speak.

7 THE COURT: If it's a matter of days, you're
8 asking for a matter of months.

9 MS. BEST: Your Honor, if I can explain. I've
10 spoken to this expert and, you know, once she can get here
11 to get this done, it will take a couple of days.

12 THE COURT: Sure.

13 MS. BEST: It's coordinating with her schedule and
14 getting her up here and then her time to review what's
15 there, her conducting --

16 THE COURT: I understand that. I understand what
17 an expert does.

18 MS. BEST: Uh-huh.

19 THE COURT: But it doesn't take her six months to
20 do that.

21 MS. BEST: No, I mean, that's absolutely -- you're
22 absolutely right about that, Your Honor. I mean, the
23 mitigation -- you know, we had -- I kind of feel like we're
24 putting a lot of ex parte stuff on the record here about our
25 strategy, but.

1 MS. BROWN: Your Honor, if I may interrupt just a
2 moment with the ex parte because I do believe that there are
3 things coming in. You have already ordered that there are
4 no ex parte communications in this case on funding, so we
5 shouldn't be holding back at this point. Supreme Court has
6 just recently in the Stanco case affirmed that ex parte
7 funding request, that procedure is not proper for these
8 cases. And I have the order if the Court would like to
9 review that one as well. So we're kind of dancing around a
10 few names and what we're doing here under provisions of ex
11 parte that are not applicable. Thank you.

12 MR. GROSE: Well --

13 MS. BEST: If I could just go forward --

14 THE COURT: Just one at a time. One at a time.

15 MS. BEST: Sorry. If I could just sort of go
16 forward. We had this case. We did not have funding. We --
17 back before Your Honor was appointed to the case, OID was
18 objecting to our mitigation person, so no work was getting
19 done there. When you came on, you gave us funding for a
20 \ mitigation investigator, but nothing was getting done. So
21 we moved as quickly as we could to have that person
22 replaced, which is what we've done.

23 Now, since we've had our mitigation person on, a
24 lot of work has been done, but there is still some
25 additional work that has to be done, which is information

1 that has to go to our expert. So that is part of -- I mean,
2 Teresa Norris has done a lot of work, but there is
3 additional work that she has got to get done so that our
4 expert will have the full wealth --

5 THE COURT: So how much time is she spending on
6 it?

7 MS. BEST: He's spending a lot. She's was down
8 there for, you know, a full week a few weeks ago. But there
9 a number of different people in this case. I mean, there
10 are a number of witnesses.

11 THE COURT: All right. Well, let me hear from the
12 State.

13 MS. BROWN: Thank you, Your Honor. May it please
14 the Court.

15 THE COURT: If you've got that Stanco order?

16 MS. BROWN: Yes, sir, I do. Your Honor, we do
17 object to any additional delay in this case. This case has
18 been pending since May 16th of 2012. We are going to rely
19 on part on the denial of the motion for continuance in Louis
20 Winkler, another capital PCR case, and, also, denial of
21 continuance in Steven Stanco. And if I could just share.

22 You might have that. I'm going to give you a copy
23 of it.

24 And I will hand this up to the Court. May I
25 approach Your Honor?

1 THE COURT: Certainly, please. Thank you.

2 MS. BROWN: What we've heard today, Your Honor, is
3 this. We're not looking at an issue that would bar
4 imposition of a death sentence, such as an intellectual
5 disability claim. That's not been made. We don't have
6 anything on competency that may affect the presentation of
7 factual issues, as in Donnie Council's case, or even prevent
8 execution. We're not at that point yet. But no mental
9 state that would go to that. In fact, opposing counsel said
10 today that it would likely be an ineffective assistance of
11 counsel claim connected with this neuropsychologist that has
12 recently been retained.

13 Well, Your Honor, we would have a problem with
14 that and with their ability to be able to prove it because
15 we're already taken the deposition of trial counsel. Trial
16 counsel told us that applicant did not cooperate in testing.
17 So, obviously, counsel cannot be faulted for not presenting
18 evidence when his client tortured that information. So in
19 short, we haven't heard anything that should constitute good
20 cause to continue this case once again.

21 And I would remind the Court that we were in
22 Conway in February when I asked for a final date for final
23 amendments and nobody said anything about a possible
24 continuance and we were all working toward the July date.
25 Your Honor's been very patient and gave opposing counsel six

1 more months back in November. We would ask that this
2 particular continuance be denied.

3 THE COURT: Anything further?

4 MS. BEST: Yes, may I just sort of respond? Ms.
5 Brown mentions a Winkler case and, also, a Stanco case where
6 continuances were denied. I will say that my knowledge of
7 Winkler is that relief has been granted on a particular
8 claim on that case and it is on appeal at this point.
9 Stanco, the denial of continuance in that is different from
10 this case. They had received absolutely no funding. That
11 hearing just happened a couple of -- maybe a month ago. And
12 that is, also, additionally on appeal right now. The issue
13 of the denial of continuance will be a certain part of those
14 appeals.

15 You know, as for the mental state, you know,
16 Ms. Brown doesn't know of any sort of mental exclusions.
17 She does not know about the mental state. You know, she's
18 saying that we should be denied because we haven't put
19 anything on the record about his mental state at the time.
20 But precisely what we're investigating at this point are
21 issues related to his mental state.

22 She refers back to a deposition that -- with
23 Mr. Bloom where he alleged that Mr. Dickerson did not
24 cooperate with some of their testers, but that in no way
25 concludes a finding of ineffective assistance of counsel.

1 There are events that we are privy to that she is not that
2 would allow us to go forward on an ISU claim regardless of
3 the deposition that she attended and what she believes she
4 knows about this case.

5 MS. BROWN: Your Honor; if I may, I would just add
6 it's their burden to show good cause to have this case
7 continued once again.

8 THE COURT: Well, the good cause seems to be
9 conflicts with other cases and that's what bothers me.

10 MS. BROWN: Yes, sir.

11 THE COURT: And when these other cases have
12 arisen, it leaves me wondering if counsel has advised the
13 trial judge or the motions stemmed from those cases that you
14 have this case and this case is a -- I can't -- I wonder if
15 when you say Judge Gergel has scheduled a trial in a civil
16 rights matter --

17 MS. BEST: Well --

18 THE COURT: -- to begin in June of 2015 if you
19 advised Judge Gergel that you have a death penalty PCR
20 pending for the following months and please see if he could
21 reschedule that. In other words --

22 MS. BEST: Well, I will tell you, Your Honor,
23 since this has been filled, as of two days ago, that case is
24 settled. So that case is not currently going on that date.

25 THE COURT: I wish you had told me that.

1 MS. BEST: I'm sorry, Your Honor, that just
2 happened.

3 THE COURT: Listen, I'm as much in favor of giving
4 counsel time for vacations as reasonably possible. I'm very
5 sensitive to that. I was, naturally, in your position at
6 one time in the past. And those family things were very
7 important. But, you know, just -- it's just frustrating
8 when I see a motion that says well, I've got to do this,
9 I've got to do that or I've got to do this and it's really
10 not really addressing the progress of this case or the
11 priority of this case. But asking for a continuance based
12 on another trial somewhere else and it appears that this
13 case doesn't get the -- this case gets the short shift.
14 Well, we can get Judge Cooper to continue our case, so let's
15 go ahead and schedule it. And I'm being -- I am being a
16 little bit facetious in saying that, but I hope you
17 understand the Court's frustration and I'm sure the State's
18 frustration as well.

19 All right. This is what I'm going to do, this --
20 the hearing on this case will be continued till -- for 90
21 days, until the 19th of October, the week of October 19th,
22 2015. And this is why I wanted to have a record today.
23 There will be no more continuances. This Court will not
24 grant an additional continuance of the hearing, save death
25 or serious illness of one of the parties. And I mean that.

1 And if you want -- if we come to that date and you're not
2 prepared, the hearing is going forward. You can appeal it
3 and do whatever you want, but that's the last continuance.
4 That's it.

5 MS. BEST: (Ms. Best nodded head.)

6 THE COURT: There will be no more. And I hope you
7 -- you know, another thing that I hope you -- I don't know
8 if you understand, but I would hope you would, but this --
9 you know, there's a ripple effect when these things are
10 changed. It's not only my schedule, which is -- which has
11 to be changed now and that week has to be filled, but other
12 judges are affected, too. I mean, it's a ripple effect. If
13 I want to claim the week of the 19th of October, which is,
14 basically, 90 days, I've got to kick some other judge out.
15 They've got to move some other judge around. It's not --
16 it's not just a -- I don't run the court system and it --
17 it's a burden upon court administration to change
18 everything, especially -- and I'm sure -- let me just check.

19 Does the State have any conflicts with the week of
20 October 19th?

21 MS. BROWN: No, sir.

22 THE COURT: All right. The applicant, any known
23 conflicts at this time? Because I'm going to ask that if
24 there are that you make efforts to change those conflicts.

25 MS. BEST: No conflicts from us, Your Honor.

1 THE COURT: And you need to tell your experts to
2 get to work and that you're not going -- you're not going to
3 have the luxury of saying well, she's got or he's got this
4 other schedule conflict or this other -- if they do, get
5 another one. You know, it's just -- I'm not going to do it
6 again. It's just -- it's just -- I don't think it's fair to
7 your client, although he's where he is. He's not going
8 anywhere, but it's still not fair to your client or his
9 family to keep postponing these things.

10 Anything further?

11 MS. BEST: No, Your Honor.

12 MS. BROWN: Your Honor, we would respectfully
13 request a time for the final amendments because we're
14 stalled until we get the allegations.

15 THE COURT: How much -- you need it, what -- did
16 you say 30 to 60 days in advance?

17 MS. BROWN: I believe I asked for a minimum of 90,
18 which if you are extending to 90, that would be the
19 July 15th date, so.

20 THE COURT: Right. All right, July 15th.

21 MS. BROWN: Thank you, Your Honor.

22 THE COURT: Final application -- final amendments
23 to the application.

24 MS. BROWN: And, Your Honor, I would understand
25 that that would be the final. You would not allow any

1 additional amendments, is that correct?

2 THE COURT: Only under extreme circumstances.

3 MS. BROWN: Thank you, Your Honor.

4 THE COURT: All right.. I'm going to ask the court
5 reporter to make -- she's not going to like me for this, but
6 make me a transcript of this hearing just so that there's no
7 question come September or whenever as to what was said here
8 today. I will get you a copy of it if you wish.

9 MS. BROWN: I would like one, Your Honor. Thank
10 you.

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1 COUNTY OF RICHLAND)

2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled William O. Dickerson Vs. State
5 of South Carolina, Case No. 2012-CP-10-3216, at the Richland
6 County Courthouse, October 19, 2012.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 17 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 29th day of May, 2015.

15 _____

16 Crystal Holmes, Official Court Reporter

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State of South Carolina)
County of Charleston)

In the Court of Common Pleas
Ninth Judicial Circuit
2012-CP-10-3216

William O. Dickerson,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

Transcript of Record

September 18, 2015
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge

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

E. Charles Grose, Jr., Esquire
Elizabeth A. Franklin-Best, Esquire
Attorneys for the Applicant

Melody J. Brown, Esquire, Assistant Attorney General
J. Anthony Mabry, Esquire, Assistant Attorney General
Attorneys for the Respondent

Joseph Dawson, III, Esquire
Bernard E. Ferrara, Jr., Esquire
Johanna S. Gardner, Esquire
Attorneys for the Charleston County Attorney's Office

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

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No Exhibits Introduced.

1 THE COURT: I have a motion to compel and motion to
2 quash. It all involves the same subject matter in the
3 William O. Dickerson case. And, Mr. Grose, if you wish
4 to ---

5 MR. GROSE: I think, Your Honor ---

6 THE COURT: --- proceed with your motion to compel.

7 MR. GROSE: Thank you, Your Honor. Attached to the
8 motion to compel, you should have a copy of my letter of
9 August 27th of this year to Solicitor Wilson, and the
10 subpoena to her office, and the attachment to the subpoena.

11 THE COURT: Right. I have that.

12 MR. GROSE: As well as the email correspondence hoping
13 to narrow the issues for this hearing, which we were unable
14 to do.

15 As the court knows, one of the issues that is asserted
16 in various ways in the amended application for
17 post-conviction relief has to do with whether or not
18 Solicitor Wilson violated *Batson vs. Kentucky* in this case.
19 And under U.S. Supreme Court precedent, the *Miller-el* case
20 in particular, we're also allowed to look at pattern and
21 practice evidence to see if she's done it in other cases.
22 And it appears from some of the transcripts that we have
23 where we can identify race that she has, in fact, done
24 that.

25 THE COURT: In what particular?

1 MR. GROSE: Well, it, it, it appears that -- we, we
2 have the record in Colin Broughton, which number fourteen
3 on that list, and in a case number two on that list that
4 was tried in 2004, we actually have a transcript where
5 Judge Goodstein found that she had violated -- that
6 Solicitor William had violated *Batson*. And, in fact, had
7 advanced reasons very similar for exercising her strikes as
8 she did in Mr. Dickerson's trial.

9 We are in the process -- we, we have been trying to
10 obtain -- well, one of the missing pieces for us -- there
11 are several missing pieces, but one of the critical missing
12 pieces for us is the list of jurors that were subpoenaed
13 for these other cases. The, the gender is not readily
14 apparent in most of the cases -- I mean, I'm sorry. The
15 race is not readily apparent in most cases from the record,
16 and we've inquired with the clerk of court's office
17 Charleston. And, based on the record retention policy,
18 maybe they have one of those lists left we, we have gotten.
19 We've also reached out to some of the defense lawyers in
20 those cases that were tried, and we've been able to come up
21 with a few additional juror lists, but not everything.
22 Certainly a minority of what's on that list.

23 Now, we're going to have a conversation with our
24 statisticians on Monday about whether or not this new
25 information is going to be sufficient for them to do a

1 statistically reliable analysis, and of course if it is,
2 we'll notify the attorney general and provide them with
3 information.

4 But it appears from -- and I'd actually like to hand
5 up two other letters because there was a FOIA component to
6 our request that the Charleston County attorney has also
7 answered, and there's an exchange from them on September
8 8th and from me to them on September 15th. If I could
9 approach, Your Honor?

10 THE COURT: Yes.

11 MR. GROSE: What it appears is that there's
12 essentially three categories of information that we've
13 asked for in the subpoena and in the FOIA request. One is
14 for the juror list that we believe Solicitor Wilson would
15 probably keep in her file, as most attorneys do after they
16 try a case, and they have not denied that she possesses
17 those documents.

18 The incident reports, because this also could be
19 significant, how many of the cases that Solicitor Wilson
20 personally prosecutes where there's either a white victim
21 or an African-American defendant, and that information
22 would be on those witness -- or those incident reports.
23 And again she's not denied that she has those. She's just
24 said it's too difficult for her to retrieve those from
25 storage, which I find preposterous because we do that all

1 the time in law offices.

2 And the third category of information goes to her
3 notes and information that she had prepared for selecting
4 the juries in that case which, while they've not clarified,
5 we believe that's what they are asserting the privilege and
6 work product aspect toward.

7 What we know is in the *Miller-el* case, the lawyers
8 representing the death-sentenced inmate had access to those
9 very types of materials. And what we know on the case
10 *Chapman vs. Foston*, which is the United States Supreme
11 Court granted certiorari in and will have oral argument
12 later this year, it developed similar to how this case has
13 developed where the prosecutor refused to disclose this
14 information in the state court proceedings. The
15 information was eventually released under a state Freedom
16 of Information or public records act. And in the federal
17 habeas case which is going up to the Supreme Court, there
18 is -- in what has been written about this case, there is
19 information in it that's very troubling about the exercise
20 of the strikes in that case.

21 And one of the things that, you know, we keep circling
22 back around to, this position with some of the documents
23 that the solicitors claim privilege to initially and now
24 additionally claiming privilege to the same information in
25 other cases, is this is what the federal courts are looking

1 at to, in part, to review *Batson* claims after conviction.
2 And so when our leads to get some of this information dried
3 up, so to speak, through other means, we decided to go to
4 the solicitor for the incident reports and the jury list as
5 well to see how she tracks race when she's selecting jurors
6 in Charleston County.

7 The fourteen cases on that list, thirteen of them are
8 Charleston County cases. The *Broughton* case is a Berkeley
9 County case. She was the prosecutor in all fourteen of
10 them, based on the clerk of court records that we reviewed,
11 the minutes that are maintained in the courthouse. So,
12 we're specifically looking at cases when either as deputy
13 solicitor or the elected solicitor, she was the lead
14 prosecutor involved in the case, trying, and responsible
15 for the jury strikes.

16 And, you know, we could be -- we, we had -- when we
17 were having our status conference before we were on the
18 record, there was some reference about the potential of a
19 floating hearing. It could very well be that the U.S.
20 Supreme Court later this year or between now and next
21 summer decides the case out of Georgia and makes it very
22 clear that all of us have to look at this information.

23 And, and we think that given that need that we have in
24 this case to present this issue, and given the public
25 interest in this state and in Charleston in particular

1 these days with the high profile racially charged cases
2 down there that are getting a lot of attention, we believe
3 that, you know, sunlight needs to be shown on this
4 information and that -- this court to determine whether or
5 not, not only was *Batson* violated in this case, but also if
6 there is a pattern and practice that points to the fact
7 that it was violated in Mr. Dickerson's case.

8 THE COURT: Are all of these cases -- they are, I
9 assume, they're from various criminal, various criminal
10 acts. They're not all murder cases.

11 MR. GROSE: They're all murder cases.

12 THE COURT: They're all murder cases.

13 MS. FRANKLIN-BEST: With one attempted murder, Your
14 Honor.

15 THE COURT: And is the defendant African-American in
16 all these cases?

17 MS. FRANKLIN-BEST: It would appear so. We are still
18 trying to narrow down some of the defendants in those
19 cases. But it appears that the majority of the cases that
20 I've been able to identify that -- at least everything I've
21 been able to confirm so far, they have all been
22 African-American.

23 THE COURT: You can go to the DOC website and probably
24 get half of them.

25 MR. GROSE: But that's also not the victim. We're

1 also looking at -- and that's one of the additional
2 reasons.

3 THE COURT: All right, you're asking for incident
4 report, complete and accurate copies of jury lists, jury
5 strike sheet, and all information created, assembled about
6 all potential jurors, and all notes made during roll call,
7 jury qualification, jury selection. Is that correct?

8 MR. GROSE: That's correct. Yes, sir.

9 THE COURT: And what was the subject of the FOIA
10 request?

11 MR. GROSE: If, if you turn back a couple of pages?
12 Basically we served the subpoena, and then in separate
13 paragraph said:

14 In addition to discovery under the South Carolina
15 Rules of Civil Procedure, please consider this
16 request for the records pursuant to the South
17 Carolina Freedom of Information Act.

18 THE COURT: Just additional supporting records?

19 MR. GROSE: Yes, sir. We wanted to make it a dual
20 request, in part looking at the Georgia model that's now
21 going to the Supreme Court. We wanted to make sure that we
22 were asking for the information in the same capacity that
23 those litigants have, have obtained it.

24 And, and as you are probably aware, North Carolina has
25 had a racial justice act where they've had some hearings,

1 and some death sentences have been set aside, and
2 disclosure was required by North Carolina in those cases as
3 well of this same type of information.

4 THE COURT: And the Charleston County attorney's
5 office says these incident reports are not available in the
6 solicitor's office, which is an incredible statement to me.

7 MR. GROSE: Well, that's, that's not exactly what they
8 said. They, they ---

9 THE COURT: Office did not originate these reports.
10 It does not have such reports readily available.

11 MR. GROSE: Well, they said they don't have them
12 readily available. I think that means that they don't want
13 to go and pull their files and get them. That's the way I
14 interpret it.

15 THE COURT: They gave you a website.

16 MR. GROSE: Huh?

17 THE COURT: They gave you a website.

18 MR. GROSE: For, for the other agencies but not the

19 ---

20 THE COURT: All right, let me hear from the county.

21 MR. DAWSON: Thank you, Your Honor. Please the court?

22 THE COURT: Mr. Dawson, how are you?

23 MR. DAWSON: Yes, Your Honor, very good. Thank you
24 for inviting us to Richland County today. It was an
25 enjoyable ride up this morning, or this afternoon.

1 I do want to try to attempt to respond to some of the
2 things that were raised, and I do acknowledge that my
3 office received a subpoena through the solicitor's office,
4 as well as the FOIA request that you asked about.

5 All right, Your Honor, at the outside -- and part of
6 the reason I have Mr. Ferrara here today is we have
7 attempted to try to locate and obtain the documents that
8 you've already started to ask about. So, I appreciate the
9 court's comments about it being incredible that we don't
10 have them. It was more we don't have them in the office
11 and have already attempted to procure those documents in
12 response.

13 THE COURT: Right. They would not be in your office.

14 MR. DAWSON: No, sir, they would not, and so I wanted
15 to point out first as relates to the county's privilege, we
16 do assert that the matters contained in the solicitor's
17 office files are work product. They are privileged. I do
18 acknowledge, though, Your Honor, that there are different
19 categories of documents that are being discussed, that
20 being incident reports, jury lists, and then finally the
21 notes and impressions or thoughts of those prosecutors in
22 looking at those documents and those jury lists in
23 preparing to qualify a jury.

24 THE COURT: Let me interrupt you just a minute.

25 MR. DAWSON: Yes, sir.

1 THE COURT: Mr. Grose, remind me of my previous order
2 with regard to the solicitor's file. What did that
3 encompass?

4 MR. GROSE: Well, you have a disk with over 2,100
5 pages of documents. We're not sure how many. We know
6 there's approximately 2,100 that are in PDF form. There's
7 also, from the description that we've been given,
8 electronic files on those documents. Not everything on
9 that disk pertains to jury selection, but -- and all of the
10 documents that you have pertain to Mr. Dickerson's case
11 specifically.

12 THE COURT: I'm just asking you what, what that order
13 -- because I don't have it in front of me. It's back in
14 the file..

15 MR. GROSE: Well, the, the -- you found everything to
16 be protected work product or privilege, and, and that's
17 been fully litigated. We may have to revisit that after
18 the Supreme Court acts in the Georgia case because that may
19 present a new ground for your consideration. We won't know
20 until that opinion comes out.

21 THE COURT: Are we plowing the same ground?

22 MR. GROSE: No, sir. This is ground, this, this --
23 first of all, the, the, the -- these list of cases have
24 nothing to do with the documents, nothing to do with the
25 order that you've already done. The incident reports and

1 the jury list would not -- I don't think there's any
2 conceivable way for those to be work product.

3 THE COURT: All right.

4 MR. GROSE: If we don't at least ask for this same
5 information for these cases, then we would be doing Mr.
6 Dickerson an injustice by not developing the record. So,
7 it, it's, it's a similar field, but it's a different field
8 that we're plowing right now.

9 THE COURT: All right. Go ahead, Mr. Dawson.

10 MR. DAWSON: Your Honor, if I may approach? I do have
11 a copy of the order that you issued.

12 THE COURT: Well, it ---

13 MR. DAWSON: If it's of any value to you because
14 it ---

15 THE COURT: Would you please ---

16 MR. DAWSON: Yes, Your Honor. Thank you.

17 THE COURT: It's in a huge file.

18 MR. DAWSON: Yes, sir.

19 THE COURT: I assume you rely on it?

20 MR. DAWSON: Yes, sir, Your Honor. I appreciate you
21 raising that because I think a lot of issues that we
22 probably will talk about center on some of the things you
23 already addressed.

24 But what I wanted to first about was the sheer volume
25 of information that was being asked for. Today Mr. Ferrara

1 is prepared to walk you through a privilege log and some of
2 the information that we have so that if the court desires
3 today to have an in-camera review of some of the documents,
4 we'll be happy to do that.

5 The problem we've had is twofold, and I think Mr.
6 Grose has already, has already articulated, and we believe
7 there is a burden on their part to see if there is, in
8 fact, a way to get the same information through other
9 means. And I think what you've heard is that they already
10 reached out to defense counsel for the cases, the fourteen
11 cases that are listed to try to obtain that information.
12 What I'm not sure I heard was a definitive answer as it
13 relates to the information being asked for and whether they
14 were able to achieve their objectives in getting them to
15 cull down this list because, in fact, it's a list of
16 fourteen cases from 2002 to 2000 -- 2002 to, say, present
17 cases that they have access through to and have attempted
18 to get to get access to. And I'm not certain whether or
19 not they've, in fact, gotten the exact information they've
20 asked for.

21 The problem the solicitor's office has, Your Honor, in
22 trying to, to gather the fourteen cases, there's probably
23 almost twenty boxes of material that we've already started
24 to go through. And the concern we have in regard to jury
25 lists and incident reports is there many be annotations,

1 notes and so forth, by those prosecutors as part of that
2 file that we do claim is work product. And, in fact, if it
3 has no annotations, no notations, nothing whatsoever, then
4 we'd probably put that in a different category. But
5 equally, they have access to that same information through
6 the various law enforcement agencies that had made the
7 arrests and created those incident reports. And equally
8 there may be information in that -- those reports that
9 should be redacted. And therefore, the county would ask
10 that we have sufficient time to actually thoroughly go
11 through that material, determine what is privilege, what
12 needs to be redacted. And I would ask the court to
13 consider if, in fact, they have already obtained some of
14 that same information, it is duplicative to have the county
15 to do the same thing.

16 THE COURT: Well, let me just say this, Mr. Dawson.
17 This hearing is thirty days from today.

18 MR. DAWSON: Yes, sir.

19 THE COURT: And you're talking about time.

20 MR. DAWSON: Yes, sir.

21 THE COURT: The process they say they have engaged in,
22 I don't know specifics, but they, as an officer of the
23 court, they're telling me they've been unable to get ---

24 MR. DAWSON: Yes, sir.

25 THE COURT: --- what they want or enough of what they

1 want from either defense counsel, or I guess it would have
2 to be defense counsel, or the public record.

3 MR. DAWSON: Yes, sir.

4 THE COURT: So, I'm inclined to try to push this
5 forward.

6 MR. DAWSON: Yes, sir.

7 THE COURT: Even though it may be an inconvenience.
8 I'm certainly aware of the work product aspect of Solicitor
9 Wilson's case preparation, and -- but I'm going to -- I'm
10 predisposed to try to ---.

11 MR. DAWSON: Yes, sir.

12 THE COURT: --- accomplish what defense counsel says
13 they need to adequately present their case.

14 MR. DAWSON: Yes, sir.

15 THE COURT: And if there are ongoing Supreme Court
16 cases that bear directly on this, then that may be even
17 more of an incentive to try to move it forward. So -- and
18 it may be burdensome, and I know they're probably under a
19 lot of duress at the present time, stress at the present
20 time, but this case is going to be tried in thirty days.
21 And these two primary cases, it looks like they're some
22 time in 2016. So, you may proceed.

23 MR. DAWSON: Yes, sir.

24 THE COURT: But I just wanted to tell you my mindset.

25 MR. DAWSON: I appreciate that, Your Honor.

1 THE COURT: It's, it's...

2 MR. DAWSON: Well, because it will tailor my
3 presentation because what I'm not necessarily suggesting in
4 this hearing and, therefore, that's what I wanted to
5 articulate, the volume of their request. And I understand
6 the difficulty they're having getting to the information.
7 And while we have started -- to include today getting more
8 boxes -- trying to be responsive to the request, I raise
9 the issue of time because if fourteen cases, albeit only
10 one in another county -- it, in fact, is in another county
11 -- and cooperate with that other county to get those files
12 to make sure we are getting a complete answer to the
13 request.

14 And so as it relates to the incident reports, trying
15 to accumulate those, and then equally have the opportunity
16 to go through them to make sure that there are not
17 additional information outside of the pure incident report
18 that was produced, equally making sure that the jury list
19 -- if, in fact, it is just a jury list -- and less probably
20 -- there's less reason to argue today. However, the
21 opportunity to go through all of those lists to determine
22 if, in fact, there are annotations and such that would be
23 work product, to be able to inquire of the court whether we
24 can redact that information, which are the first two things
25 they mention.

1 The third item deals with specifically those
2 notations, those notes, those annotations and mental
3 impressions that may, in fact, be on the documents. We
4 believe the court has already ruled on that issue, albeit
5 it's in this present case. I believe that ruling should
6 apply equally in these other cases: that they should not
7 have access to the solicitor's office work product as it
8 relates to the fourteen cases.

9 So, we've kind of divided in those categories, but I
10 guess I wanted to alert the court that even if you say Mr.
11 Dawson, I hear you. I appreciate all your arguments today,
12 but I'll tell you what. I'm going to give them everything
13 they've asked for, I still have the issue of time. As I
14 mentioned, we've accumulated eighteen boxes. They're still
15 -- the boxes are still coming, and while we've attempted
16 to ---

17 THE COURT: How many of these cases have you
18 identified?

19 MR. DAWSON: Well, we have identified all of them and
20 have been reaching out to get the materials.

21 THE COURT: Oh, you have? Okay.

22 MR. DAWSON: Yes, sir, to actually make sure the
23 materials that we've received is, in fact, everything
24 because the last thing we want to do is represent to the
25 court that we believe we have everything without making the

1 appropriate effort to identify that we have created the
2 sufficient log, which we don't want that to be an issue to
3 be later raised that, well, the privilege log is
4 insufficient. And then obviously give the court adequate
5 time to go and review it, make a determination.

6 I have one box today which is a sampling of the
7 information, and of the fourteen, I believe I have
8 identified everything in only one case. And that case
9 didn't actually -- did not actually go to trial, but there
10 was -- and there was a plea. So, I would not have the kind
11 of information that they're asking for.

12 So, to give you the range of a single file -- because
13 it didn't go to trial. So, I would not have the
14 information with regard to juror lists and notes and so
15 forth to cases where ---

16 THE COURT: How many of these are there?

17 MR. DAWSON: Sir?

18 THE COURT: How many of these are plea cases?

19 MR. DAWSON: I think there's only one as far as we
20 have been able to identify. I have that one plea case in
21 that box. Until ---

22 MR. GROSE: And it's our understanding that pled after
23 a jury was selected. We're only ---

24 THE COURT: Okay.

25 MR. GROSE: So.

1 MR. DAWSON: So, prepared to offer that to the court
2 today, but we equally believe we would need some time to
3 make sure we have been comprehensive in accumulating the
4 information. We believe in order for you to make a
5 determination, there needs to be an in-camera review. We
6 also need to think through the logistics of getting all of
7 that information to the court to make that review.

8 Once again, I think the incident reports, assuming
9 there are no notations -- annotations is one problem,
10 albeit voluminous. Still need to go and do it. The other
11 matter is a little different.

12 THE COURT: There are probably only fourteen incident
13 reports.

14 MR. DAWSON: I wish there were, Your Honor, but that's
15 not been the case so far.

16 THE COURT: Okay.

17 MR. DAWSON: Because there have been other incident
18 reports that were also contained in the file. We are going
19 through the process of trying to identify whether or not
20 they were inadvertently put in the file or they were, in
21 fact, part of the file. And the last thing I want is to go
22 through and make a judgment call that even though there's
23 an incident report in the file, I shouldn't give it, only
24 to find out later that they believe that there was, in
25 fact, additional things and I withheld those. So, some of

1 those files have almost a boxful of incident reports. I
2 don't understand why, and we've spent the better part of
3 this week trying to go through those, and came to the
4 conclusion it's not appropriate for us to make that
5 judgment call that that incident report should not be in
6 that file, given the subpoena has been requested. And so
7 in part the problem is -- I understand the importance of
8 the request, but the request is fourteen potential murder
9 cases, and they're not small files. So, I understand -- as
10 the court mentioned, there's a potential trial coming in
11 thirty days, but that's equally the problem on this side of
12 the aisle, so to speak, as well. The time and commitment
13 to go and do what they claim they need, given the timing of
14 the request.

15 Your Honor, Mr. Ferrara is prepared to go through a
16 privilege log, give you a sampling of what we've been able
17 to pull. If the court would like to look at those
18 documents today, great.

19 What I guess I'm asking for today is some order of
20 administration on how best to do what the court needs in
21 order to make a decision when you'd like that to occur, and
22 then how we transmit that information to you for you to
23 have a review. I think the last time this occurred, we
24 were only talking about one case. You were able to get
25 that information, make a review, and make the

1 determination. Now we're talking about fourteen.

2 (A PAUSE.)

3 THE COURT: All right, Mr. Ferrara.

4 MR. FERRARA: Well, Your Honor, depending on how you'd
5 like to approach this, I've got a box of samplings from the
6 fourteen cases. The most relevant one that you and Mr.
7 Dawson just exchanged discussion on was the fourteenth, the
8 *Broughton* case.

9 You had asked there should be one incident report in
10 each case. Well, these are all the incident reports in the
11 *Broughton* case, and the *Broughton* case contained four
12 boxes. And again, my sample is just to show you the
13 voluminous nature of some of the boxes, and this stack
14 right here is just incident reports that again may contain
15 personal information, confidential information. It may
16 contain medical information.

17 THE COURT: Well, I'm ---

18 MR. FERRARA: And that's ---.

19 THE COURT: Maybe I misspoke when I said I understood
20 -- when I implied that I understood what an incident report
21 was, but you said you're already finished with the
22 *Broughton* case.

23 MR. GROSE: Well, we have the transcript from the
24 *Broughton* case.

25 THE COURT: The *Broughton* plea?

1 MR. GROSE: The *Broughton* -- well, no. *Broughton*,
2 *Broughton* is the only capital case that's on this list.

3 THE COURT: Okay.

4 MR. GROSE: And it ended on a motion for Judge
5 Nicholson to strike the death notice that imposed life
6 sentence based on state misconduct. But that did not
7 happen until the sentencing phase.

8 For them to go to that case and say that's a lot -- I
9 don't know what these incident reports are. Sometimes I
10 have incident reports in my file from other cases for
11 investigating backgrounds of people. That's not what we're
12 asking for. It almost seems like they're making this too
13 complicated in order to flood you with paperwork and make
14 it difficult. The jury list should be very easy to
15 identify in each file. You know, there, there -- you're
16 familiar ---

17 THE COURT: Talking about the total, total jury list?

18 MR. GROSE: The total jury. The jurors that are
19 subpoenaed for the term of court to go through
20 qualification, selection should be very easy to identify.
21 You're familiar with those lists from years of qualifying
22 juries. For all fourteen cases, I would be surprised if,
23 if that was a very big stack of paper.

24 I can tell you that what we're looking for is the
25 incident report that identifies the defendant and the

1 victim, the gender, the race, and a general description of
2 what the crime is. We're not looking for everything, and
3 then this is something that ---

4 THE COURT: Let me see that.

5 MR. GROSE: --- that every responding ---

6 THE COURT: Just hand it up because notes by an
7 officer are not considered an incident report. An incident
8 report to me is Jo Jones shot Larry Smith.

9 MR. GROSE: And, and sometimes the, sometimes the
10 official incident report may only have a paragraph, and
11 there may be a main supplement that contains the primary
12 information, but we're talking two, three sheets of paper
13 in each one of these.

14 THE COURT: Wait a minute. Wait a minute.

15 (A PAUSE.)

16 THE COURT: Now, Mr. Ferrara.

17 MR. FERRARA: Yes, Your Honor.

18 THE COURT: This is not a jury list -- I mean, this is
19 not ---

20 MR. FERRARA: Incident reports.

21 THE COURT: --- incident reports. That's jury
22 information. Here's the incident report. That's juror
23 lists.

24 MR. FERRARA: I'm sorry. You're right, Your Honor. I
25 apologize.

1 THE COURT: That's the incident report.

2 MR. FERRARA: I apologize, Your Honor.

3 THE COURT: That's all right. I've done a lot of
4 criminal law.

5 Here's the jury list. Here is the incident report.
6 Incident report says ---

7 MR. GROSE: Well, and, and ---

8 THE COURT: --- somebody shot somebody.

9 MR. GROSE: Right, and *Broughton* being a capital case,
10 I'm guessing that there's probably a juror questionnaire
11 attached to each jury sheet, as there is in this case. Of
12 course, that would not apply to the other thirteen cases.

13 Now, were there to be ---

14 THE COURT: Jury questionnaires.

15 MR. GROSE: --- incident reports where those jurors
16 had been charged with or convicted of crimes that wasn't
17 disclosed, that, that would be the type of information
18 we're looking for.

19 THE COURT: Well, this is -- these are the jury --
20 these are the notes on the jury information. There is a
21 questionnaire attached to each, and it appears that each
22 one has notes, handwritten notes from somebody in the
23 solicitor's office. That's what they are objecting to,
24 correct?

25 MR. DAWSON: That's correct, Your Honor. Thank you.

1 And, Your Honor, if I may? As it relates to what I, I
2 guess I hear would be a little more narrow focus to the
3 incident reports, that will make my life a lot easier
4 because what I don't want to do, as I said, is make a
5 judgment call as to what the request was in the subpoena.
6 What I've heard today helps to limit that, and that helps
7 us to expedite the information as it relates to incident
8 reports.

9 THE COURT: It would be my belief and understanding
10 that ---

11 MR. DAWSON: Yes, sir. Well, I ---

12 THE COURT: --- should be fourteen of these.

13 MR. DAWSON: Your Honor, that I can accommodate
14 relatively quickly, given ---

15 THE COURT: It tells you who, who the defendant is,
16 who the victim is, and what the officers thought happened
17 when ---

18 MR. DAWSON: Yes, sir.

19 THE COURT: --- they did their initial investigation.

20 MR. DAWSON: Your Honor.

21 THE COURT: That's all it is.

22 MR. DAWSON: Thank you, Your Honor.

23 THE COURT: And there are no -- on this one, there
24 were no notes from what I would assume ---

25 MR..DAWSON: Yes, sir.

1 THE COURT: --- would be the solicitor's office.

2 These are just a narrative ---

3 MR. DAWSON: That's correct, Your Honor.

4 THE COURT: --- from the arresting officer as to what
5 he or she found at the scene.

6 MR. DAWSON: Yes, Your Honor. We, we would ask for
7 those incident reports that we do identify that do, in
8 fact, have notes and so forth, that we have the opportunity
9 to flag them so that you are aware of them.

10 THE COURT: You flag them and I'll, I'll look at them.

11 MR. DAWSON: Yes, sir. The other thing ---

12 THE COURT: I've got time.

13 MR. DAWSON: Thank you, Your Honor. The other thing
14 that we have noted in some instances is that the incident
15 reports do have things like Social Security numbers and
16 other information that we're surprised to see. And I don't
17 suspect, given what the -- what Mr. Grose said he's looking
18 for, he's not looking for that kind of information.
19 Therefore, we should be able to redact that as well.

20 THE COURT: I've never -- don't believe I've seen a
21 Social Security ---

22 MR. DAWSON: Your Honor, I said the same thing until
23 -- unfortunately -- I guess we didn't grab that example,
24 but when I saw that, I became a little more nervous again
25 about simply indicating that incident reports were okay.

1 MR. GROSE: And I'll make it easy. We're not looking
2 for Social Security numbers. We, we do want the, the, the
3 name, the race, and the gender. I think we're entitled to
4 that, but we're not after Social Security numbers, bank
5 accounts, or any kind of -- that kind of stuff that may
6 have been on incident reports before everything got so
7 easily transmitted electronically.

8 THE COURT: Well, somebody has already redacted these.

9 MR. DAWSON: That was -- unfortunately, Your Honor, we
10 have not started any redaction process. We simply have
11 tried to gather the material in preparation for being here
12 today to demonstrate to the court that we are attempting to
13 comply, but also ---

14 THE COURT: I understand. I take that you're acting
15 in good faith.

16 MR. DAWSON: Thank you, Your Honor.

17 THE COURT: I just wonder who's redacting -- who has
18 been redacting this incident report. You know, it's
19 daytime phone number and evening phone and quite a few
20 addresses, ZIP codes, addresses. Now, I don't know.

21 But, all right, it looks like you can get incident
22 reports without much trouble. And the jury lists, now
23 these are -- this is not the jury list. These are the
24 responses to the questionnaire.

25 MR. GROSE: And we don't need the questionnaires but,

1 but since you have -- it's been disclosed that there's
2 handwritten notes on that that would be responsive to our
3 subpoena if you don't rule that it's privileged or work
4 product. We would request that you take custody of those,
5 since that's the only other capital case, and that it be
6 sealed until you make a decision. And if you decide to
7 withhold it, that it be sealed for appellate review.'

8 MS. BROWN: Your Honor, I have absolutely no position
9 on the motion to compel, as you know. But when we talk
10 about the record and what's coming, I feel compelled to at
11 least put the attorney general's position on the record
12 about this.

13 THE COURT: Say that again.

14 MS. BROWN: If I may.

15 THE COURT: Tell me again. Say that again.

16 MS. BROWN: The motion to compel is, of course, on
17 work product privilege and several other privilege
18 assertions by the solicitor's office. Charleston County
19 will be representing the solicitor on those assertions.
20 However, since this is -- there have been actually several
21 comments today about expanding the record in the PCR and
22 making arguments in the PCR, and I feel compelled to state
23 the attorney general's position, the state's position as it
24 regards the litigation at issue. In fact, when we look at
25 the litigation at issue, some of my comments will become

1 very clear.

2 Mr. Dickerson was sentenced to death May 7th of 2009.
3 We are here on his case. We are not here in any kind of a
4 civil action suit against the solicitor. We are not here
5 in a massive civil rights action. We are not here on even
6 a freestanding *Batson* claim.

7 There is a claim that was made in the most recent
8 application alleging a violation of equal protection, I
9 believe. But, Your Honor, that kind of information could
10 have been raised at the trial and should have been raised
11 at trial. So, the only proper issue before the court
12 should be ineffective assistance of counsel. Again, 2009
13 trial.

14 What I've heard today, there are several listings
15 available that are past 2009. Going to be hard to make
16 that relevant to any kind of argument that should have been
17 made at the trial and was not. Essentially that
18 freestanding argument, Your Honor, if it could be heard at
19 all, should be considered as the prejudice prong of the
20 *Strickland* claim that counsel was ineffective for making
21 these arguments at the time.

22 Now as a general area, Your Honor -- because I don't
23 want to make this argument after you've had this hearing
24 and you ask me. Ms. Brown, why didn't you bring this up
25 before? But here's the thing, Your Honor. What this is

1 going to is to try to put together some kind of statistics
2 to say that there was an inference that a strike was
3 improperly made. That's it: statistics for an inference of
4 a strike was improperly made. But in this record, we have
5 already the explanation that the solicitor gave for the
6 strike at issue. The statistics really aren't going to do
7 anything. We've already given the reason for the strike.
8 Now, if the reason for the strike is false, then we have an
9 issue to argue, but statistics only get you to that point,
10 an inference.

11 And I would ask you, if you have a moment, to look at
12 the *Miller-el* case on page 241. That's the U.S. cite. The
13 Supreme Court mentions the statistic of 91 percent, 91
14 percent of African-Americans struck at that particular
15 time, and they called that, quote, bare statistics, end
16 quote. Well, if 91 percent doesn't get you there, Your
17 Honor, I really don't understand why we would spent so much
18 time to make a statistical analysis, especially in light of
19 this record where we already have the explanation at trial
20 on record, and it can either be proven or disproved.

21 So, really what we're doing does not lend anything to
22 evidence that can be relied on in the post-conviction
23 relief action, especially cases that occurred after
24 sentencing would not have been something that counsel could
25 have brought up. It does not go to what was being done at

1 particular point in time in 2009.

2 Your Honor, I'd also say that *Miller-el* isn't just a
3 statistical case. They're talking about a book that, that
4 prosecutors had that would suggest certain strikes be made
5 certain ways. There was a shuffle of the jury pool. All
6 of this goes into that statistical analysis in *Miller-el*.
7 That's just not the case here; that's not the way things
8 were done. It's not the way things were done in this case
9 in particular.

10 But again when you talk about 91 percent being bare
11 statistics, it's very difficult to see that there's
12 anything that could be culled from the information that
13 they're requesting and used in this capital post-conviction
14 relief to see, to see if Mr. Dickerson is entitled to a new
15 trial because at the end of the day, that's what we are
16 supposed to be looking at. Is Mr. Dickerson entitled to a
17 new trial, not what the solicitor's office has done from
18 2002 to ---

19 THE COURT: '13.

20 MS. BROWN: --- 2015.

21 And in the *Broughton*, I would -- just wanted to
22 mention that I thought I heard the state misconduct issue.
23 I just wanted to clarify. That had nothing to do with the
24 prosecution or with *Batson*, the selection of the jury. As
25 I understand it, that arose when a witness intimidated

1 another witness, but that was not a *Batson* issue. So, I
2 wanted to underscore that as long as we're talking it. So,
3 when we talk putting things in the record that actually
4 have absolutely no relevance and no use in post-conviction
5 relief, I mean, I feel compelled to put the AG's position
6 on the record.

7 MR. GROSE: Your Honor, that sounds like objections
8 they can make at the hearing, arguments they can make.
9 What she's essentially arguing is, is that we're not
10 allowed to present pattern and practice evidence. The
11 Supreme Court has said that we are.

12 She mentioned that was books involved. We've
13 disclosed to her the prosecution coordination manual. It's
14 just basically a blueprint on how to give false reasons for
15 racial strikes to get around *Batson*. And she has the
16 criminal histories, and she knows that the solicitor
17 misrepresented the information to the judge in this trial.

18 So, when -- there, there is a lot to present, and what
19 we are here doing is asking for the components to present a
20 category of evidence that the U.S. Supreme Court said that
21 we're entitled to present. We want to have a fair
22 opportunity to present those. They'll have a chance to
23 make their objections and their arguments and get those
24 ruled on at trial. And we want Your Honor to have a fair
25 chance to consider this issue because I think, I hope that

1 we're all in agreement that Mr. Dickerson should not suffer
2 under an unconstitutional conviction and sentence.

3 MS. BROWN: , Your Honor, there is some very strong
4 language about misrepresentation and what we know and what
5 we do not know and what they've shown and what they have
6 not shown. And they have not shown any misrepresentation
7 at this point by any method that I am aware of. And, in
8 fact, Your Honor gave them, I believe, the histories of
9 some seventy jurors. So, they should have that information
10 and not make those representations at this point in time.

11 THE COURT: Okay.

12 MS. BROWN: I'll be glad to litigate it, Your Honor,
13 at the appropriate time.

14 THE COURT: Well, let me ask you, Ms. Brown.

15 MS. BROWN: Yes, sir.

16 THE COURT: What's your position on this, if any, on
17 this subpoena?

18 MS. BROWN: On the subpoena?

19 THE COURT: Yeah, and the range of topics that are
20 covered.

21 MS. BROWN: Well, I'd have to go back to I don't think
22 it should affect what we are doing at this point because
23 it's overly broad. It's leading only to statistical
24 information. This is nothing that shows Mr. Dickerson had
25 some kind of mental health issue; it's nothing to do with

1 that. It's statistical information trying to create or
2 demonstrate as tendency to do something. That's basically
3 what it is, but it's not a tendency to commit murder. We
4 know Mr. Dickerson has committed murder, and we need to get
5 back to the trial portion there.

6 Now as far as privilege, Your Honor, as Your Honor is
7 aware, we have not asserted privilege on behalf of the
8 solicitor. That is the solicitor's privilege. So, that's
9 why I'm not speaking to that privilege Your Honor.

10 THE COURT: Mr. Dawson, you may continue.

11 MR. DAWSON: Your Honor, I think we're at the point --
12 and I also have and will be happy to provide a copy of a
13 memorandum to the other side and to the court articulating
14 our position on why we believe it's privileged, why we
15 believe it's work product, and why we believe the request
16 is overly broad. It's voluminous; it's burdensome.

17 I've already heard the court's inclination with regard
18 to the incident report, and I think, given some of the
19 comments I've heard today, that it sounds like there is an
20 attempt to start to narrow the focus of the request. I
21 will alert for the court -- I know the court's seen the
22 attachment to the subpoena, but it does use words like,
23 phrases like all information created or assembled about all
24 potential jurors. That's, that's pretty broad, and so I
25 appreciate counsel today trying to narrow the focus on what

1 he's looking for. But when the subpoena was given, it was
2 pretty voluminous, and we are attempting to comply, but we
3 believe that the compliance is first identifying it.

4 Secondly, providing it to the court, and I hear that,
5 well, all we're attempting to do is flood you with papers.
6 Fortunately -- the request is what's flooding the papers,
7 not my attempt. Until -- all I'm asking for now is if the
8 court's inclined to pursue this course, to give us some
9 time to be able to get the information together in a format
10 that you can, in fact, look at it and make a determination.
11 And if I may, I'll be happy to provide the memorandum and
12 attachments to the court.

13 THE COURT: Absolutely.

14 MR. DAWSON: Your Honor, I don't know if there's any
15 particular need for Mr. Ferrara to continue to go through
16 the box and/or -- as I mentioned to you, I believe it's an
17 attachment, a privilege log where we had attempted to start
18 to identify categories of items based on the subpoena. But
19 I guess, like I said, we're at a point where a little bit
20 of guidance and/or instruction ---

21 THE COURT: All right.

22 MR. DAWSON: --- about time would be helpful.

23 THE COURT: What about -- what did you say about a
24 privilege log?

25 MR. DAWSON: Yes, sir.

1 THE COURT: Which one?

2 MR. DAWSON: There's one attached to this package of
3 papers I just gave you. It's the last, Your Honor, where
4 we attempted to start this process of identifying documents
5 based on the case number identified in the subpoena and
6 start this process. But I'll be the first to acknowledge
7 to the court we're still getting information, and we've
8 been working on trying to identify items in the boxes and
9 would need more time to complete this process.

10 THE COURT: All right. You've been through ---

11 MR. DAWSON: Your Honor, the concern I have is I'm
12 still getting boxes.

13 THE COURT: Is what?

14 MR. DAWSON: I'm still getting boxes, Your Honor, is
15 my concern. And I, what I don't want to do is be in a
16 position later on of there being some discussion about,
17 well, we withheld information. I want to make sure I have
18 it all when I represent to the court I have it, and find
19 the best way to pull out the relevant information and
20 provide it to the court.

21 THE COURT: How long -- when do you think this will
22 be? Has somebody been assigned to this with some exclusive
23 designation, I want is done by a certain date?

24 MR. DAWSON: I haven't given a certain date. But I've
25 assigned a paralegal and one of my junior lawyers,

1 unfortunately, to work on this for the better part of this
2 week to be in a position to talk to you intelligently today
3 with the eye of determining how much time the court is
4 going to give for us to put it in a format where you can
5 actually look at it versus hauling twenty boxes up here and
6 saying here it is, Your Honor, which I don't think I'm
7 going to get very far doing that.

8 THE COURT: Jury lists prepared by the clerk of court
9 should be something simple.

10 MR. DAWSON: It is, Your Honor, and Mr. Grose is
11 right. The clerk of court in Charleston has only retained
12 that information for three years. So, we've confirmed, in
13 fact, that's a limited amount that we can even go to the
14 clerk to get. So, therefore, we are going back into the
15 boxes for those years that she does no longer have those
16 available.

17 THE COURT: I would think a reasonable solicitor would
18 at least tag these files so you would know where to look
19 for ---

20 MR. DAWSON: Yes, sir.

21 THE COURT: --- something like that.

22 Your juror strike sheet, what are you seeking there,
23 Mr. Grose? Just the actual strikes?

24 MR. GROSE: The, the actual -- yeah. I, I -- lawyers
25 have different systems. I have a system that I use when I

1 strike juries, and that's, that's what I'm looking for. It
2 may just be their notes for when they were actually
3 striking the juries.

4 THE COURT: Well, their notes are on here. I would
5 assume that ---

6 MR. GROSE: Well, there may be another set.

7 THE COURT: --- the strike sheet would -- I don't
8 know, but it would have a bunch of Xs and Os. That's what
9 I would think in relying on these notes, strike or don't
10 strike.

11 MR. GROSE: Well.

12 THE COURT: But I don't know.

13 MR. GROSE: I, I, I don't know.

14 THE COURT: All right, let's keep moving.

15 MR. GROSE: Yes, sir.

16 THE COURT: Now:

17 All information created or assembled about all
18 potential jurors, regardless of whether it was
19 prepared by you, by -- given someone else.

20 I think that's where we're just going to hit a
21 loggerhead. I have -- that's where privilege gets raised
22 and ---

23 MR. GROSE: I, I, I ---

24 THE COURT: --- and the extent of the request is
25 pretty burdensome.

1 MR. GROSE: Well, I, I don't know that the extent of
2 the request is pretty burdensome. That type of information
3 in my file in a noncapital case would be in a very small
4 folder. There's, there's -- it's, it's not much of it.

5 And I understand that that's where the appearance of
6 the privilege or the work product comes into play. But you
7 have this whole line of cases, *Batson*, *Miller-el*, where
8 essentially the Supreme Court has said even a criminal
9 defendant doesn't have a work product or attorney-client
10 privilege when it comes to the reasons why they strike
11 jurors because the defense is required to give those
12 information.

13 We're just -- we're, we're seeking all the information
14 that is available. And, well, if you look at *Miller-el* and
15 if you look at cases going to the Supreme Court, you know,
16 if they're tracking the jurors by race and making notations
17 in it that go to race, whether veiled about bad
18 neighborhood that happens to be a majority African-American
19 neighborhood, those are things that Your Honor is entitled
20 to consider under this claim, or we believe.

21 And we agree we shouldn't be trying the case today.
22 We just want to get to the point where we can present that
23 information to Your Honor at the appropriate time.

24 ORDER OF THE COURT:

25 THE COURT: All right, Mr. Dawson, I'm going to order

1 that you continue your process..

2 MR. DAWSON: Yes, sir.

3 THE COURT: And not, not eliminate anything on the
4 subpoena list, and I want there to be some way you can
5 communicate to the court when you have substantially
6 completed ---

7 MR. DAWSON: Yes, sir.

8 THE COURT: --- your efforts.

9 MR. DAWSON: Yes, sir.

10 THE COURT: So that the court can consider what looks
11 like already claims of work product.

12 MR. DAWSON: Yes, sir.

13 THE COURT: That's everything I see on the privilege
14 log that's ---

15 MR. DAWSON: Yes, sir.

16 THE COURT: --- started so far, and I don't know
17 whether I'll see anything else.

18 MR. DAWSON: Yes, sir.

19 THE COURT: On the privilege log, but it will least
20 indicate, indicate that you have attempted and perhaps
21 complied with the subpoena.

22 MR. DAWSON: Yes, sir.

23 THE COURT: I'm not going to quash the subpoena, in
24 other words.

25 MR. DAWSON: Yes, sir.

1 THE COURT: All right. You understand?

2 MR. DAWSON: Yes, sir, I do. Thank you, Your Honor.

3 THE COURT: And just for your -- I guess maybe for
4 everybody's information, I will have time, potentially some
5 time the week of the 5th of October. I've got a general
6 sessions term in Fairfield that usually falls apart.
7 Usually not a lot going on up there, but I don't know at
8 this particular time. I'm sorry, that's the 28th, 29th,
9 and 30th. I'm available the 5th, 6th, and 7th of October
10 and the afternoon of the 8th and 9th. I've got a trial, a
11 one-week trial scheduled the week of the 12th. It's a
12 right high profile case in Richland County, and I'll make
13 time.

14 MR. DAWSON: Yes, sir.

15 THE COURT: If I have to meet you in Neeses or Bowman
16 or something and exchange. And I assume that Mr. Grose and
17 Ms. Best will be available as much as we can.

18 MR. GROSE: As much as we can. I will just tell you
19 that I have had Newberry County reschedule a jury trial to
20 the afternoon of the 6th, and you are on some of these
21 communications. I have an oral argument at the Supreme
22 Court on the morning of the 7th, which they were kind
23 enough to schedule where it didn't conflict with our
24 hearing in Charleston.

25 THE COURT: Well, what I'm probably going to end up

1 doing is taking a day ---

2 MR. GROSE: Okay.

3 THE COURT: --- to review these -- the privilege log
4 and the documents that support it. If I have to go to
5 Charleston to do that, I'll do it.

6 MR. GROSE: But -- yes, we'll -- except where I'm
7 already got hold of by another judge, I'll be available if
8 you can get that judge to shake me loose, and we can all
9 continue.

10 THE COURT: Mr. Dawson, those items that don't relate
11 to privilege, I'm going to order that you produce them.

12 MR. DAWSON: Yes, sir.

13 THE COURT: Not just say I've got them, but ---

14 MR. DAWSON: Yes, sir.

15 THE COURT: --- things that we can strike off the
16 list.

17 MR. DAWSON: Your Honor, I think I've heard you loud
18 and clear, especially in light of some of the narrowing of
19 the focus there on the incident reports. We will produce
20 those, get those and produce them.

21 THE COURT: All right.

22 MR. GROSE: And we would appreciate the jury list as
23 soon as possible. If there is something they're claiming
24 privilege on, perhaps they could redact that part and give
25 us the part that's printed by the clerk, and then we could

1 argue about the rest at a later date.

2 THE COURT: Well, they'll -- we'll be looking for
3 them.

4 MR. DAWSON: Thank you, Your Honor.

5 MR. GROSE: Thank you, Your Honor.

6 THE COURT: Anything further?

7 MS. BROWN: No, sir, Your Honor. Thank you very much.

8 THE COURT: Thank you very much.

9 MR. GROSE: Oh, we had had a request for you to take
10 custody of the *Broughton* materials.

11 THE COURT: Motion's granted.

12 MR. GROSE: Thank you.

13 THE COURT: Well, I don't know what else is here. In
14 other words, anything that's here that's responsive to the
15 subpoena. Don't necessarily want to look at the whole
16 file, but you don't know what's ---

17 MR. FERRARA: I, I don't, Your Honor.

18 THE COURT: All right. Well, at this point all I have
19 is the incident report, which I will produce to you; the
20 court will produce the incident report.

21 Any objection to giving them this incident report now
22 so we don't have to worry about it?

23 MR. DAWSON: Your Honor, all I'd ask that -- I did not
24 make copies of anything. I grabbed the box. If I could
25 get a copy of it, that would be helpful.

1 THE COURT: You're going to get a copy for the file
2 and a copy for them.

3 MR. DAWSON: Thank you, Your Honor.

4 MR. GROSE: Thank you, Your Honor.

5 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR CHARLESTON COUNTY, SOUTH CAROLINA,
ON THE 18TH DAY OF SEPTEMBER, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

S/ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

OCTOBER 9TH, 2015

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Charleston	)	2012-CP-10-3216
	)	
	)	
WILLIAM O. DICKERSON,	)	
	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT,	)	

November 20, 2015
Camden, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

CHARLES GROSS, ESQ.
ELIZABETH FRANKLIN-BEST, ESQ.
Attorneys for the Applicant

MELODY BROWN, SENIOR ASSISTANT ATTORNEY GENERAL
Attorney for the State

BRUCE DURANT, CHARLESTON COUNTY SOLICITOR'S OFFICE

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: Let me see if I'm up the date with what
2 we're -- why we're here. First is the -- I've handed to
3 you my rendering of a review of the privilege log
4 presented by the 9th Circuit Solicitor's Office and my
5 conclusions about the privilege and work-product issue.
6 I'm prepared to hear any objections to that. I suspect
7 that I will.

8 I have the State's motion. I believe this is the one
9 Ms. Brown said has been fully briefed on an order to
10 compel compliance with the order respecting privilege; is
11 that correct, Ms. Brown?

12 MS. BROWN: Your Honor, I believe the motion to
13 strike and/or dismiss the claim has been fully briefed.

14 THE COURT: Oh, okay. I have that, too.

15 MS. BROWN: Yes, sir.

16 THE COURT: I was coming to that.

17 MS. BROWN: Okay. I don't believe this one has been
18 briefed, the motion to compel.

19 THE COURT: All right. And anything -- is there
20 anything else that we know of that's outstanding as of
21 today?

22 MS. BROWN: Yes, sir. There is our motion for an
23 order allowing the release of criminal histories, but I
24 believe that will become moot when you release the
25 information after your privilege review because that would

1 include the very rap sheets that I was requesting be
2 released.

3 THE COURT: All right.

4 MS. BROWN: And if that stands and it's disclosed, I
5 can offer to you an order finding it moot in a disclosure
6 for the privilege log.

7 THE COURT: All right. All right. Well, let's
8 address the privilege log, and I'll just start with the
9 Applicant.

10 MS. FRANKLIN-BEST: Yes, Your Honor. May it please
11 the Court. I mean, this -- you are releasing what we had
12 asked be released, so we do not have any objections. We
13 are pleased with this.

14 I would ask that once we have an opportunity to
15 review these documents that we may want Your Honor to
16 reconsider the prior privilege claim for the first 2100
17 pages that also included some juror materials, but I'd
18 like to --

19 THE COURT: I'm not sure why I need to reconsider
20 that.

21 MS. FRANKLIN-BEST: Well, I'm not sure yet, Your
22 Honor. I just -- I noticed that we're now getting a
23 number of materials related to jury selection which I'm
24 pleased with.. I'm not saying that we are going to ask for
25 reconsideration --

1 THE COURT: Okay.

2 MS. FRANKLIN-BEST: -- but it's possible.

3 THE COURT: I can't anticipate that.

4 MS. FRANKLIN-BEST: Exactly, Your Honor.

5 THE COURT: Mr. Durant?

6 MR. DURANT: I have no objection, Your Honor. It's
7 up to you, always has been.

8 THE COURT: All right. Well, I think the most
9 convenient way, expeditious way of doing it would be for
10 your office to merely burn those items highlighted and
11 give them a disk.

12 MR. DURANT: I'll be glad to do it. It would
13 probably be Monday at the earliest --

14 THE COURT: Well, I understand.

15 MR. DURANT: -- that I could get it out in the mail.

16 THE COURT: I understand that. I found the disk --
17 you know, I was feeling daunted when had I realized I had
18 to go through four boxes.

19 This just made so it -- I mean, we -- my law clerk
20 and I just scrolled the entire disk yesterday. You know,
21 it was so much more convenient. Everything is there, so
22 I'm moving towards the 21st century.

23 Well, that's good. Thank you very much.

24 All right. And the claim not being cognizable in
25 Post Conviction Relief, has everybody agreed it's been

1 fully briefed?

2 MS. FRANKLIN-BEST: Yes, Your Honor.

3 MS. BROWN: Yes, sir, Your Honor.

4 THE COURT: All right. I'll take that up. I'll let
5 you know in the very near future.

6 And okay, Ms. Brown, your motion to compel compliance
7 with the order respecting privilege --

8 MS. BROWN: Yes, sir.

9 THE COURT: -- go ahead.

10 MS. BROWN: First, let me say I find it very
11 unfortunate to have to make this motion at all, but I feel
12 that it must be made.

13 Your Honor -- and this is referenced today. You had
14 previously made an order dated and filed September 10th.

15 THE COURT: No. I just couldn't -- let me just -- do
16 you have a copy?

17 MS. BROWN: I do, Your Honor.

18 THE COURT: Okay. Because in reviewing it over here,
19 I've got a split file. Half of it is in Columbia, and
20 half of it is here. I looked through my documents here
21 and don't have it.

22 MS. BROWN: May I approach?

23 THE COURT: Just for -- just for review, yes.

24 MR. GROSS: Judge, if -- this may move things along.
25 One of our arguments was going to be that this is not ripe

1 because no FOIA lawsuit has been filed, and now in light
2 of the order that you just issued where we're receiving
3 some of these materials that were asked under that, the
4 motion is moot. So I don't -- it's not ripe because no
5 FOIA lawsuit has been filed.

6 THE COURT: I thought -- well, no FOIA lawsuit has
7 been filed --

8 MR. GROSS: Well --

9 THE COURT: -- your request referenced FOIA.

10 MR. GROSS: -- it's moot because you ordered them to
11 turn over the juror information that we have asked for.

12 MS. BROWN: Your Honor, it's not moot, respectfully,
13 because the request made was, quote, any and all materials
14 relating to the jury selection and capital trial, end
15 quote.

16 That would cover more, obviously. There has been
17 privilege asserted over lots of notes and that sort of
18 thing, but importantly, this isn't about FOIA. This isn't
19 in response to FOIA. This is requesting that this court
20 send out an order saying that you have to comply with this
21 court's ruling on privilege.

22 That's what I'm concerned about is the order that you
23 make in this case be adhered to and there be no
24 circumvention of that order. So it's not moot, Your
25 Honor, and we respectfully request your intervention.

1 THE COURT: What did you just hand me?

2 MS. BROWN: Your Honor, that's a motion for an order
3 to compel. It also has a copy of an order --

4 THE COURT: But that's a --

5 MS. BROWN: -- in the Lominack matter.

6 THE COURT: I have this. No. I asked you -- well,
7 you're referring -- you're referring to my order of
8 September 10th.

9 MS. BROWN: Right, Your Honor.

10 THE COURT: That's what I --

11 MS. BROWN: That is the privilege document.

12 THE COURT: That --

13 MS. BROWN: I believe I do have that.

14 THE COURT: Okay. That's what I was asking for.

15 MS. BROWN: I think I do, Your Honor.

16 THE COURT: I've got it in Columbia.

17 MS. BROWN: I may have it with my -- my file. That
18 was not attached to the motion or reply, Your Honor, so I
19 do not have it with me today. I apologize.

20 THE COURT: Well, you and I are in the same boat, but
21 I'll -- I have this.

22 MS. BROWN: Okay.

23 THE COURT: And I have Judge Westbrook's order also.

24 All right. Well, go ahead and put it on the record,
25 Ms. Brown.

1 MS. BROWN: Okay. Your Honor, it's basically what we
2 had just gone over; that unfortunately, counsel for
3 Applicant -- and -- and this is important. In the
4 capacity as counsel for Applicant received the same
5 information or at least part of that information that you
6 found privileged before just by another vehicle.

7 It's troubling because work-product privilege does
8 still apply and FOIA requests. So there are very few
9 options of what that request would have been for: One, to
10 circumvent your order; two is to hope for a windfall; or
11 three, to seek another ruling on a work-product privilege
12 from another judge, and that would be in with our motion
13 under the FOIA request.

14 Those options are not very pleasant to consider, so
15 we would ask Your Honor to please order compliance with
16 your orders regarding privilege so that we don't have this
17 attempt to circumvent your order in this case.

18 THE COURT: You don't want that hanging out there, is
19 that so?

20 MS. BROWN: Yes, sir.

21 THE COURT: All right. How about from the
22 Applicant's counsel, what's your position?

23 MR. GROSS: Your Honor, the -- I guess the first
24 issue is -- is that in light of your ruling here this
25 morning, as we've already said, this is moot. Second,

1 it's not ripe.

2 The order that she has handed up to you regarding
3 Lominack vs. the Solicitors in the 11th Circuit was an
4 order after the FOIA lawsuit was filed.

5 No FOIA lawsuit has been filed. I mean, we were told
6 in one of the depositions if you want something from
7 Solicitor Wilson, just ask. So we did, and she said no.

8 Granted, that does, you know, create the -- the
9 prerequisite for filing a lawsuit, but we have not filed a
10 lawsuit. So I don't know that you can deny access to the
11 courts.

12 It may be a different standard for reviews to apply.
13 It may be, you know, a whole host of things. These are
14 defenses that they could raise at that point in time.

15 We have respected your order, but yet at the same
16 time we're under an ethical obligation to explore all
17 legal means necessary to try to get information.

18 We have, in fact, gotten information in this
19 litigation through the Freedom of Information Act, and we
20 sent a Freedom of Information request to Prosecution
21 Coordination. They provided us with documents that we
22 have disclosed in discovery.

23 In fact, their discovery request asked for us to
24 disclose anything that we received pursuant to FOIA
25 requests that we intend to use at the hearing which we

1 have done.

2 So I think it's -- it's -- number one, it's not ripe
3 because no lawsuit has been filed; and two, it's moot
4 because of the order that you indicated that you're
5 prepared to issue after we had an opportunity to review it
6 at the beginning of this hearing.

7 THE COURT: All right.

8 MS. BROWN: Your Honor --

9 THE COURT: Yes.

10 MS. BROWN: -- may I offer one more thing?

11 THE COURT: Sure, sure.

12 MS. BROWN: I think it's important not to mesh
13 theories, and part of that response sort of meshes some
14 theories here. I want to make sure that you understand
15 our position.

16 The FOIA request that they referenced getting
17 information from Prosecution Coordination and information
18 on other cases had nothing to do with the trial in this
19 case, and that's why our discovery request asks for
20 anything they did outside that.

21 THE COURT: What would you -- how would you couch an
22 order from this court? Let me leave it. I'm thinking of
23 something --

24 MS. BROWN: Sure.

25 THE COURT: -- but what is your thought as to what an

1 order should say?

2 MS. BROWN: Well, first of all, I think it should be
3 narrow. I think it should be narrowed to comply with the
4 order that you have made --

5 THE COURT: All right.

6 MS. BROWN: -- with regard to privilege, and that no
7 information from any Freedom of Information request Act or
8 any other method, not information getting -- gotten from
9 any other source could be used in this case when it
10 conflicts with the ruling that you have made in your
11 order --

12 THE COURT: So --

13 MS. BROWN: -- regarding and respecting privilege.

14 THE COURT: So that would be two things: A, prevent
15 them from filing any further FOIA requests; and B,
16 preventing them from using anything they've already
17 acquired with a FOIA request from being introduced in the
18 course of this trial; is that correct?

19 MS. BROWN: And in fairness, I think it would need to
20 be restricted to the 2009 trial because there are other
21 methods. There are other things they can look at with
22 FOIA, but what we're concerned about is the 2009 trial and
23 so --

24 THE COURT: Do you understand now, what -- what she
25 is driving at?

1 MR. GROSS: Yeah. She is driving at denial of
2 compulsory process, in part, and I don't understand. Part
3 of what she said was so broad that we not be allowed to
4 use anything that we obtained through any other
5 circumstance.

6 THE COURT: As a result of a FOIA request.

7 MR. GROSS: Well, that's not what I understood her to
8 say, and if it's resulting from FOIA, does that mean we
9 can't use the FOIA stuff we've already turned over and
10 disclosed to them?

11 I mean, you know -- I mean, we -- I mean, we've
12 gotten information about prosecution training and manuals
13 for jury selection from Prosecution Coordination.

14 And if her -- and this is stuff that was in existence
15 at the time and relied on by the Solicitor's Office at the
16 time of the 2009 trial, and if their order is so broad
17 that we -- she is shaking her head no, but that's what I
18 -- what I heard her say was very broad.

19 THE COURT: Well, I tell you one way to solve it.
20 Both of you give me a proposed order, and I'll consider
21 it.

22 MR. GROSS: Fair enough.

23 THE COURT: Fair enough?

24 MR. GROSS: We can do that.

25 MS. BROWN: Your Honor, I would also like to put on

1 the record that -- and underscore that I attempted to
2 consult with opposing counsel, and they refused to
3 acknowledge any --

4 THE COURT: All right. I find you in compliance with
5 Rule 11.

6 MS. BROWN: Thank you.

7 THE COURT: Ten days?

8 MS. BROWN: I can probably get it to you by Tuesday,
9 actually, Your Honor.

10 MR. GROSS: Ten days is fine.

11 THE COURT: Probably ten days is getting -- running
12 up on...

13 MR. GROSS: We can get to it you before Thanksgiving.

14 THE COURT: Five days. Well -- all right. Have it
15 in, at least in my email by the 25th, that's Wednesday.

16 MR. GROSS: The only other issue that we had -- well,
17 we can do that. The only other issue is the funding
18 orders that we had submitted.

19 THE COURT: You got them?

20 MS. FRANKLIN-BEST: I do, Your Honor. If I could
21 hand this up.

22 THE COURT: Oh, here it is. It's already submitted.

23 MS. FRANKLIN-BEST: Oh. Thank you, Your Honor.

24 THE COURT: Do you file that?

25 MS. FRANKLIN-BEST: Yes, thank you.

1 MS. BROWN: Your Honor, in regard to the funding, as
2 you will recall, we had no position on the funding
3 request, but we were asking for expedited release of
4 supplemental discovery in particular of the disk that had
5 the jail calls on there.

6 We never have been able to open it. The Solicitor's
7 Office hasn't opened it is my understanding, so we would
8 like to hear them, too.

9 If they can get them recovered from whatever the
10 detention center has on -- on the disk, whatever program
11 can be used.

12 Secondly, I wanted to also offer in trying to open
13 these disks myself, I was able to -- with the Solicitor's
14 kind help -- get the disk to the detention center. They
15 couldn't use the program that they had used on the disk
16 either, but they may have some materials in archives.

17 So it won't be exactly what was on the disk, but if
18 this does not work out, there may be something that can be
19 considered from archives. Again, it won't --

20 THE COURT: You mean Charleston County?

21 MS. BROWN: Charleston County Detention Center, not
22 what was on the disk but --

23 THE COURT: Well --

24 MS. BROWN: And I just wanted to offer that because I
25 didn't want to get down the road and say, "Is there any

1 other way we can recreate this," and this is what they
2 told me.

3 MR. GROSS: Well, this is news to us. We'd like that
4 information be provided to us as soon as possible. I
5 mean, the -- these conversations --

6 MS. BROWN: Well, now this would be new material, so
7 he would have to go through the detention center. I don't
8 have anything on it. We -- we don't have it. It's --

9 MR. GROSS: All right. Well --

10 MS. BROWN: And we don't know if it exists either.

11 THE COURT: All right.

12 MR. GROSS: Well, tell us what it is in no
13 specificity so we can subpoena it.

14 MS. BROWN: Well, that was it. That's all they told
15 us, there may be some records on their hard --

16 THE COURT: Just check archive material.

17 MS. BROWN: Right.

18 THE COURT: Let me know if I can help you, folks. Do
19 you have reciprocal discovery?

20 MR. GROSS: I would -- I would ask as far as in line
21 with how to help with this, the hearing is coming up
22 pretty quick. Normally, we have to give 15 days notice or
23 something under subpoena. I would like --

24 THE COURT: If you need me to sign it, I'll do it.

25 MR. GROSS: Yes, sir.

1 THE COURT: Expedited.

2 MR. GROSS: Thank you.

3 MS. BROWN: And we don't mind calling the detention
4 center to let them know it's coming to see if there's
5 anything they can do to start the process early.

6 THE COURT: That would be a big help, too.

7 MS. BROWN: I'd be glad to, Your Honor.

8 THE COURT: Remember, I have no -- I have no more
9 court scheduled. I have no more court reporters until the
10 hearing. Not to say I can't get it, but it's not as
11 convenient as just walking in after --

12 MS. BROWN: Yes, sir.

13 THE COURT: -- magistrate court appeals.

14 MS. BROWN: Would you mind, Your Honor, if I had a
15 proposed transportation order sent to you?

16 THE COURT: For what?

17 MS. BROWN: The inmate for the hearing of
18 December 7th.

19 THE COURT: Oh sure.

20 MS. BROWN: Okay.

21 THE COURT: I assume they want him there.

22 MS. FRANKLIN-BEST: Yes, Your Honor.

23 THE COURT: And I'm not sure -- I don't think we have
24 a courtroom yet or a court reporter.

25 (Off the record).

1 Thank you, counsel.

2 MS. FRANKLIN-BEST: Thank you, Your Honor.

3 MR. GROSS: Thank you.

4 MS. BROWN: Thank you.

5 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
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evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Charleston County, South Carolina, on the 20th day of
November, 2015.

January 7, 2016

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

In the Court of Common Pleas
Ninth Judicial Circuit
2012-CP-10-3216

William O. Dickerson,
Applicant,
vs.
State of South Carolina,
Respondent.

Transcript of Record

December 7, 8, 2015
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge

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

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1 MONDAY, DECEMBER 7, 2015

2 THE COURT: This is the post-conviction relief hearing
3 of William O. Dickerson. State ready to proceed?

4 MR. ZELENKA: Yes, Your Honor.

5 THE COURT: The applicant ready to proceed?

6 MR. GROSE: Yes, sir.

7 THE COURT: All right. Any matters of prehearing
8 procedure that we need to address before we get in?

9 MR. GROSE: We would ask that Mr. Dickerson's hands be
10 released so that he can make notes and communicate during
11 the hearing.

12 THE COURT: Any objection from the state?

13 MR. ZELENKA: We'll leave it to the security folks,
14 Your Honor.

15 THE COURT: All right. I've talked to security. Go
16 ahead and release his cuffs. That's the only restraint
17 we'll...

18 MR. GROSE: Fair enough.

19 DEPUTY: We were instructed we can only give him one
20 hand free.

21 THE COURT: If he needs ---

22 DEPUTY: Both hands free?

23 THE COURT: Both.

24 DEPUTY: Yes, sir.

25 (A PAUSE.)

1 THE COURT: Mr. Grose.

2 MR. GROSE: Obviously there's been a number of
3 hearings, and I know y'all had the status conference, and I
4 just want to put on the record that we are proceeding
5 pursuant to some of the things that were decided last week
6 as far as scheduling.

7 As far as today, I don't really intend to make an
8 opening statement, but I can give you just probably a two
9 or three-sentence introduction of what to expect.

10 One of the claims is, is that trial counsel did not
11 adequately investigate and discover William's neurological
12 deficits that essentially resulted from lead neurotoxicity,
13 and we have two experts that are here today that will be
14 our first two witnesses and I imagine will take the better
15 part of the day. The first one is Dr. Richard Canfield,
16 and the second one is Dr. Marlyne Israelian, and we're
17 prepared to go forward.

18 THE COURT: All right, anything from the state at this
19 point?

20 MR. ZELENKA: Nothing from the state, Your Honor.

21 THE COURT: All right, you may proceed.

22 MR. GROSE: All right. At this time I would call Dr.
23 Richard Canfield.

24 RICHARD L. CANFIELD, BEING DULY
25 SWORN, TESTIFIES AS FOLLOWS:

1 THE COURT: Have a seat in the witness box. State
2 your full name for the record.

3 WITNESS: Name is Richard Lane Canfield.

4 VOIR DIRE EXAMINATION BY MR. GROSE:

5 Q. Dr. Canfield, what is your profession?

6 A. I am a developmental psychologist by training. I --
7 that's where -- my, my Ph.D. is in developmental
8 psychology, with specialization in early childhood and
9 infant cognitive development.

10 Q. And have, have you had -- I assume you've had some
11 training and education in order to be qualified in that
12 profession?

13 A. Yes. So, I, I did an undergraduate degree in
14 psychology at the University of Puget Sound. I completed a
15 doctorate degree in developmental psychology at the
16 University of Denver. I completed a post-doctoral
17 fellowship in developmental psychology in human development
18 at Cornell University, and have studied infant and child
19 development for more than thirty years now.

20 Q. And what has your professional experience been over
21 that period of time, the thirty years?

22 A. Well, I was a -- I began my study, studies looking at
23 early infant cognitive development with interest in brain
24 functional correlates to behavior. I, when I took an
25 assistant professorship at -- in the Department of Human

1 Development at Cornell University, I began a study of early
2 childhood lead exposure in Rochester, New York. That
3 formed a large part of my work while I was in that
4 department, and I continued in the Division of Nutritional
5 Sciences where I currently have a position, and I work in
6 lead exposure. I work in mercury toxicity. I also look at
7 nutritional affects on early brain and cognition in
8 children.

9 Q. So, a lot of your work has had to do with lead
10 toxicity it sounds like.

11 A. I think I'm, I'm best known for work in the effects of
12 early lead exposure on the progression of child development
13 in terms of cognitive function.

14 Q. Okay, and I'm not sure exactly how to characterize
15 you, but it would be a developmental psychologist with a
16 specialty in children and early development, as well as a
17 specialty in lead toxicity?

18 A. That's -- you did a good job, yes.

19 MR. GROSE: At this time, we would offer Dr. Canfield
20 as an expert.

21 THE COURT: Any voir dire or objections?

22 MR. ZELENKA: None, Your Honor. No objection.

23 THE COURT: You may proceed.

24 MR. GROSE: Thank you, Your Honor.

25 DIRECT EXAMINATION BY MR. GROSE:

1 Q. Now, obviously we're here to talk about William
2 Dickerson, and you have been retained by Mr. Dickerson's
3 legal team. Have you reviewed any information before
4 today?

5 A. Yes. I received a large number of documents
6 describing the -- some of the evidence from previous cases,
7 evidence ---

8 Q. Now previous cases, you mean ---

9 A. Sorry, his ---

10 Q. --- his previous trial?

11 A. His previous trial.

12 Q. Yes, sir.

13 A. Thank you, and I reviewed the documentation on the
14 lead exposure findings for him and his sibling, and I
15 reviewed large number of documents of the findings from the
16 original case, as well as hospital records. I, I don't
17 have the full list with me, but I could provide that.

18 Q. You're -- are you aware of the area of Charleston
19 where William grew up?

20 A. I am.

21 Q. And you're aware of some of his medical history,
22 particularly in his childhood years?

23 A. I am.

24 Q. All right, and are those the types of things you
25 normally rely on?

1 A. Yes.

2 MR. GROSE: If we can mark this as Applicant's Exhibit
3 Number 1.

4 (LAB REPORT MARKED INTO EVIDENCE AS APPLICANT'S
5 EXHIBIT NUMBER 1.)

6 BY MR. GROSE:

7 Q. I'm going to show you what's marked as Applicant's
8 Identification, Applicant's Number 1 for identification.
9 Is that a record that you have reviewed?

10 A. Yes, it is.

11 Q. And what is that?

12 A. This is a laboratory report showing an analysis of
13 lead in blood for William Dickerson. And it shows a
14 reading of 9 micrograms per deciliter, and I noted the date
15 that it was collected and correlated that with his age at
16 the time.

17 Q. All right, and what was his age at the time?

18 A. He was eleven years, nine months, and I believe nine
19 days.

20 Q. Okay, and is that a type of document that you rely on
21 when you're looking at a child's blood level?

22 A. Yes. These are the types of lab reports that we use
23 in our studies of lead exposure in children that meet the
24 highest scientific standards and would be entered in as
25 evidence for peer-reviewed publications on demonstrating

1 effects of lead exposure.

2 Q. Okay. Now, it's pretty obvious, because we've already
3 put it up on the screen, that you have a powerpoint
4 presentation today. Will that assist with your testimony?

5 A. Yes. I think it's important because there's a lot of
6 context required to understand what this document means.

7 Q. And when you say what this document means, we're
8 talking about what a reading of the 9 at approximately
9 twelve years of age means for William?

10 A. Yes.

11 MR. GROSE: All right, at this time, Your Honor, I
12 would move Applicant's Exhibit Number 1 into evidence.

13 MR. ZELENKA: No objection.

14 THE COURT: Without objection.

15 (LAB REPORT MARKED INTO EVIDENCE AS DEFENDANT'S
16 EXHIBIT NUMBER 1.)

17 BY MR. GROSE:

18 Q. Now as I understand it, before we kind of get to that
19 point, your powerpoint goes through and explains some
20 information about lead that will help us understand what
21 William's blood reading at age twelve means once we get to
22 that point?

23 A. Yes.

24 Q. Okay.

25 MR. GROSE: And so at this time, Your Honor, I'd like

1 to move into his presentation -- we probably need to dim
2 the lights just a little bit.

3 THE COURT: Well, A, I don't know if we can do that.
4 Certainly not going to turn them off.

5 MR. GROSE: Yeah, they don't need to be turned off.

6 (A PAUSE.)

7 BY MR. GROSE:

8 Q. What's the -- would it help you if you stepped down
9 here by your computer?

10 A. I think, if that's okay, it would help.

11 THE COURT: Yes. Go ahead. Just for my tech here,
12 can you wireless that?

13 WITNESS: I can give it to you on a stick right here.

14 MR. GROSE: Well, we can email -- we've got ---

15 MS. FRANKLIN-BEST: I can give you a hard copy right
16 now if you'd like.

17 THE COURT: That's fine.

18 MR. GROSE: And we can email her a copy, too.

19 THE COURT: You can email her.

20 MS. FRANKLIN-BEST: Okay.

21 THE COURT: She can see it on her screen. I can see
22 the big screen.

23 BY MR. GROSE:

24 Q. All right, if you want to go ahead and proceed,
25 Doctor.

1 A. So as I said, I think it is important to understand
2 what a lead level, 9 micrograms per deciliter, means in a
3 child at the age of twelve. And I, I felt like it required
4 a little bit of background to show that. So, then we can
5 talk a little bit about, you know, about the phenomenon of
6 lead poisoning, the lead exposure in our society.

7 Something ---

8 WITNESS: Excuse me for the problems with the
9 presentation. I'm not accustomed to the courtroom
10 atmosphere for electronics, but I'm -- so, I just want to
11 say ---

12 THE COURT: We are somewhat primitive here.

13 WITNESS: I think I made a lot of assumptions that
14 were unwarranted, but I appreciate your patience.

15 BY MR. GROSE:

16 A. So, I'm going to talk a little bit about what lead is,
17 and most of us know it is a dull, gray metal. It is an
18 element, so it does not degrade. It's already in its most
19 basic form, and I should say will degrade into radioactive
20 materials in hundreds of thousands of millions of years,
21 but for the human life span, it essentially does not
22 degrade.

23 And we know it in the -- in batteries, but the issue
24 has been its use historically in paint and as an antiknock
25 additive to gasoline. That's tetraethyl lead. It was

1 widely used in house paint prior to its ban in 1978. It's
2 still used in industrial marine and some other various --
3 lift that a little bit.

4 And then with lead poisoning -- so, lead poisoning,
5 many people think of it as thing of the past, but it's,
6 it's common even today, but it was much more of a concern
7 in the past. It is still one of the most common
8 environmental health problems in children, and it is
9 caused, obviously, by too much lead in the body.

10 And I'll show you how high blood lead levels can cause
11 brain damage. I won't speak specifically about some of the
12 other things, but there is mental retardation that's
13 associated with it. I talk -- with it. I will talk about
14 behavior problems associated with lead. There are also
15 physical health issues with anemia. That's low iron.
16 Liver and kidney damage, hearing loss, hyperactivity,
17 development delays, other physical and mental problems.
18 So, there's a lot of evidence for lead being a causal agent
19 in brain damage that leads to behavior, behavioral
20 disruption.

21 Q. And just before you more on, we're talking about
22 things like development delays. These are things that we
23 see in childhood. Is that correct?

24 A. Yes, and -- but there's -- it's much more subtle than
25 that. Developmental delays are usually so obvious that one

1 can, can, can diagnose them by looking. But with lead,
2 it's often referred to as the silent villain because
3 children look okay, but if you measured the lead in their
4 blood and then followed them, you would find that there are
5 serious health and mental consequences of that.

6 Q. Okay, and we're going to get into more of that in ---

7 A. Yes. Yes. So, the exposure for most children in the
8 US today, it is lead chips and lead dust from peeling and
9 chalking paint. So, it's from the paint that was put on
10 the walls inside and outside homes around windows, around
11 doors, et cetera, that wears and, and chips and then -- and
12 the particles can fall onto the floor and, and onto
13 surfaces where children can, can contact them.

14 There's also lead particles from, from vehicle exhaust
15 from years of using leaded gasoline, which settled on the
16 soil near busy roadways, and there are many other ways of
17 being exposed to lead. But those first two are, are the
18 primary ones.

19 We'll talk a lot about, about lead paint because
20 lead-based paint is likely to be the exposure, major source
21 of exposure in this particular circumstance of this case.

22 Prior to 1930, almost all paint was white, and the
23 pigment was white lead, and color came in 19 -- between '30
24 and '50, and a lot of that was red lead, and these are just
25 different forms of lead and different compounds with lead

1 that would be -- would color the paint and provide us with
2 something other than just white.

3 It wasn't until 1978 that lead-based paint is banned
4 in the US, even though it was very clear for many decades
5 before that -- clear both to the scientific community, the
6 medical community, and, and to the lead industry -- that
7 children were being poisoned and killed by, by contact with
8 deteriorated lead paint.

9 Q. And when you say it was banned, that was when they
10 quit selling it and, and putting new coats of paint in
11 houses, but we still have a lot of lead paint in our inner
12 cities today?

13 A. Yes. And if, if a house was built before 1950,
14 chances are very high there's a significant amount of
15 lead-based paint in that, in that residence. It varies
16 somewhat by region, but we recently certainly know in this
17 region and in Charleston -- and I'll talk about Cincinnati
18 and Rochester, New York -- that there is a substantial
19 amount of lead paint because that's when many of these
20 areas were populated and houses were built.

21 Q. Okay.

22 A. And lead was marketed as a very, very desirable aspect
23 of paint, that it lasts, and high-lead content was a good
24 thing. I grew up on a farm where the farmers, you know,
25 swore by their lead paint because it was -- it would last

1 and it was -- and this marketing material was put out while
2 there were files in the lead industry's and the paint
3 industry's offices documenting lead poisoning from
4 high-lead paint.

5 Q. And if you could go back?

6 A. Yeah.

7 Q. It almost looks like it's marketed towards children,
8 too, in a way.

9 A. Yes. In fact, it was almost explicitly marketed to
10 children, and I'll show you that just a moment. Also
11 here's the Little Dutch Boy: Use it everywhere. And, and
12 it was used to keep maintenance costs down, again because
13 it so sturdy. Because it was also promoted for use in
14 hospitals and healthcare clinics and, and places, it had a
15 very healthy reputation.

16 This is the most explicit ad for children because it
17 was a document that was sent to dealers telling the paint
18 sellers not to forget the children. Someday they may be
19 customers, and they would sell -- they would give them
20 coloring books so they could buy coloring books and the kid
21 could paint Dutch Boy colors and, and get hooked on the
22 paint. And then they grow up, they'll still use it, and
23 that may account for people of my father's generation when
24 I was growing up being so, you know, adamant that, that
25 this was such a good product.

1 It doesn't always stay in good shape, however, and so
2 here's an example of what happens when lead paint
3 deteriorates. If -- this is an extreme example, of course.
4 It is peeling, and, and, and we can't see in this
5 photograph the chalkiness where you have some dust forming
6 on the outside that then can, can follow onto the floor.

7 MR. ZELENKA: Your Honor, just to -- I would object to
8 the relevance of that photograph unless it's directed to
9 this defendant.

10 MR. GROSE: Well, this is for demonstrative. This is
11 to kind of explain the background. We will talk about
12 where William lives specifically later on.

13 MR. ZELENKA: Okay. Thank you.

14 THE COURT: That objection may apply to several of
15 these exhibits. Overruled. I'll allow him to go ahead.

16 BY MR. GROSE:

17 A. So, again, this is an example of the prime target for
18 peeling paint, and I am using this to describe to you the,
19 the process by which children become exposed because when
20 infants and toddlers first begin to crawl and walk, they
21 are -- they have their hands on the floor a lot. They,
22 they put their fingers in their mouth. They put objects in
23 their mouth. They may pick up a chip of paint, but it's
24 not just the chips of paint but the dust that's on the
25 floor, and they'll have saliva on their fingers and suck

1 their fingers. The, the toys will be -- have saliva on
2 them. The lead will stick to that. They'll put it back in
3 their mouth. So, there are many, many aspects of the --
4 just the ecology of a -- of an infant and young child's
5 life that puts them at particular risk for exposure to
6 lead.

7 The other aspect of early infancy and childhood is
8 that children absorb lead more readily than adults. So,
9 even though for an adult using lead and working with lead
10 might not cause, you know, serious problems, for a child
11 they will absorb more in that same environment and, and
12 become damaged.

13 Q. How does that happen? I mean, the difference between
14 a child and an adult?

15 A. Well, the, the digestive system of a child is more
16 efficient. It's also the case that children are pound for
17 pound, they ingest more water, they breath more air, they
18 eat more food, and so they have more of the environment
19 getting inside their body. And so you take the increased
20 absorption rate plus the increased pound for pound
21 ingestion, and then in addition to that you have the fact
22 that the brain is developing its basic capacities at those
23 ages and is most sensitive to environmental insults. And
24 that is what some of us call a perfect storm of, of the
25 nature of the child's life, the nature of their body,

1 what's developing in their brain. Then altogether they
2 work together to produce a very dangerous situation.

3 Q. All right.

4 A. That just to say again that the hand-to-mouth
5 behaviors, the higher absorption rates, and the critical
6 brain structures that are in the process of development
7 are, are key to why young children are at the highest risk.

8 This is another -- just a demonstrative slide just to
9 show that the exterior of the house is as important as well
10 as the interior because when the exterior paint
11 deteriorates, the lead falls around the foundation of the
12 home and the soil. And children often play around the
13 foundation of a home, especially in urban areas, and so
14 that's a significant source for lead exposure when there's
15 deteriorated lead on the outside of the home.

16 The second source of lead that's most important is, is
17 leaded gasoline and, and that was used to -- allow us to
18 have high-compression engines and, and tetraethyl lead
19 allowed it so that we could have compression and you
20 wouldn't get the knock and the, and the, and the misfiring
21 of the, of car, the pre-ignition, and we could get more
22 power out of an engine. So, it was used widely in the US.

23 This is an example of what happens. This is a photo
24 or an image of New Orleans. This is pre Katrina where
25 there's a roadway that goes along here, and the wind blows

1 from the Gulf. And what you see here are very high levels
2 of soil lead right at the bases of tall buildings around
3 here. And it's a study that's been published showing that,
4 that this legacy of decades and decades of lead spewing out
5 of tailpipes gets in with the soil and, and creates a
6 contaminated situation.

7 Q. So, basically this was people driving across the road,
8 then blowing kind of into the buildings and then settling
9 into the ground?

10 A. Yeah. The lead blows out of the tailpipes, the wind
11 picks it up, throws it against the buildings, it falls to
12 the ground and into the soil decade after decade. And, and
13 serious soil lead contamination, at least pre Katrina, is
14 what this represents.

15 And this is the kind of thing that happened in any
16 older, you know, city that had busy roadways during that
17 time when leaded gasoline was used because remember the
18 lead doesn't go away. It, it's an element. It doesn't
19 degrade, doesn't become less toxic over time. It's always
20 there, and so when we put it out into the environment, it's
21 there.

22 This is an exhibit of the, of the tonnage of lead used
23 in paint and gasoline from 1910 to 1990, and it shows here
24 -- this is just the white lead pigments, and this is on
25 thousands of tons. So, we start here, you know, about

1 120,000 tons per year of lead paint and increasing to, you
2 know, almost 170,000 tons, and then declining as
3 regulations started cutting back on the high lead content
4 until 1978 when it was pretty much eliminated.

5 On the other -- the other axis shows thousands of tons
6 of lead spewed out of tailpipes of car due to leaded
7 gasoline. And that ramps up from the 1930s until the hay
8 day of leaded gasoline and gas guzzling cars to the 250,000
9 tons of lead per year that is spewed out of the tailpipes.

10 And to go back to some of the way this was marketed,
11 this is -- they used Niagra Falls to say there were 1
12 billion gallons of ethyl a year. Can't quite see the 1,
13 but that's 1.25 million gallons of lead per year that was
14 put out into, into the atmosphere and into our bodies.

15 So, the point here is that some companies wanted lead
16 to cover the earth and it -- they succeeded. So, let's see
17 -- talk about what happens when lead gets in the body, how
18 it gets in, and then what happens to it.

19 This is a figure that I will talk about in general,
20 and then I'll have some details about it in slides. Up
21 here in these ellipses you see the different sources of
22 lead in the environment, and so the environment is up here.
23 The human body is down here. So, you can see that lead is
24 in, in glazed pottery, in auto emissions, industrial
25 activities, paint pigments. There are natural sources of

1 because it is an element. So, weathering of rock is a
2 source of lead, but it's not, not a very important source
3 for children's exposure.

4 Plumbing and soldering leachate, breast milk for
5 infants, and some folk remedies have lead, but typically we
6 can look at the environmental sources in terms of ambient
7 air, household dust, soil, and surface and groundwater.
8 And we can see that these sources can get into the food and
9 drinking water, and then it can be ingested, okay? These
10 ambient air sources can be inhaled, and some very fine dust
11 can be inhaled. So, inhalation and ingestion are the two
12 main routes of exposure into the body.

13 Q. All right, and if you follow the, the diagram from,
14 you know, the, the paint as a source, you know, it looks
15 like it can go a couple of different ways, but it can
16 ultimately be either ingested or inhaled?

17 A. Yes. Yes.

18 Q. Okay.

19 A. The majority is ingested, but it can be inhaled if
20 it's in small enough particles and there's enough dust in
21 the home.

22 So, what happens when you inhale it is it goes into
23 the respiratory tract, and then it gets almost fully -- all
24 of it gets absorbed into the plasma, a very high
25 percentage, over 90%. Gastrointestinal tract is less

1 efficient, but it still goes into the, into the blood, into
2 the plasma.

3 Then it -- what happens is it goes into soft tissues
4 and into bone and different types of bone. And, in fact,
5 down here there is a cycle of lead moving from bone back
6 into the blood into soft tissues and, and -- so that when
7 you're exposed, you store most of your lead in your bones.
8 But then when you're growing and calcium gets released from
9 your bones or you're remodeling bones from broken bones or
10 something, then the lead gets released with the calcium
11 from the bone and then can re-expose you, getting into your
12 brain through the soft tissues of the brain, the liver, the
13 kidney, et cetera.

14 Some of it gets -- this shows that some of it gets
15 excreted in urine and feces. This is feces, this is urine,
16 but most of the lead will stay in your, in your body.

17 Q. And when we're talking with the soft tissue, one of
18 the ones that you have listed is the brain?

19 A. Yes. We ---

20 Q. And that ultimately becomes important with childhood
21 development?

22 A. Yes, and that, that's, that is my focus. So, I'll
23 just say here that the -- that the rate of absorption, as
24 I've said, depends on age. It also depends on nutritional
25 status. A child who is low in iron, low in calcium, low in

1 zinc, those are divalent cations, the same as lead, at
2 that 2 plus ion, and so it will increase the absorption of
3 lead.

4 So, the inhaled lead is deposited in the lower
5 respiratory tract. It's almost completely absorbed. 10 to
6 15% of lead is absorbed from the GI tract of adults, and up
7 to 50% is ingested from the GI tract of pregnant women and
8 children. And the proportion absorbed increases under
9 fasting conditions and calcium deficiencies, et cetera.

10 And again, lead is hazardous because for some reason
11 -- for one reason that it's, it's like other necessary
12 minerals, but it has a plus 2 oxidation state. It allows
13 lead to mimic these other essential nutrients. The problem
14 is when it gets into the cell, it doesn't have the same
15 properties as the nutrients; lead has no known nutritional
16 value. It's only a toxin. It disrupts the cellular
17 metabolism, and that's what happens in the brain. It also
18 happens with the kidney and, and other tissues.

19 Q. All right, let's talk about this a little bit more.
20 You, you say it mimics things like calcium and iron. Tell
21 us a little bit more about what that means and how that
22 happens.

23 A. Sure. So, one example is that in the brain, calcium
24 is used as a signal. The level of calcium inside a cell is
25 one of the signals it uses to know -- that, that controls

1 internal processes. One of these processes is a process
2 known as programmed cell death. That's a normal part of
3 development. In fact, we're born with more brain cells
4 than we need, and we actually, we lose some as we grow up,
5 the ones that aren't used. And -- but the problem is that
6 programming can get disrupted. Calcium is one of the
7 clues. When there's a high level of calcium in a cell, it
8 will, it will use that as a signal to start this programmed
9 cell death. The problem is that lead is about 1000 times
10 more effective than calcium at starting that programmed
11 cell death. And so when lead gets in the cell, because it
12 does have -- not the same sort of chemical structure, a
13 similar one, but it doesn't have the same effect of
14 calcium. This small amount of lead will have -- will make
15 the cell think it's got enough calcium inside that it needs
16 to engage in this programmed cell death. So, that's one of
17 the, one of the mechanisms of neurotoxicity of lead.

18 Q. All right, and so it's actually killing brain cells
19 that, that wouldn't have been killed otherwise?

20 A. Yes.

21 Q. All right, and when you say neurotoxicity, what does
22 that term mean?

23 A. Neuro is really meaning brain or, or, or neuron. It's
24 not a, not a -- I'm not -- I'm specific -- I'm not
25 specifically referring to one or the other. It's about the

1 neurol system and elements of the neurol system. In this
2 case, it is neurotoxicity of, of the -- toxicity to a
3 neuron in the brain.

4 Q. And you also said that lead mimics iron. Can you tell
5 us a little bit more about that?

6 A. Yeah. What it -- lead can mimic iron and compete for
7 your metalloprotein transporters in the gut that allow us
8 to get to the calciums in metal and, and iron is a metal.
9 Zinc is a metal. Lead is also a metal, and it can occupy
10 much more effectively those metal transfers in the gut so
11 that you can't absorb calcium or iron as well. And,
12 therefore, you could become anemic, iron deficient, or
13 anemic as a result of, of lead exposure.

14 Q. Okay, and did you ever see any evidence that that ever
15 happened to William?

16 A. I, I didn't see an iron -- the level of an iron test
17 in the records that I -- I did see a reference to him being
18 given a medication for iron deficiency or for anemia, but I
19 didn't, I didn't focus on that part.

20 Q. Okay. Do you want to proceed?

21 A. In addition to the damage to neurons, lead can also
22 damage astroglial cells, and they support in the brain and,
23 and they help produce myelin, which is the fatty insulating
24 sheaths around axons. The -- it can -- lead can lead to a
25 demyelination which leads to less efficient processing of

1 all sorts of signals in the brain. It can also disrupt
2 neurotransmitter synthesis. That is the generation of the
3 neurotransmitters in our brain like dopamine and serotonin.
4 Can affect their uptake and, and the reuptake after they've
5 been expressed out of a cell. So, it has affects both on
6 the structure and on some of the neurochemistry of the
7 brain.

8 So, need to say a little bit about how, how lead is
9 stored because this is important for understanding what it
10 means to have a blood lead level of 9 at the age of twelve.
11 So, when the lead is in the blood, 99% of it is in the red
12 blood cells, and it has about a twenty-five day half-life.
13 That means that if a child eats lead, ingests lead on day
14 one and they absorb it and you test their lead, their blood
15 for lead, maybe they have a blood level of 50. In
16 twenty-five days with no further exposure, they would have
17 a level of about 25. So, it declines over time without
18 further exposure. So, when you see children with
19 consistently high blood lead levels, that means it's not
20 just one event, but it's a consistent exposure over time.

21 And that any particular sample you get may be --
22 depending upon how near or distant it is from the most
23 recent exposure, you'll either get a higher or a lower
24 blood lead level because again after it gets out of the
25 blood, it goes into soft tissue, and we don't sample

1 kidney, bone, blood marrow, liver, or brain. We only
2 sample blood. And in these soft tissues, it has about a
3 forty day half-life. But then in the bones and teeth, as I
4 said, it's about a twenty-five year half-life, and about 95
5 percent of our total body burden as adults is in our bones.
6 So ---

7 Q. When you say body burden, that's what we're still
8 carrying around?

9 A. That's what we're still carrying around. Anyone who
10 grew up during the time of leaded gasoline still has a lot
11 of that lead to their bones.

12 And I'm going to say a little bit about measures of
13 lead exposure again. You use blood lead in almost all
14 studies of, of lead exposure, and that can either be a
15 venous puncture or capillary fingerstick. So, these are
16 two ways of getting blood to test for lead. Some studies
17 have used tooth lead. There are questions about which
18 tooth to use; there's variation within the mouth. There's
19 the variation depending on what part of the tooth you
20 sample. So, it's a little bit questionable about using
21 tooth lead, but it is a measure, since it's like bone. It
22 is a measure of long-term exposure.

23 Bone lead also, if you x-ray fluorescence, you can get
24 a bone lead measure, but that remains also more an
25 exploratory measure. Blood lead is really the measure that

1 is used in most of the science.

2 Q. And we're going to get to some scientific studies
3 later.

4 A. Yes.

5 Q. And that's, and that's what they used was the blood
6 measure?

7 A. In, in, in almost all circumstances. There are some
8 -- there's one tooth measure and one bone measure.

9 Q. Okay.

10 A. So, just to give you some sense of how potent a
11 neurotoxin lead is, so we talk about it in terms of
12 micrograms per deciliter of blood, and a microgram of lead
13 is that much of an ounce.

14 Q. That's really, really small.

15 A. Yes, and a deciliter is about 20 teaspoons, and a
16 child has about four quarts of blood. So, the toxicity
17 today is the same as about a millionth of a teaspoon in the
18 entire bloodstream of a child. So, it doesn't take very
19 much. And, and again the notion of a teaspoon of lead
20 making a big difference rings true when it comes to
21 childhood development in brain function.

22 So this -- now let's talk about the health effects of
23 lead exposure, and this is particularly with children. We
24 start down here at about 10 micrograms per deciliter, 20,
25 30, 40, 50, up to 150. This is not a -- not drawn to scale

1 because this scale is too wide. At the highest level, yes,
2 lead can kill you. At somewhere 100 to 150 is, is a good
3 possibility of death. You get up around 100 and you get
4 the, the brain swelling and brain inflammation and damage
5 to the structural features of the brain. You get kidney
6 damage, and you get this, what's called Frank anemia when
7 the lead is high enough that you can't absorb iron, and it
8 takes the place of iron in your blood. It's not until
9 you're up around 60 micrograms per deciliter that you start
10 seeing physical identifiable symptoms in the absence of
11 medical symptoms.

12 So, the child at 60 will start -- will show colic.
13 They'll have an upset stomach. They won't feel well, but
14 by that time you've already -- they've already ingested a
15 very large amount of lead. And we'll go through at lower
16 levels the kinds of things that are, that are affected.

17 So, when it's hemoglobin synthesis, and that's where
18 you're carrying your iron, you have increased vitamin D
19 metabolism. You have increased risk of hypertension in
20 adulthood with, with that level. You have -- this should
21 be decreased nerve conduction velocity. That's an error on
22 the slide. You have increased level of erythrocyte
23 protoporphyrin, and that's related to zinc, a, a disruption
24 of zinc metabolism and zinc absorption. You have decreased
25 vitamin D metabolism. So, it's increased at some levels,

1 decreased at others. Decreased calcium homeostasis, and
2 then down in the lower levels we've got -- you see that
3 even with a low 10 you've got development toxicity of
4 decreased IQ, decreased hearing, physical growth decreased,
5 impaired peripheral nerve function, and yes, that it does
6 get through the trans -- through the placenta down at this
7 level.

8 Q. Okay. So, there's a, there's a lot going on at below
9 10 ---

10 A. Yes.

11 Q. --- is what you're saying?

12 A. Yes. So, you, you see -- well, the first clinical
13 signs you see are colic up around 60. All this is hidden.
14 You don't see it unless you test for lead or you test one
15 of these functions and see if something is, is wrong.

16 Q. And so just for the record, when you say all of this,
17 you're pointing to the 40 and below?

18 A. Yes. Yes.

19 Q. Okay.

20 A. The, the complicated slide to show that we recognize
21 over the years that, that lead is a problem, lead poisoning
22 is a problem. This axis on the left, the ordinate shows
23 the blood lead level, the average blood lead level of
24 children in the US. On the, the horizontal axis, that
25 shows the years from '72; it does go up to '04. You can

1 see that the average blood lead level went down very
2 dramatically, okay, and that's a result of -- in these
3 boxes we see the different US policies that were phased in
4 during this time. So, lead-based paint poisoning
5 prevention began in 1974. The phase out of gasoline lead
6 and soldered cans in 1973, and that was the beginning of
7 the phasing out. Lead was not totally removed from, from,
8 from gas until 1988. It's still used in aviation gas.
9 Residential lead paint was banned in 1978. These have all
10 been very, very successful for reducing blood lead in
11 children.

12 Q. And, and, and I assume that this is because the
13 government was becoming aware of the dangers of lead?

14 A. Yes.

15 Q. And, and this runs from -- and it's a little bit cut
16 off on our screen -- from 1972 to 2004?

17 A. Yes.

18 Q. And so all the research the government was looking at
19 on this slide for public policies was available before
20 William's jury trial?

21 A. Yes. So, so, this was -- these were very effective
22 policies to bring down children's blood lead. And as, and
23 as that -- as research came out and these, these policies
24 showed that -- although in 1960 the definition of an
25 elevated lead level for a child was 60 micrograms per

1 deciliter because that's when the child would show clinical
2 symptoms. Then as more research came out to show that
3 there were long-term effects of high lead levels, these --
4 the blood lead concentration that was considered
5 problematic came down step by step. And then in 1991 it
6 came from, from 25 micrograms per deciliter to 10
7 micrograms per deciliter.

8 Q. Okay. Now, if we're looking back at Applicant's
9 Exhibit Number 1, which we looked at earlier, this was a
10 19 -- June 2nd of 1988 test, correct?

11 A. Yes.

12 Q. All right. So, if you put William's 9 into context of
13 what the standards were in 1988, where does that put us?

14 A. Yes. So, the standard in 1988 was 25 micrograms per
15 deciliter, and it was -- so, his lead level was less than
16 half of what the standard was at that time. The research
17 that, that forced the standard to be reduced from 25 to 10
18 was published in 1979.

19 Q. So, it was around, it was around well before this
20 test?

21 A. The, the, the research findings were available, but
22 there was -- there's always been a lot of resistance to
23 changing policies on lead, on the use of lead in the US
24 because of industry concerns about, about their, about
25 their profits and their being able to stay in business.

1 Q. Be able to stay in business and sell the stuff.

2 So in the -- by the 1990s, a little bit after this
3 test, it dropped. The standard dropped to 10, and has it
4 dropped further since then?

5 A. Yes, it has, and I'll review some of the research,
6 some of the research that I've done on the effects of lead
7 in this very low range that as recently as 2012 was used
8 to, to, to formulate two new standards. One is that the
9 definition of an elevated blood level is now 5 micrograms
10 per deciliter, but it's also explicitly acknowledged that
11 there's no known safe level of lead in children.

12 Q. And while that change didn't happen in 2010, a lot of
13 that research was available 2009, the time of William's
14 trial, and going backwards?

15 A. Yes. There were a number of studies that were
16 published prior to 2003 when, when my colleagues and I
17 published a study in the *New England Journal of Medicine*
18 that was convincing to most people that the level of 10
19 micrograms per deciliter was, was too high.

20 Q. You want to proceed, please?

21 A. So, although lead levels came down for children, they
22 didn't come down the same for all children. This is the
23 percentage of US children ages one to five with elevated
24 blood lead concentrations, and this was elevated by
25 definition of 10 micrograms per deciliter in 1997.

1 And this is just broken out by race and ethnicity by
2 the CDC showing that although white non-Hispanics had a
3 blood lead level average of -- 2.3% of them had a -- sorry.
4 2.3% had a blood lead level of 10 or greater for white
5 children. For black non-Hispanic, the percentage with
6 elevated blood lead was 11.2%, and that reflects a lot of
7 the housing quality, living in inner cities with and near
8 busy roadways and, and, and those kinds of factors.

9 Q. And let's just elaborate on this, and of course, you
10 know, William is a, is a black man, and so he's at a higher
11 risk for the lead exposure?

12 A. Yes.

13 Q. And that's in part because of the poverty and living
14 in the old houses in the inner cities?

15 A. Yes.

16 Q. Okay.

17 A. Okay, if you can just back up for second. Your source
18 on this is 1997?

19 A. Yes. This is 1997 data.

20 Q. All right.

21 A. So, so, with this context I want to make the case that
22 Mr. Dickerson was a, a poorly documented case of childhood
23 lead poisoning, and it was documented because there was --
24 there is a measure of 9 micrograms per deciliter at the age
25 of twelve, okay, but ---

1 Q. And that's Applicants Exhibit 1?

2 A. Yes.

3 Q. Okay.

4 A. But, but it's -- that -- as of today, that's nearly
5 double the current CDC, Centers for Disease Control,
6 definition of an elevated blood lead level, which is 5
7 micrograms per deciliter.

8 But it's important that he was older at the time, and
9 I'll show that that's -- reflects a more serious problem at
10 earlier age, and the reason is because blood lead tracks
11 over time. So, I'll explain what that means.

12 Part of it is that blood lead changes with age, and
13 this is the typical case of children living in old homes
14 with, with lead paint on the walls and lead contamination.
15 It will change with age in a very regular way. It's a
16 lawful and predictable change, okay? So, it doesn't stay
17 the same.

18 Q. When you say lawful, what do you -- how are you using
19 that term?

20 A. That, that is within a, within a child, their lead
21 level at one age is a good predictor of their lead level at
22 previous ages or subsequent ages, and I'll provide some
23 evidence for that.

24 Q. Okay.

25 A. So, that helps us understand what a 9 at the age of

1 twelve means because there is predictability there.

2 Q. And, and, and when you're talking about this
3 predictability, that's -- and we're going to get to these
4 studies, but that study is applying the scientific method?

5 A. Yes.

6 Q. Okay.

7 A. So, I'm going to talk about the Cincinnati Cohort for
8 evidence of lead tracking over time and, and let me just go
9 back.

10 The reason, the reason for using the Cincinnati Cohort
11 is because Cincinnati -- this cohort was begun in the, in
12 the late 1970s, and so it's very much the same time period
13 as when William was growing up in Charleston. And
14 inner-city Cincinnati is very similar in terms of its
15 housing stock, in terms of the population: largely
16 African-American; largely impoverished; and, and housing
17 of, of very fairly poor quality, meaning that there's a lot
18 of lead paint hazard. So, Cincinnati will help us
19 understand Charleston.

20 This is a figure that is, again, part of the story of
21 blood lead tracking over time. This is blood lead level,
22 mean blood lead level in children on, on the vertical axis.
23 On the horizontal axis is blood -- is the age at which that
24 measure was taken. So in the Cincinnati Cohort, you
25 actually have umbilical cord lead, but they -- these are in

1 months of three, six, nine, twelve up to seventy-eight
2 months. So, they took -- measured very, very frequently,
3 again because lead has that -- in blood has a rapid
4 half-time or half-life of twenty-five days. They wanted to
5 make sure they didn't space their lead measures too far
6 apart.

7 What these investigators did is they divided up their
8 300 children, approximately 300 children into quartiles.
9 That is the lowest -- this is lowest 25% of the children,
10 their blood lead over time. This is the next 25%, next
11 highest 25% over time. This is the third highest 25%, and
12 this is the highest quartile up here. You can ---

13 Q. So, basically we -- just for the record, we've gone
14 from the, the bottom line up as the exposure is higher?

15 A. Yes. So, the, the highest exposure at twenty-four
16 months was about 10 micrograms per deciliter in the most --
17 in the least exposed kids in Cincinnati, whereas the
18 highest exposed kids, the highest 25% of them were above 32
19 at around twenty-four months. So, what we can see is that
20 in this case, lead changes over age. It peaks right around
21 twenty-four months, somewhere between eighteen and
22 thirty-six months, the time when children are most active,
23 and it follows a period where they are engaged in a high
24 degree of hand-to-mouth behavior.

25 And so this is a -- they still, they still are engaged

1 in hand-to-mouth behavior at that age, and they're not
2 typically responsible for washing their hands or for
3 keeping things clean. It's very, very important for
4 parents to monitor their children if there's a lead hazard
5 so that they're not putting their hands in their mouths or,
6 or, you know, licking a doorjamb, which children will do.

7 So, so the point here is that lead increases and then
8 decreases, okay? So, this shows you that whatever the
9 child's lead is at an early age -- at a later age, if they
10 were in a lead-contaminated environment, the chances are
11 that their lead was much higher at an earlier age.

12 In this study by Kim Dietrich in Cincinnati was --
13 began the recruitment in '79 population: inner-city
14 minority population, low income. Housing stock was
15 comparable to Charleston. The air lead was likely lower in
16 1979 than it was in 1976 just because of the reduction in
17 leaded gasoline, and in, in 1976 being when William was
18 born. And the paint condition in 1979 was a few years --
19 were -- sorry, paint condition for, for William's world
20 was, in 1976, just a few years newer on average. So, there
21 are variations, some variations but ---

22 Q. So, that's pretty close. When you're talking about
23 paint that could have been put there decades ago, the three
24 years is still pretty significant?

25 A. Yes. It's a, it's a small amount, and I want to show

1 you that that -- this pattern over time is not true only
2 for Cincinnati. This is the Rochester Cohort. This is the
3 study that I worked on; I was the lead author on the named
4 publications from this study. And again we have blood lead
5 level of the children on the vertical axis, and the
6 horizontal axis is age.

7 You can see you beginning at six months the lead level
8 is fairly low because children at six months still haven't
9 gotten up and started moving around the house; they're not
10 crawling yet. Soon as they start crawling and walking
11 around, they are -- they get into the lead and if there's
12 lead in the environment, you get this increase. Then as
13 they gain more control and they're cleaner and putting
14 fewer things in their mouths, their lead level declines.

15 Q. Right. So, we're seeing that same pattern in a
16 general sense that we saw in the Cincinnati Cohort?

17 A. Yes.

18 Q. And we know the Cincinnati Cohort began in 1976. When
19 were you doing the Rochester Cohort?

20 A. This began in 1996.

21 Q. Okay. So, over, this was over a couple year period,
22 and again before William's trial?

23 A. Yes.

24 Q. Okay.

25 A. And the paper that publishes these data was available

1 in the -- probably the leading medical journal that -- and
2 was widely cited and widely in the press. It was quite a,
3 quite a widely distributed finding.

4 Q. And when was that published?

5 A. That was 2003, spring of 2003.

6 Q. Okay.

7 A. It was in all the major newspapers, and so it was hard
8 not to miss.

9 So, I think I, I said 1996. I should have said 1997.

10 I made a mistake. Again, this is the Rochester Cohort,
11 recruited in '97. It was also inner-city minority
12 population, low income. Much lower airborne exposure due
13 to the, the lack of leaded gasoline plus less industrial
14 exposure and lower exposure from many, many sources. The
15 housing was in somewhat better condition in Rochester than
16 in Cincinnati.

17 So this pattern that I talk about, I'm just going to
18 put it all together. There were a number of long-term
19 studies of children's blood lead level, and I'm putting
20 these -- there are some in other countries: in the former
21 Yugoslavia, in Port Pirie, Australia. There's Cincinnati
22 data; there's also data from Cleveland. These are up here.
23 Then there are a much more high-level exposure. There are
24 two groups that have low-level exposure: one in Boston, one
25 in Rochester. And, and again they're down here, but you

1 can still see the change.

2 Q. So, so -- and, and these studies, these have all been
3 around for a while?

4 A. Yes, published beginning in the 1980s, but most of
5 them were published in the, in the '90s.

6 Q. And so we're seeing, you know, the same pattern across
7 different cities and even around the world?

8 A. Yes.

9 Q. Okay.

10 A. So, now let me get to what I mean by lawful, and this
11 will be a little bit of a complicated photograph, image, so
12 let me walk you through it.

13 Just focus on an individual box here on the upper left
14 of a scatter plot that shows -- this is on, on vertical
15 axis is blood lead, okay, and then you also have blood lead
16 on the horizontal axis, but this is representing two
17 different ages. What we can't see on the slide here is
18 this. This column of data refers to blood lead at age one.
19 These are data from the Rochester Cohort.

20 So, you can -- what you have here is essentially
21 information about the correlation: blood lead time one was
22 six months, and at six months you can still see a fair
23 amount of correlation, although they're statistically
24 significant. They are low, about .20 or .40 during this
25 time. But as soon as you get beyond six months, when again

1 the children are more active and ingesting lead, then you
2 see the correlation from, from age twelve months and if you
3 look at age twelve months, this is called twelve to
4 eighteen months, twelve to twenty-four months, twelve to
5 thirty-six months, and twelve to sixty months. You can see
6 how there is the higher, higher correlation as you go on.
7 That is within a child, you can predict what their lead
8 level is, is going to be or was when their circumstances
9 are the same. That is, in an older house with a lead
10 hazard.

11 Q. So, so, let me just make sure I understand this.
12 We're now, instead of looking real broadly, we're looking
13 at the individual children in the study?

14 A. Yes, and what this show -- what this shows when you
15 put this together with the curves over age and the
16 predictability within a child, it allows you to conclude
17 how an individual child moves in that same way, okay?
18 That's not just a figment of a group average or something.
19 Individual children are moving in that increasing blood
20 lead up to age twenty-four months or so and then decreasing
21 afterward.

22 Q. And so we're jumping a little bit ahead, but what
23 you're saying is is you can take this information from
24 Applicant's Exhibit Number 1 and get more information out
25 of it based on what we know from these studies?

1 A. Yes.

2 Q. And so when we get to that, we're actually going to be
3 able to plot William's?

4 A. Yes, and I've, I've done that in, in the other -- some
5 slides.

6 Q. We're getting a little bit ahead.

7 A. Yeah.

8 Q. I want to kind of link this ---

9 A. Yes.

10 Q. --- with what's coming.

11 A. Yes.

12 Q. Okay.

13 A. So, this is what I'm culling, drilling down with the,
14 with the Cincinnati Cohort since it, since it is a good
15 comparison to, to Charleston during similar time period.
16 And what I've done here is I've taken the average blood
17 lead levels from the Cincinnati Cohort data. So, this line
18 that starts down here is the average during the first year
19 and it's low for that Cohort, just little bit above 10, and
20 we want to follow this line. So, this is the line we were
21 looking at. These bars show the variation in blood lead
22 level at each age because not everybody had the same lead
23 level.

24 Remember that we showed those multiple curves. So,
25 this would be the curve, the low level, the middle level,

1 and the higher level. This is -- they did also a blood
2 lead test when the children were fifteen years of age.

3 Q. And that's at the far right corner of the slide?

4 A. Yes, the far right. So, you can see two things. One
5 is lead has a -- blood lead has declined greatly since the
6 child was six years of age. And also the variability has
7 changed quite a bit, which means there's not as much
8 distinction between -- from one child to the next. You
9 take -- you know, this huge amount of variability at age
10 two is now shrunk down to all the children are, are
11 closer together, okay? That means that even a child who
12 was maybe quite high up here, even in the highest -- this
13 doesn't represent the highest. This is -- these are
14 standard deviations, but even a child that was up here at
15 twenty-four months, even if they maintain their same rank,
16 they're still only this far from the mean here.

17 Q. That's at age fifteen?

18 A. At age fifteen years. I will say that I -- this --
19 these -- this is a line. I, I plotted this as a line
20 because it's based on individual data. You don't have ---

21 Q. And when you say, just for the record, your -- the
22 line is between age six and age fifteen?

23 A. Yes.

24 Q. Okay.

25 A. And, and we don't have measures in here, okay? We

1 also don't necessarily have, you know, every day measured
2 throughout life, but it's -- I just made this a straight
3 line even though it's most likely this comes down and --
4 more quickly and then that flattens out. But I think it's
5 -- I just wanted to be conservative and let it be a
6 straight line because it makes the point just as well.

7 Q. And by conservative, that puts the average a little
8 bit higher than if it started down?

9 A. Yes.

10 Q. Dipped down between, say, ages six and eight or nine?

11 A. Yes.

12 Q. Yeah.

13 A. This could have been modeled statistically to produce
14 the most plausible curve in this range, and it would not
15 likely have included that. I could do that, but I didn't
16 think it was worth the, the court's expense. And so I, I,
17 I made this a -- just allowed it to be straight. So, this
18 is likely -- represents a higher level at age twelve than
19 is truly the case.

20 Q. Okay.

21 A. So, here is at eleven year, nine months for, for
22 William. This is where his blood lead was at nine, okay?

23 Q. So, it's above a conservative average?

24 A. Above a conservative average. It's, it's 50% above a
25 conservative average, and again this is all to show that

1 age twelve to have a blood lead 9 may, may not sound like a
2 problem unless you understand the context of what that must
3 mean. And so if he were 50% above average, because we know
4 that what -- a child's blood lead at one age predicts well
5 what their lead is at some subsequent ages or previous
6 ages, we can just make a guess that his lead level was 50%
7 above at all ages. And I'm showing you here the line that
8 shows what 50% above the mean for the Cincinnati Cohort is
9 at ages from one year through fifteen years with William's
10 lead level plotted at -- where that was measured to be.

11 MR. ZELENKA: Your Honor, at this time I will object
12 to this testimony. We were advised that he was not going
13 to give a specific opinion on the defendant's state of
14 blood lead level in our discovery, and this is the first
15 we've learned that he's got an opinion as to that exact
16 level on the Applicant's Exhibit 1.

17 MR. GROSE: What they were advised was ---

18 THE COURT: Hold on.

19 MR. GROSE: I'm sorry.

20 THE COURT: Not beyond.

21 MR. ZELENKA: Correct. We understood that they had
22 Applicant's Exhibit 1. We understood he was going to give
23 general information about lead poisoning in children but
24 not specifically related to the defendant.

25 MR. GROSE: What they were advised was, was that he

1 had not seen the defendant, and this is information that is
2 -- you know, one, one of the things they're going to try to
3 say is, is that there was various reasons why trial counsel
4 didn't do some of this and then ---

5 THE COURT: Well, that, that's another ---

6 MR. GROSE: Yeah.

7 THE COURT: That's another issue.

8 MR. GROSE: Well.

9 THE COURT: That's not the subject of the objection.
10 He said it's a surprise that he's plotted this defendant --
11 I mean, this applicant on this chart.

12 Is that correct?

13 MR. ZELENKA: That would be correct, Your Honor.

14 MR. GROSE: Well, what they were advised was is that
15 he had not -- that Dr. Canfield had not seen William. They
16 were given this information over the weekend. So, this is
17 not the first time they saw this information was today.
18 This, this slide was in what they have been provided.

19 MR. ZELENKA: On Saturday.

20 THE COURT: Kind of late to get it.

21 MR. GROSE: But regardless, I've got to proffer this
22 either way for appeal. So, I suggest we just go through
23 it and, and we can rule later whether you consider it or
24 not.

25 THE COURT: Well, how much more of it is there? Is

1 the remaining portion of his testimony ---

2 MR. GROSE: We, we ---

3 THE COURT: Let me finish my ---

4 MR. GROSE: I'm sorry. I apologize.

5 THE COURT: Designed to substantiate these documents?

6 MR. GROSE: We have ---

7 THE COURT: We've got him plotted on at least the next
8 two, this one and the next one, and what I'm ---

9 MR. GROSE: We, we've got ---

10 THE COURT: --- my question is, is this -- will this
11 be substantiated by the rest of this? In other words, is
12 the rest of this presentation designed to prove what is
13 stated ---

14 MR. GROSE: We ---

15 THE COURT: --- in this document?

16 MR. GROSE: We, we have a few more slides with regard
17 to this, and then he gets back to a general discussion of
18 lead and its affect on, on the brain and, and things like
19 that.

20 THE COURT: All right. Go ahead.

21 MR. GROSE: Right. Thank you, Your Honor.

22 THE COURT: I'm going to take his objection under
23 advisement.

24 MR. GROSE: Okay. Thank you, Your Honor.

25 MR. ZELENKA: Thank you, Your Honor.

1 BY MR. GROSE:

2 Q. So, this, this slide that we're looking at plots what
3 you would predict William's to be over time?

4 MR. ZELENKA: Your Honor, just for the record, it's my
5 understanding that this is slide number 44 on the
6 powerpoint that was provided to me this morning.

7 THE COURT: I don't have a number. Is that -- have
8 you counted them?

9 MR. GROSE: Yes, Your Honor.

10 THE COURT: For the record?

11 MR. GROSE: The printouts, I believe, are labeled, so
12 -- and we'll put a copy of that in.

13 (A PAUSE.)

14 THE COURT: My law clerk said it's 45 on the disc.

15 MR. ZELENKA: Okay.

16 THE COURT: But it's in the vicinity.

17 MR. ZELENKA: All right.

18 BY MR. GROSE:

19 Q. You can proceed.

20 A. So, so, what this is, is since we know his lead level
21 was about 50% above the Cincinnati average at age twelve,
22 this just plots what 50% above the average at age twelve is
23 -- or what 50% above the average throughout the earlier
24 ages.

25 So, the, the question that I had was, you know, is

1 this a realistic estimate? And so I did have information
2 about his sibling, Armon's blood levels, from the ages two
3 years through six years. There are multiple measures each
4 year and, and ---

5 Q. And just to interrupt, Armon's -- well, two things.
6 One thing. Armon's blood lead is from information that's
7 in the record from William's trial?

8 A. Yes.

9 Q. And, and number two just for the record. By the way,
10 when did you complete this information, these
11 extrapolations, for lack of a better word?

12 A. When did I complete them? It -- I don't think it was
13 earlier than Friday.

14 Q. Okay. So, this is recent?

15 A. Yes. I had a ---

16 Q. Recent work?

17 A. I had a commitment that kept me busy until late in the
18 process, and I was never sure if this -- what the date for
19 this was going to be. So, I wasn't able to get it together
20 beforehand.

21 Q. All right.

22 A. So, so we look for -- look at Armon, who was measured
23 multiple times, which I averaged the two to three times a
24 year that he was from ages two to six years. And this is
25 on a different scale now, as you see, because his average

1 at age two was up above 50, 50 micrograms per deciliter.
2 And it did come down, as you can see, because again around
3 age two is the maximum, and you can see how his blood lead
4 level declines rapidly during the age period to age six
5 just like we see in other situations.

6 So, I, I took this information in addition to the
7 information about -- that's again in the material that I
8 reviewed when William's mother's boyfriend moved into the
9 Bogard Street house in -- when William was two and a half
10 years of age. He noticed that it was so disgusting and so
11 broken down and so eat up inside with rats in the walls
12 that he tore all the walls out and put new sheet rock in.
13 And we know what happens when you tear out walls with lead
14 in a contaminated home. It creates just an incredible
15 lead ---

16 THE COURT: Can you give me a citation to what he's
17 talking about in the transcript?

18 MR. GROSE: As far as?

19 THE COURT: Armon.

20 MR. GROSE: Armon's, Armon's blood level? We can get
21 that for you. I, I don't -- it would be during the --
22 probably during Dr. Cunningham's testimony, but we, we
23 will, we'll supply that for you, Your Honor.

24 THE COURT: I've got the transcript. I just wondered
25 if you knew where it is, and this whole thing about tearing

1 out the walls.

2 MR. GROSE: I'm sorry?

3 THE COURT: And the part about tearing out the walls.

4 MR. GROSE: That was ---

5 BY MR. GROSE:

6 Q. Well, where did you review that?

7 A. I think it was in the facts-of-the-case document.

8 Q. So, some of the background documents?

9 A. Yeah, background documents. Flood, F-L -- what was
10 his name?

11 MR. ZELENKA: The facts-of-the-case document? I'm not
12 familiar with a facts-of-the-case document.

13 WITNESS: Well, I mean, I can provide you with the
14 actual name.

15 THE COURT: The facts of the case are not ---

16 WITNESS: I think ---

17 THE COURT: The facts of the case are not evidence.

18 WITNESS: I, I, I reviewed what I was given, so.

19 THE COURT: I understand.

20 WITNESS: I don't know the exact status of it, but I
21 was...

22 (A PAUSE.)

23 WITNESS: So, in the ---

24 THE COURT: Just hold on.

25 WITNESS: Would you like me to find that now or?

1 MR. ZELENKA: Just a point of clarification, Your
2 Honor. I reviewed the materials I received Saturday.
3 These slides are not in those materials, slide number 44,
4 45, what I call 44 and 45.

5 MR. GROSE: There were -- there was two documents that
6 I think were faxed to you Saturday, and it was faxed with
7 you with also the information that it was going to be
8 probably updated over the weekend. And so we, we can get
9 what we sent you on Saturday if that's going to become an
10 issue.

11 THE COURT: That's not really the issue.

12 BY MR. GROSE:

13 Q. When you're, Doctor, when you're doing something like
14 this, do you rely on social history information?

15 A. Can you define social history information?

16 Q. Information that's been compiled from, well, records
17 or interviews from witnesses and, and that sort of thing.

18 A. Yes.

19 Q. And so that something that's reasonably relied on in
20 your field?

21 A. Yes. I have, I have to rely on the source, and I have
22 relied on, on your team as the source of the documents and,
23 and considered them to be truthful, and that's what I --
24 that's where I got it.

25 COURT REPORTER: Excuse me, Your Honor. I need the

1 witness and the attorney to keep their voices up, please.

2 MR. GROSE: Certainly.

3 BY MR. GROSE:

4 Q. All right, you can proceed.

5 A. So, so what I did is -- and, and, and didn't do it as
6 -- on a time scale that was as convenient as I would have
7 liked, and I apologize for not having the material together
8 sooner, but the -- I pulled together the information that
9 was available to me on, on Armon's blood lead levels, on
10 William's blood lead levels, on Cincinnati Cohort, and on
11 the documentation that I reviewed about the renovation done
12 to the home that William was living in at age two and a
13 half. And I formed my opinion of, of this: that there
14 would be -- that the estimate of his lead exposure during
15 early childhood was probably in between, conservatively in
16 between this 50% higher and, and the Armon curve. That is
17 my scientific opinion based on the evidence that I
18 reviewed.

19 Q. And of course William and Armon were living in the
20 same household, the same building?

21 A. I believe so.

22 Q. All right. You can go on.

23 A. So, this -- I did -- part of scientific reasoning is
24 to, is to check and make sure that if you come up with a, a
25 belief based on evidence, that it's not contradicted by

1 other evidence. So, I looked at a publication which you'll
2 see a little bit more of later. This, this is a map of
3 Charleston County that shows all the houses that were built
4 before 1950, and these are the black dots, and the white
5 dots represent all the locations where there were lead
6 poisoning cases of children. And this is for the period of
7 1991 to 1998, if I am reading that correctly.

8 MR. GROSE: If I could mark this as Applicant's
9 Exhibit Number 2?

10 (RESEARCH ARTICLE ON PUBLIC HEALTH MARKED AS
11 APPLICANT'S EXHIBIT NUMBER 2 FOR IDENTIFICATION.)

12 BY MR. GROSE:

13 Q. Now, Dr. Canfield, the slide that we're looking at has
14 -- it's, it's the Charleston study. The figure is figure
15 1, map of Charleston County, is -- do you recognize
16 Applicant's Exhibit Number 2?

17 A. Yes.

18 Q. And what is that?

19 A. This is a peer-review published research article from
20 *Public Health Reports* in 2003. The lead author is James
21 Roberts, and it's a use of geographical information
22 systems. That is satellite data, and correlating that
23 with, with ZIP code and, and residential address and then,
24 and then putting together the characteristics, various
25 characteristics of those addresses. And here the, the

1 characteristics are the age of the housing that is before
2 -- built before 1950 or after. You remember 1950 is
3 when lead began to be reduced in residential paint. And
4 then he, he included the examples of childhood lead
5 poisoning cases, and these are lead levels above 10, which
6 was what the standard was in 1998. Those are the white
7 dots. And so I've reviewed this as part of my preparation
8 for this.

9 Q. All right, and this, and this study was published in
10 2003?

11 A. Yes.

12 Q. All right. And, and figure 1 for a map of Charleston
13 County comes from this study. It's marked as Applicant's
14 Number 2?

15 A. Yes.

16 MR. GROSE: At this time, I'd move Applicant's Number
17 2 into evidence.

18 MR. ZELENKA: No objection.

19 THE COURT: Without objection.

20 (RESEARCH ARTICLE ON PUBLIC HEALTH MARKED INTO
21 EVIDENCE AS APPLICANT'S EXHIBIT NUMBER 2.)

22 BY MR. GROSE:

23 Q. All right and, and again the -- what are the white
24 dots?

25 A. The white dots are confirmed cases of childhood lead

1 poisoning at a particular address.

2 Q. Okay, and is, is this the -- does this correlate with
3 where William lived?

4 A. Well, I used Google Maps to find the, the 6 Bogard
5 Street address, Bogard, I guess, and so this is the --
6 where Google Maps placed that address and, and I looked. I
7 compare the two maps, and it's not easy to see here but
8 this location is, is here on the map. And that shows that
9 there are documented cases of childhood lead poisoning at
10 that location during 1991 to 1998.

11 Q. And you can go on, and what is that?

12 A. I used Google maps again to, to look at -- I wanted to
13 see if I could just get a look at what the house looked
14 like that he was living in. And this is the house that was
15 shown and I, I noted the deteriorated paint on the outside
16 today, and I -- and the general condition of the house.
17 And, and actually I, I believe there's a date on this photo
18 of, of when Google Maps -- sorry. I may have edited that
19 out there, but I can provide that information. It is
20 relatively recent within a few years of today.

21 So, when I put together all the information there
22 about what we know about how childhood lead levels changed
23 over time, what we know about William's blood level at age
24 twelve, what we know about Armon's blood lead levels from
25 age two to six, the information I reviewed about the, the

1 renovation of the home and tearing the walls out when
2 William was two and a half years old, and then looking at
3 the fact that there were confirmed cases of lead poisoning
4 at the address, and, and then the general condition of the
5 house, I didn't find any inconsistencies with my previous
6 conclusions that, that I think his lead levels were likely
7 to be somewhere between 50% of Cincinnati levels and
8 Armon's levels.

9 MR. ZELENKA: Again, Your Honor, for the record,
10 objection based upon the discovery issue.

11 THE COURT: All right. Your objection is noted. I'm
12 having a hard time following myself. I mean, it's been a
13 big jump with these last few slides.

14 Did he say the house was torn up when William was two
15 and a half years old or Armon was two and half years old?
16 Armon wasn't even born. Fair?

17 WITNESS: His exposure may have been from the results
18 of the contamination from the previous renovation. I, I
19 don't know, or another source.

20 THE COURT: Okay.

21 BY MR. GROSE:

22 Q. But you do know that, from the record, that Armon had
23 very highly elevated levels?

24 A. Yes.

25 Q. Okay.

1 A. His highest level at his first test was 70 micrograms
2 per deciliter.

3 Q. Okay.

4 A. I can average his through his first year. Measures
5 through first year came out to above 50, almost 60.

6 Q. All right and, and Armon was tracked for some period
7 of time because he had readings that were above 25. Is
8 that correct?

9 A. Yes.

10 Q. And, and, and when he had those readings that were
11 above 25, that was when the CDC had the standard of 25?

12 A. I believe so.

13 Q. And when William had his tracked, the standard still
14 hadn't even come down to 10?

15 A. That is correct.

16 Q. Okay. All right.

17 MR. GROSE: Judge, do you have other questions because
18 we can pause on this a little longer.

19 THE COURT: Move on.

20 MR. GROSE: Okay. All right.

21 BY MR. GROSE:

22 A. So, to review what I've done is to, is to build the
23 context for understanding what the 9 micrograms per
24 deciliter at age twelve means when you bring together the
25 evidence that's available in the scientific literature and

1 in the material I reviewed, and that's how I formed my
2 opinion.

3 So, I'm just going to talk now about some of the
4 health effects of lead, to talk about exposure, and just
5 generally about health effects.

6 But childhood lead poisoning has been around a long
7 time. Even Romans knew of plumbism in their lead in
8 adults. There were observations as early as 1904 in
9 Australia that the peeling paint in -- on houses was
10 causing lead poisoning in children. There were many
11 physicians' case reports beginning in the 1910s in the US,
12 and it was a study by Byers and Lord in 1943 that showed
13 there were lasting effects of lead. These -- this is the
14 information that was available, you know, during the time
15 when lead paint was -- when lead was still a very high
16 content in paint. It wasn't until we got to someone who
17 was studying the subclinical effects of lead -- that's Dr.
18 Herbert Needleman of Harvard in 1979 -- where we began to
19 understand that even though you can't, you can't see a
20 child being injured by lead because their stomach is upset
21 and they have brain swelling, et cetera, or they die that
22 you still have significant effects.

23 So, we're going to now talk about relating lead
24 exposure to child outcomes, and from that we're going to
25 take a lead measure and take a good look at blood lead, and

1 then we'll relate it to an outcome like an IQ score, okay,
2 and we'll see several ones.

3 It's important when we're doing this kind of work to
4 understand the scientific context that we're in. That is
5 when you're dealing with humans, we can't do a controlled
6 experiment where we dose some children with lead and not
7 others in a random fashion and then see what the outcomes
8 are. Unfortunately, the lead -- children have been exposed
9 to lead in a less-than-random fashion. They've still been
10 exposed, but when you can't do a randomized controlled
11 experiment, you look at these associations and then you
12 look to other factors that might also explain the
13 association. That's how -- the general approach of these
14 studies in humans. And, and I will say that the results
15 that I, that I present are consistent with animal
16 experimental studies in this same area.

17 So, I mentioned that this important study in 1979
18 looked at two blood levels of over 3000 first and second
19 graders in Boston, and so these -- remember the tooth lead
20 is a measure of long-term lead exposure and I'll -- and
21 there is some -- you know, there are different ways of
22 getting at dentine lead, but the results of this study are,
23 are important and they were impactful in policy changes.

24 He categorized them into high versus low-lead children
25 based on their tooth lead level and tested them for general

1 cognitive function, attention, classroom behavior. And the
2 question was is there an independent association between
3 lead and neurobehavioral function in children? And none of
4 these children were -- had been lead poisoned by medical
5 definition. They had never shown symptoms of lead
6 poisoning.

7 When he looked at the effects of the Wechsler
8 Intelligence Scale for Children Revised, which is, which is
9 the standard, gold standard IQ test at the time, the low-
10 lead children had a mean IQ of 106.6, and the high-lead
11 children had an IQ of 102.1, and so that difference of 4
12 and a half points was statistically significant. And I'll
13 say that that was an independent association. It was
14 controlled for a lot of factors, which I'll show you in a
15 moment. And then look at the verbal IQ here was, was --
16 significantly declined. Performance IQ was not quite
17 statistically significant.

18 He also looked at classroom behavior and found that
19 the high-lead children were more distractible, dependent,
20 impulsive, easily frustrated, and daydreamer, more likely
21 to be a daydreamer. The low-lead children rated as more
22 persistent, able to follow simple directions, able to
23 follow a sequence of directions.

24 Q. So, so, we're, we're actually seeing the effects of
25 lead manifested in the behavior of the children?

1 A. Yes. This is classroom behavior of children in first
2 and second grade.

3 Q. Okay.

4 A. So that I want you to focus on the, on the top row of
5 bars here. These are the different outcome measures that I
6 was talking about in terms of being distractible, not
7 persistent, daydreamer, et cetera, which is along the
8 bottom. The important thing I want to show here is these
9 bars are by categories of tooth lead level, and he's
10 divided them up into six different groups from low to high.
11 And the, the point here is that what he found across most
12 of these measures -- as you can see, they go from low lead
13 to high lead or -- yes. You get what's called a dose
14 response. That's as the exposure increases, the outcome
15 here increases. So, distractibility goes up; it goes up
16 from low to high. It's not the same for all of these, but
17 there is a dose response, and that's part of confirmatory
18 information that the, the, the ingredient or the toxin that
19 you're looking at is affecting -- the dose is important in
20 affecting the outcome, and that is as the dose goes up, the
21 outcome changes in a, in a predictable manner.

22 These are other studies that looked at blood lead, and
23 you can see they are much smaller samples and so -- they,
24 they didn't have 3000 children. There's more variability
25 here, but there's still a lot of evidence of dose response,

1 again not on all measures but most of them. And this is a
2 hair lead measure. I didn't speak about hair lead, and I
3 would be happy to just let that go by unless you want me
4 to.

5 Q. In all of these studies, particularly the tooth study
6 and the blood study, the tooth study was done in 1979 and
7 the blood study in 1984?

8 A. Yes.

9 Q. All right. So, obviously that was available before
10 William's jury trial?

11 A. Yes.

12 Q. All right.

13 A. And this is for the Needleman study that -- of the
14 3329 kids in Boston. In order to assure himself that there
15 was not some other aspect of the child's history or family
16 environment or other aspects of the environment that were
17 actually causing the relationship between tooth lead and
18 the behavior outcomes and the IQ outcomes, he controlled
19 those analyses. Took into account the child's age, sex,
20 weight, height, head circumference, race, birth weight,
21 birth order, family structure -- that is a single parent or
22 two parent -- number of hospital admissions, immunization
23 history, PICA history. PICA history is eating nonfood
24 items, and that could include lead. The number of
25 pregnancies in the mother, the mother's age at birth, her

1 education, occupation, the father's age at birth, father's
2 social class, father's education and occupation, parental
3 IQ, and parental attitudes and aspirations for the child,
4 and there were more. But it was a fairly exhaustive look
5 at trying to see if he could either predict the association
6 that he found between lead and outcomes based on some other
7 variable, or reduce the prediction to the point that it
8 didn't seem like lead was, you know, the main factor here.
9 And, and the results that I showed you are after this --
10 controlling for these other things.

11 Q. Okay.

12 A. Again, it was really based on the Needleman study that
13 we drop from 25 down to 10 micrograms per deciliter. That
14 was the main part of it. There were some early results
15 from some other studies, but I think it was the -- after
16 people had adjusted that with the rest of the literature,
17 it was changed from, drastically from 25 down to 10
18 micrograms per deciliter.

19 It also -- his results led to the initiation of these
20 prospective cohort studies. Most of them between 1986 and
21 1995 is when most of the publications came out. They were
22 recruited in the late '70s. There were seven studies on
23 three continents with 3000 infants and sometimes prenatal
24 measures, and many measures of possible confounders and
25 effect modifiers, and by that I mean these are control

1 variables that either would be alternative explanations for
2 the -- any associations between lead and the child behavior
3 outcome, or something that would change the magnitude of
4 that association and change the way we would interpret it.
5 And it looked primarily at cognitive outcomes and also some
6 behavioral outcomes.

7 And I -- just to say prospective cohort study is one
8 where you take the children beginning at birth or some of
9 them before birth or shortly after birth and follow the
10 same individuals over time. So, you can actually track
11 them and get the same measure on the same individuals so
12 you know what the blood lead value that you measure when
13 the child is age six months or two years is, the same
14 child. You're doing an IQ test on them when they're five
15 or six years of age.

16 The, the children, you know, differ with respect to
17 their toxic exposure, their diet, their disease, et cetera.
18 So, there's a lot of variation in the children, and the
19 goal is to determine how, to determine how the insults
20 affect rate or the level of an outcome. That is let's
21 just say the level of an IQ score. That's the, that's the
22 goal.

23 The -- I'll drop to the conclusion of, of these
24 studies. This was before the year 2000, and the general
25 conclusion was that as lead increased 10 micrograms per

1 deciliter, IQ decreased by one to two points. And I'll
2 show you, this shows you the IQ score of children that were
3 enrolled in those studies and the blood lead level of, of
4 those children. Concurrent means blood level -- lead level
5 at the age they were tested for IQ. And when you look
6 across the cohort, you see a lot of consistency, although
7 it's not perfect, of, of having lower blood lead level is
8 associated with a higher IQ, the higher blood lead level
9 with the lower IQ. That's -- in Mexico this was not
10 significant, but it was in Port Pirie, in Boston,
11 Cleveland, Cincinnati, and Yugoslavia. Rochester is there
12 for a future reference.

13 And let me back up for a minute. The Cleveland was
14 not statistically significant but the -- but besides Mexico
15 and Cleveland, the others were.

16 When we did our study in Rochester, the point here was
17 to look at the effects of low level lead exposure, okay?

18 Q. When you say low level, what ---

19 A. At the time we were doing the study, the level that --
20 of, of concern of an elevated blood lead level was 10
21 micrograms per deciliter. One of the limitations of almost
22 all of these studies is that you mostly have children with
23 high blood lead levels applied to these standards. That is
24 above 10 and 10, 30, or 40. So, they weren't really able
25 to estimate the, the effect of lead at low levels. The

1 Boston study had children that were quite low. Most of
2 them -- in fact, almost all of them were below 20. All of
3 them were below 20 and most of them were below 10. So, in
4 the Boston study, you can see something, but that's really
5 the only study we have. Some of these, the lines go below
6 10, but there's very, very few children that actually have
7 lead levels that were below 10.

8 So, again the, the general conclusion as -- from the
9 previous studies was lead goes from 10 to 30, IQ declines
10 by one to three points over that range, and the -- but
11 notice that it's 10 to 30 because there really wasn't any
12 information about lead levels below 10.

13 THE COURT: All right.

14 A. So, the, the Cornell Rochester ---

15 THE COURT: That's a good place to take a short break.

16 MR. GROSE: Fair enough.

17 THE COURT: Court reporter needs a break.

18 MR. GROSE: Fair enough. Thank you, Your Honor.

19 THE COURT: About ten minutes.

20 MR. ZELENKA: Thank you, Judge.

21 (OFF THE RECORD.)

22 THE COURT: All right, Mr. Grose, you may continue.

23 MR. GROSE: Thank you, Your Honor. May it please the
24 court?

25 BY MR. GROSE:

1 Q. Dr. Canfield, I think when we, we left off and took a
2 break, we were beginning to go into the Rochester study
3 that you performed where you were focusing on low-level
4 lead exposure.

5 A. Yes. So, I was describing the characteristics of the
6 children in the Rochester Cohort, and we recruited them
7 beginning -- they entered the study at six months, and we
8 followed them through six years of age. We did blood lead
9 tests repeatedly through this time, and we had an initial
10 sample size of 275 children. And so we measured lead, we
11 measured several aspects of cognitive function, as well as
12 these potential confounders and effect modifiers. Again
13 other variables that, that in a study of association, you
14 want to make sure you account for so that you don't
15 mistakenly attribute an effect to lead when it should be
16 attributed to another factor in the child's life or, or
17 physical, physical health factors.

18 Q. Now is it, is it pretty important stuff going on when
19 -- development of children up to six years of age?

20 A. Well, this is the time period when the child's
21 developing all the capacities: the cognitive capacities,
22 and the emotional capacities, and the self-regulatory
23 capacities. And by that I mean the ability to regulate
24 their behavior according to, to social norms that allows
25 them to enter school and be expected to sit in a seat and

1 listen to a teacher and follow instructions and, and
2 perform tasks independently and those kinds of things. So,
3 there's really a shift at about age six where we expect
4 many different things of children and required to be more
5 mature and, and they advance into this new realm of
6 society, whereas prior to that their, their -- the
7 expectations are less. And that's because their brains and
8 their behavior is not developed to the point where they
9 have those kinds of expectations. So, it's those critical
10 aspects of, of child development that are, that are
11 happening during this period of time.

12 So, these other contributors to IQ scores that we
13 looked at to make sure that we didn't mistakenly attribute
14 something to lead that might have been attributed to, say,
15 cigarette smoking during the prenatal period or alcohol and
16 drug use by the mother, or the mother's education or IQ, or
17 whether the child was in a single or two-parent home,
18 whether the mother was depressed, or whether she engaged in
19 harsh or insensitive parenting practices. These are all
20 kinds of documented factors that could affect the child's
21 development and that are well known. So, we wanted to make
22 sure that we measured and, and took account of those.

23 We also, you know, were cognizant of keeping track of
24 the child's age and recording what sex or gender they were,
25 their birth order, whether there were any birth

1 complications. So, were they low birth weight, or were
2 they premature, or were there other health complications at
3 birth which we know are associated with developmental
4 complications. Were they breastfed or not, did they --
5 were they iron sufficient. That is, what is their iron
6 status. Did they attend daycare, and what is their race or
7 ethnicity.

8 We looked at factors like crowding in the home. It's
9 known that crowding in the home is related to child's
10 outcome. We also had something called a home score, which
11 is a measure of the, the, the environment in the home and
12 how well it supports the child's cognitive development,
13 their cognitive and, and emotional development. So,
14 includes some, as we'll see, some factors on the -- how the
15 mom treats the child and also, you know, what kind of
16 materials are in the home to support child development. We
17 also looked at family income because that's an important
18 predictor of the child's outcome.

19 This home scale that I talked about is important. It
20 requires you to go into the home and, and observe for one
21 to two hours the -- what the, as best as possible, what's
22 the normal, you know, activities in the home during a day.
23 So, you look at a number of measures on a standardized
24 form, and we're trained to do these ratings like parental
25 responsivity, and mostly it's the parent or the mom. In

1 fact, all of our cases it was the mother. Does she respond
2 to the child with a verbal response, and there's
3 acceptance. Does she, you know, not shout at the child.
4 Organization, is the child's play environment safe, and
5 that includes cleanliness when there's a lead hazard. The
6 materials that are in the home: toys or literature and
7 music that the child can use for exploration. Is a parent
8 involved in the child. Do they monitor them, keep them in
9 visual range, look at them often. These are signs of, of
10 the parental involvement and care of the child, and then
11 variety. Does the child have meals once a day with the
12 mother and father. Also, does the child get out to other
13 families' houses regularly. So, that measure sort of gave
14 us a good idea of what the quality of the home environment
15 was for our children because that's one of the most
16 powerful predictors of their cognitive and behavioral
17 outcome.

18 For cognition we looked at the Stanford-Binet
19 Intelligence Scale, Fourth Edition, and we did tests of
20 vocabulary and comprehension. We did some abstract visual
21 reasoning that was called pattern analysis. It's commonly
22 called Block Design. We did quantitative reasoning, which
23 is simple number, and then we did short-term memory,
24 different memory for sentences and leave memory, different
25 memory tests. This is ---

1 Q. And Stanford-Binet is another type of IQ test
2 basically?

3 A. Yes. This is the -- one of the original IQ tests that
4 was developed for children and has been updated for many
5 decades. And it provides these scores on verbal reasoning,
6 abstract visual reasoning, quantitative, and short-term
7 memory, and you combine these to get an IQ score, which is
8 a summary of the child's functioning.

9 MR. ZELENKA: Your Honor, a point of clarification.
10 The particular test that's shown on 68, is that the
11 defendant's test on Stanford-Binet?

12 WITNESS: No.

13 MR. ZELENKA: Okay.

14 MR. GROSE: It's just an example.

15 WITNESS: Just an example, so.

16 MR. ZELENKA: Just clarification.

17 BY MR. GROSE:

18 A. This slide was to say that -- to show what the
19 children's characteristics were in our study. Generally
20 normal gestation length, gestation duration, normal birth
21 rate. We didn't have much iron deficiency, and the average
22 Stanford-Binet in our sample is 90. Mothers were about age
23 twenty-five on average, 30% tobacco users, only 28% were
24 married, 74% nonwhite. The income was average 16,000 in
25 1998 dollars. 60% had high school or more. The home

1 scales averaged about 28 out of 39, and the Stanford-Binet
2 IQ of the mothers' scales was about 82.

3 So, I wanted to just let you know again when we can't
4 do experiments, we have to be very careful with how we do
5 our studies. You have to be very careful with experiments
6 as well, but you have to take special precautions in non
7 experimental designs. So, one of them, as you know, was to
8 measure a lot of different things that might also predict
9 your outcome that, that you want to take account of so that
10 you don't make an improper inference.

11 The other is to, is to do an a priori analysis, and a
12 priori means before the fact, so that we made a decision
13 for our statistical model what it was going to be before we
14 looked at the data. It's important because there's a
15 saying among data analysts that if you torture your data
16 long enough, it will tell you whatever you want to hear.
17 Well, this didn't -- you know, we didn't do that. We did a
18 priori analyses. So, we included, based on our review of
19 the literature, these variables on sex, race, birth weight,
20 maternal IQ, income, home score, maternal education,
21 maternal smoking, and this transparent saturation as an
22 iron measure for, for our a priori model.

23 And the results are, are shown in this figure, and
24 this was what was published in the *New England Journal of*
25 *Medicine* in 2003 that what we see here are Stanford-Binet

1 IQ scores on vertical axis and the lifetime average blood
2 lead concentration on the horizontal axis, and these dots
3 are IQ test scores for the children. There are two for
4 each child or, or most of -- almost all the children had
5 two tests, but up to two tests per child, one at age three
6 and one at age, at age five here. And this line represents
7 the best fit relationship between, between lead exposure,
8 the increasing lead level, and the decreasing IQ.

9 And what we determined is that this was actually a
10 nonlinear relationship and one in which the, the slope of
11 that relationship is steeper at the lower lead levels.
12 That is you lose -- our children seem to lose IQ points
13 faster at lower lead levels as they increase from up to 10
14 micrograms per deciliter, and then it flattened out some.
15 We don't have much data in this range because it was a low
16 lead cohort, but it turned out that our, our curve in the
17 10 to 30 microgram per deciliter range was almost identical
18 to the results of the, of the overall analysis of all the
19 previous studies that had looked at children between 10 and
20 30.

21 Q. So, so, is it fair to say that, that a lot of that --
22 the result comes from the damage that's done between 0 and
23 10?

24 A. Yes. That's been the conclusion of the general
25 scientific community from these data.

1 Q. And so even if William's lead was never higher than
2 the 9, he's still in that category where he would have
3 gotten a lot of damage?

4 A. Yes. That's -- that would be my opinion.

5 Q. All right.

6 A. And so again to make sure that this wasn't the fluke
7 of one study, we, we pulled together all the studies that
8 were -- all but one of the longitudinal lead exposure
9 studies that had been done. The, the investigators for the
10 studies that I showed you from all around the world, from
11 Yugoslavia and, and Cincinnati and Boston, Mexico and
12 Australia, and not the Cleveland group, but everyone else
13 came together, and we pooled our data to check to see if
14 this was -- seemed to hold generally.

15 Well, first we looked at the Boston study -- I'm sorry
16 -- Boston study. They were encouraged to reanalyze their
17 data. What they did is that they looked at their
18 twenty-four month lead and they saw that for children with
19 lead levels that were below 10, that the slope was steeper.
20 That is, that IQ was lost more quickly at the lower levels
21 than at the, than at the -- than when they look at the full
22 sample.

23 Q. So that, that, that's essentially the same type of
24 thing that you found in the Rochester study?

25 A. Yes. Yes.

1 Q. All right.

2 A. And those are the only two studies with the majority
3 of their children at these low levels, but we pooled
4 together all the data from all of these cohorts. Now the
5 Rochester data are plotted here as well, and one of the
6 things that I -- well, let me just move to point out that
7 the -- so these lines, they're all, all straight lines
8 because previous to our study, people had only used linear
9 modeling, but the Rochester study fits quite well in this
10 low range with the Boston study.

11 When you put all of those studies together, these
12 straight lines are just slope estimates. The curved line
13 represents the data from over 3000 children all around the
14 world with lead levels, you know, from very low up to above
15 30 micrograms per deciliter. And it turns out that the,
16 the slope here, the slope is at that straight line below 10
17 again is steeper than the slope above 10. And so the --
18 again, this is some -- taken as confirmation of the, of the
19 Rochester study, the original findings as being evident in,
20 in the best data that we had available.

21 Q. All right. So, basically what they've done now is
22 they've gone back and applied, I guess, similar methods to
23 what you did and the results are, are similar with the data
24 that they already had?

25 A. Yes. This actually -- I'm a co-author on this study.

1 This includes Rochester data, and it's co-authored by the
2 investigators of all the other studies that contributed
3 data.

4 Q. Okay, and when did this study come out, the one we're
5 talking about now?

6 A. I will have to check my records.

7 Q. Okay. Fair enough. All right.

8 (A PAUSE.)

9 A. And so this is showing this graph of the decline of
10 the, you know, elevated blood lead standard, and we had
11 left it from 1991 all the way up to 20 -- this is -- I
12 meant that to look like 2012. I thought I had that there.
13 I think it's 2012 is when the -- when it dropped to 5
14 micrograms per deciliter.

15 Q. And what was the, you know, what was the decision in
16 2012 to drop it to 5? What was that based on?

17 A. It was based on the combination of findings from the
18 Rochester study and the pooled analysis from all the
19 childhood blood study. Those were the main driving forces
20 for this policy change. There was -- there were other data
21 that were consistent with it. There were no data that were
22 felt to be inconsistent with it, and that's what the
23 decision was based on.

24 Q. All right. Your Rochester study was published in what
25 year?

1 A. In 2003.

2 Q. 2003, okay. All right, and you can go on.

3 A. So, now the question is, is the damage that early lead
4 exposure causes that we've documented, is that reversible?
5 So, there was a major randomized intervention trial done
6 using chelation therapy, and chelation is a way of putting
7 a chemical, a drug into the child that binds the lead so
8 that they can excrete it, and it's a way of reducing heavy
9 metal toxicity. And in this study, enrolled children and
10 then -- that were high lead level, they had to be, I think,
11 at least 45, and then they were randomized to either get
12 chelation or not. And the idea was -- we're not sure
13 whether it helps, and the only way we can tell is to
14 randomly assign kids to either one and then follow them
15 over time.

16 So, this shows the initial lead levels of these kids,
17 and these are the averages, are above 25, and I, I -- that
18 conflicts with what my memory was. So, I would have to, to
19 check that. I thought they were higher than that. The,
20 the solid squiggle line here, the centerline is the average
21 blood lead level for the children who were given the
22 chelation therapy. So, they started out pretty much the
23 same. The -- when they got into the study, those that were
24 not given chelation, their lead levels declined like we've
25 seen so many times just as age goes on. This is over a

1 year.

2 The children that got the chelation, their lead levels
3 dropped abruptly and then it bounced back, and that's an
4 indication of the lead that's coming out of the tissues and
5 bones and back into the blood. So, as you clean up the
6 blood, then there -- it creates a gradient where the, the
7 lead that's stored in soft tissue and bone will come back
8 into the blood. The same sort of thing that happens during
9 pregnancy with women, that there will be a reactivation of,
10 of tissue lead. Then they gave them another chelation
11 trial and brought it down again, and then it crept back up.
12 So, you can see that by the end of the study, there wasn't
13 a lot of difference.

14 So, one of the, one of the conclusions from this study
15 is that you can -- sorry -- you can reduce the blood lead
16 level but it comes back. It gets reactivated in the body,
17 and it's not that easy to just keep the, the lead level
18 low. It would be nice if you could just give them the drug
19 once, but you'd have to do it multiple times in order to
20 keep it low.

21 The conclusions of this study were that the -- there
22 was no difference in the -- from the children who were
23 chelated and those that were not in terms of their
24 cognitive function at the end of the trial. So, they, they
25 measured them at the beginning of the trial, the end of the

1 trial. It did not appear that there was any improvement
2 due to the chelation treatment.

3 Now, whether this was due to the fact that they
4 continued to be re-exposed to lead as it got reactivated in
5 the blood, whether they didn't chelate enough times, we
6 don't know. But it does point out that this is not
7 something that is easily reversed once the child is
8 exposed.

9 So, there are another group of studies on lead and
10 behavior problems and, and some of these for younger
11 children deal with parent grading scales and older
12 children, deal with the delinquency, or even the commission
13 of crime. Examples of these parent rating scales, and this
14 is the Conners Rating Scale. This is -- I'll describe some
15 research that was done with the Rochester Cohort. That the
16 parent -- these are standardized ratings that are widely
17 used in research on the child's impulsivity and
18 hyperactivity, whether they're restless, excited, excitable
19 or impulsive, do they have a conduct problem in terms of
20 fighting, being destructive, do they have a learning
21 problem, do they have a psychosomatic problem in terms of
22 health issues, or anxiety problems through being shy or
23 fearful. And then there's a hyperactivity index which is
24 the sum of ten items, and most of these items have been
25 shown to be sensitive to methylphenidate drug, so they're

1 efficacious. So, they're used as a indicator of drug
2 efficacy.

3 We studied our children in Rochester at three ages,
4 six months -- each six months apart: forty-two,
5 forty-eight, and fifty-eight months of age. And I'm
6 comparing here the normative sample from -- that represents
7 the US population of children, and this shows for like --
8 for the different subscales. What the mean value is and
9 the clinical -- the percent of children who have clinically
10 significant elevated scores. And in the normative sample,
11 the hyperactivity index is about 2 1/2% are elevated. In
12 our sample, it was 35%. In the impulsive hyperactive the
13 -- it was 2 1/2%. These are all set because they are
14 normative sample; they're set to be the same. In our
15 sample, impulsive hyperactive was 21%. The conduct problem
16 was 40%, learning problem 30%, psychosomatic problem 36%.
17 Anxiety problem was only 1%.

18 Q. So, I, I guess what this is -- is this making a
19 correlation between the exposure to the lead toxicity and,
20 for example, hyperactivity?

21 A. Yes.

22 Q. And impulsivity?

23 A. Yes. Yes.

24 Q. And when you, when you start getting into conduct
25 problems and you start having -- or I guess hyperactivity

1 and impulsivity is an impact on behavior, but bad conduct
2 is also is something that you can correlate to that?

3 A. Yes and, and the form in which a conduct problem takes
4 shape is -- depends on the age of the child and the gender
5 of the child greatly. So, as children get older, the
6 conduct problem goes from being bad behavior or a tantrum
7 in a two-year-old to being something more serious when a
8 child is larger, has more independence, is stronger, and
9 can -- their lack of control over their conduct can cause
10 more problems.

11 Q. And, and gender, what impact does gender have?

12 A. Yes. I mean, males are high. These are normative
13 samples for both genders, but males are, there are
14 separate, separate clinical cutoffs for males and females
15 that apply, males being more susceptible to most of these
16 behavior disruptions, which is true for most health
17 conditions.

18 This is to show the lifetime average blood lead up to
19 three and half years, and as lead goes up -- this is on the
20 horizontal axis as lifetime average blood lead. On the
21 vertical axis here, this is the hyperactivity index at
22 three and a half years and that's cut off there, but you
23 can see the line represents the best fit. There's a lot of
24 scatter around the line, but this is a statistically
25 significant association that describes how increasing

1 lifetime average blood lead -- so, this is not just one
2 point in time but the average from six months through three
3 and a half years -- is associated with an increase in
4 hyperactivity index. We see similar at forty-eight months
5 and at fifty-four months at four and half years. It seems
6 fairly consistent across time; it wasn't just the one-shot
7 finding. So, so that's an example of the findings on, on
8 behavior, behavior, control and regulation measures. And
9 the models that we ran, the statistical models were
10 adjusted again for the full range of, of blood lead levels
11 that we have in the study.

12 And, and this shows for the, the different indexes.
13 This is the, the coefficient of what's the chance of them
14 being categorized as clinically significantly elevated on
15 these different scales, and it just is a summary showing
16 that it's statistically significant for a hyperactivity
17 index, for impulsivity, hyper -- impulsive hyperactive,
18 from, from conduct problem, learning problems, and
19 psychosomatic problems. Anxiety problems did not show an
20 effect of lead.

21 So, then I guess the last thing I want to talk about
22 is the long-term consequences of lead, and I want to go
23 back to looking at this, you know, the amount of lead
24 that's out there because it's, it's still there.

25 Q. And this is what we looked at earlier with the, the --

1 where we had the paint and the gasoline and we show the,
2 the trends over ---

3 A. Yes. This is the total amount in tons, in thousands
4 of tons of lead in white paint pigments from 1910 to 1990
5 and in leaded gasoline, the same slide that I showed
6 earlier.

7 Q. Okay.

8 A. And I show it because it relates to some work done by
9 Rick Nevin that's been published in a number of, of, of
10 good journals showing US violent crime rates and plotted it
11 against gasoline lead munitions. So, on the left of this,
12 on the left coordinate here, the left vertical axis is the
13 tons of gasoline lead per thousand of population. So, it's
14 taking that previous data and converting it into lead per
15 thousand population. And on the right, we have violent
16 crimes per 100,000 inhabitants, and then on the ordinate on
17 the horizontal axis are years ranging, and these are moving
18 averages from 1941 to '64, '44 to '67, all the way up to
19 1986 to 2009. So, it was a way of statistically averaging
20 over that in order to remove some of the noise.

21 Then what Nevin did is he, he looked at the gasoline
22 lead and the violent crime statistics, and then he
23 experimented with different lags to, to see if there is an
24 association between the amount of lead that was pushed out
25 into the atmosphere that people breathe and then very

1 efficiently absorbed and stored in their, in their blood
2 tissue and bones, whether there was an association with
3 the lead that was in the atmosphere and later crime
4 statistics.

5 And in the case of violent crime, he found that if you
6 -- that a twenty-three-year lag would -- well, that's
7 what's plotted here is in the red is the twenty-three-year
8 lagged violent crime statistics, and that -- and in the
9 blue is the lead in gasoline, moving average. And so this
10 was to show that in the past, it was the lead emissions is
11 associated with violent crime. And this is an
12 associational study, and it's not based on individual data,
13 but it's one method to use to begin to look at whether
14 there's an association here.

15 Q. And that pattern sure looks a lot the same.

16 A. Yes and, and that's, that's something that -- you
17 know, the question one would have about this is, well, is
18 this a chance that you just happen to have the same one and
19 if you adjust it enough, you get this magical matching.
20 So, these kinds of studies take a lot of scrutiny and, and
21 a lot of, a lot of extra work to, to, to evaluate. So,
22 that was the violent crime.

23 This is the aggravated assault twenty-three-year time
24 lag, and this is robbery and gasoline lead. This is --
25 robbery, interestingly, has a nineteen-year lag, and these

1 are the best fit lags.

2 But if we look here, this is the comparison of the
3 best fit lags with age brackets for violent offenders. So,
4 here we have the dependent variable that's the outcome of
5 murder 1960 to '98, murder 1900 to 1960, assault 1960 to
6 '98, rape '60 to '98, robbery '60 to '98, and then all
7 violent crimes. This is this best fit time lag, and that's
8 the -- where you take the two curves and you find what --
9 where does it match the best. And if we look here, this is
10 the age at time of arrest, arrest, and the mode is the most
11 frequent age at arrest.

12 And these were, these -- the various years had modes
13 of eighteen to twenty-three, and half the modes were within
14 the twenty-three to twenty-nine, half medians, half the --
15 sorry. Half of the values for each age were in the
16 twenty-three above or below, and the maximum was
17 twenty-nine above and below, and it depended on the years.
18 But if you look at the, at the age at the time of arrest
19 and the best fit lag, you can see that this is -- gives you
20 some consistency in the, you know, time for -- the time lag
21 between lead level, lead emissions on a year-by-year basis
22 and murder or assault or rape or robbery or all violent
23 crimes. So, these data were influential in getting people
24 to think seriously about this kind of an association.

25 And some other people did work. This is Stretski

1 [phonetic] in 2001, and one of the questions they asked is
2 is it lead, or could it be any kind of air pollutant. They
3 looked at a broad range of air pollutants and looked at
4 the, the estimate between the air lead concentrations and
5 homicide rates, you know, on a county-by-county basis in
6 1990. And they, what they found is that the only air
7 pollutant that was -- had a greater than chance association
8 with homicide rates across counties was air lead and not
9 toluene or benzene or ethylene or -- or cyanide came the
10 closest to being nonrandom. Trifluraflin and naphthalene
11 and ethyl benzene, none of those were significantly related
12 to these crime statistics but lead, in fact, was.

13 This was not true only in the US; it was also found in
14 New Zealand. This was a study of, of, of tooth lead,
15 dentine lead which is a tooth lead measure from a study a
16 long time ago in New Zealand. And then they looked at the
17 outcomes in terms of the mean number of violent or property
18 convictions ages fourteen to twenty-one here. And what
19 they found, this is the self-reported values and -- sorry,
20 these are, these are, these are the documented values in,
21 in this column and these are lead levels in teeth going 0
22 to 2, 3 to 5, 6 to 8, and these are the rates of increase
23 of, of these violent and property convictions. They tend
24 to go up with increasing tooth lead, and what we can see
25 here is that the probability estimate for that is .02. So,

1 you know, two times in 100 would you find that chance.

2 If you look at self-reported, these are the
3 self-reported violent property offenses, and you don't see
4 an association there, which makes the point that you
5 probably don't ask the criminals whether they are guilty.

6 So, again in the Cincinnati Cohort, if we look at that
7 -- because there's also data on the, on the crime
8 statistics of the children who were recruited way back in
9 1979 in the Cincinnati Cohort. And I'm just showing this
10 slide again showing how the blood lead levels from -- in
11 the different quartiles in the Cincinnati Cohort because
12 that's how they analyze the data on the crime statistics.

13 So, if we look at -- these are self-reported
14 delinquent behaviors, and we already know to be a little
15 bit leery of, of self-reported delinquency. It didn't seem
16 to work out too well in the New Zealand study.

17 In this study -- I'd like to read that. So, this is a
18 self-reported delinquent behavior score. It's a
19 standardized measure of, of self-reported delinquency. And
20 again these are the lead levels by quartile. So, the
21 lowest quartile, the low, the medium, and the high. And
22 what we can see, the different bars within a lead level
23 represent prenatal lead, average childhood lead, or
24 seventy-eight month lead. What we can see is that the
25 lowest lead level had the lowest self-reported delinquency.

1 There wasn't a significant difference between the lowest of
2 the low. For the average childhood lead at the medium
3 level you see an increase, and at the higher level you see
4 increase from the previous. So, the notion being that
5 there's -- seems again some association between the lead
6 exposure way back in childhood, and these are measures that
7 were taken during late adolescence and early adulthood.

8 These data followed those up where they actually, they
9 went into the arrest records of all the children in the, in
10 the Cincinnati Cohort study. And this, this on the
11 vertical axis is the arrest rate ratio for violent
12 offenses. And blood lead, the early childhood average
13 blood lead concentration is here in -- on the horizontal
14 axis. And what we see in the middle line is the, is the
15 estimate from those. We see it gradually increase in slope
16 that as the early childhood average blood lead
17 concentration increases, the arrest rate ratio increases as
18 well.

19 And these, these statistics took into account maternal
20 IQ, the child's sex, the socioeconomic status using a
21 Hollingshead score, and the maternal education level. When
22 they look, they considered a much larger range of possible
23 other factors, but these are the ones that seem to
24 influence the outcomes. So, these are adjusted for that.

25 Q. And so there's a correlation between the lead exposure

1 and the crime?

2 A. Yes, for the -- this is for the arrest rate for
3 violent offenses here. .

4 Q. And this was a study published in 2008?

5 A. Yes.

6 Q. Okay.

7 A. And the last thing we'll talk about is maybe the
8 source of this, and this will give us a sense of what might
9 be going on inside the brains of these children. And this
10 is also Cincinnati data.

11 Again, I focused on this mostly because, first, it
12 does have the most data of these studies, any of the
13 longitudinal studies, and they follow them for the longest.
14 But also, it's very similar to the -- in, in historical
15 time and in, in, in socioeconomic and, and housing status
16 to Charleston during that time.

17 What this shows is the regional brain volume loss
18 based on a magnetic resonance image -- imaging of the
19 Cincinnati lead study participants. So, they, they looked
20 at the volumes of different aspects of their brains, the
21 regions of their brains for volumetric. That is how, how
22 large is a different region, and this is the regional brain
23 volume for what they -- they defined the cluster, medial
24 frontal cluster. So, that's in the front of the brain and
25 on the inside of the brain where the front -- it's in the

1 frontal cortex. That's the area where they saw the most,
2 you know, profound difference in these children.

3 And what this shows, again there's a lot of variation
4 here, but the line shows the best guess, the best estimate
5 of the, of the true relationship -- which is that -- as, as
6 childhood lead level. And you see they stopped at 5
7 because they didn't have low-lead children. But as the
8 lead level increases, the volume here, this is -- shows the
9 coordinates 5, 40, and 13 of the, of the, of the region
10 where they were looking. That is -- indicates a decline in
11 the volume of that region. As you go up in lead, you go
12 down in volume for that particular region of the brain.

13 And just to show you what that region is, so this --
14 we're looking at the inside half of the left side of the
15 brain, and this is the inside medial frontal, and this is
16 the right side. And if you're looking at the brain from
17 the front, you can see this is the area where there was
18 loss. And this is from the side of the brain, and this is
19 from the right side, and this is the left side, and this is
20 from underneath. This side is the males in the, in the ---

21 Q. And when we're looking ---

22 A. --- Cincinnati study.

23 Q. And when we're looking at the exhibit, we're looking
24 at the left side for the men?

25 A. The left side is the data for the men. It says that

1 at the bottom of the slide, and the right side is for the
2 women, and there were very, very few differences in the
3 women. The lead did not seem to affect the brains of women
4 in the same way it affected the brains of men, and that was
5 a conclusion from that study.

6 So to end here, lead is a very dangerous neurotoxin,
7 and the exposure damages intellectual functioning,
8 behavior, emotional stability, and brain structure, and
9 function, and the damage is permanent as far as we know.

10 Q. All right.

11 MR. GROSE: Judge, I want to put a copy of the
12 powerpoint in the record. I know that you have it, and
13 I've, I've debated in other cases where it should be -- go
14 in as evidence or just as a demonstrative piece. What I
15 want is is if someone's reading his testimony later, they
16 can match it to the slides, and I...

17 THE COURT: State's position?

18 MR. ZELENKA: Well, if his position is that trial
19 counsel should have presented the powerpoint at the time of
20 the trial and that's what this is proffering, we couldn't
21 have an objection to that.

22 MR. GROSE: Basically they should have presented this
23 testimony, which would have included the demonstrative
24 aids.

25 MR. ZELENKA: But subject to our objection about the

1 -- what we consider a, a discovery issue related to the
2 fact you directly related information with this particular
3 defendant, which was not our understanding of his
4 testimony.

5 THE COURT: All right. Overruled. Go ahead.

6 MR. GROSE: And I'd introduce it as Applicant's
7 Exhibit Number 3. Thank you, Your Honor.

8 (COPY OF POWERPOINT PRESENTATION MARKED INTO EVIDENCE
9 AS APPLICANT'S EXHIBIT NUMBER 3.)

10 MR. GROSE: Your Honor, at this time we went tender
11 the witness to the state.

12 THE COURT: All right. Cross-examination.

13 MR. GROSE: Probably go back to your seat and, Doctor,
14 just in case they question you about the powerpoint, this
15 is the exhibit.

16 MR. ZELENKA: Subject to our objection.

17 THE COURT: Yes. You may proceed.

18 MR. ZELENKA: Thank you, Your Honor.

19 CROSS-EXAMINATION BY MR. ZELENKA:

20 Q. Subject to our objections, Dr. Canfield, when did you
21 prepare the slides direct -- directly related to Mr.
22 Dickenson's -- Dickerson's case?

23 A. When you say directly related, I'm, I'm not clear
24 about what you're asking.

25 Q. Okay. Let me show you the slide with the heading:

1 Average Blood Lead Levels in the Cincinnati Cohort WOD at
2 Age Twelve Years. That has the blood lead at eleven years,
3 nine months.

4 A. Yeah. Okay.

5 Q. When did you prepare that slide?

6 A. I think it was probably completed somewhere between
7 Saturday night of this week and, and may have been edited,
8 and I may have -- I was continuing to work on this up until
9 later last night.

10 Q. Okay. So, December 5th and December 6th is when you
11 prepared that slide?

12 A. Well, when I, when I actually did the powerpoint I was
13 working on the -- I mean, I'd done the conceptual analysis.
14 I've been working on that for several months.

15 Q. Okay.

16 A. And I knew what -- where I wanted to go, but I hadn't
17 the opportunity to prepare the powerpoint slide until quite
18 late ---

19 Q. Okay.

20 A. --- in the process.

21 Q. So, this slide would, would not have been able to been
22 provided to me when I was provided with the sixty-eight
23 page powerpoint on Saturday, correct?

24 A. Correct.

25 Q. Okay, and the average blood lead levels, which is the

1 next slide, the estimate blood lead profile of WOD, same
2 timeframe on that ---

3 A. Yes.

4 Q. --- slide?

5 A. I had done the conceptual analysis over a period of
6 months and, and prepared the actual slides late after,
7 after you, I guess, after you received them.

8 Q. Okay, after I didn't ---

9 A. So, I wasn't ---

10 Q. --- receive them?

11 A. --- after you -- I was -- I actually didn't -- not
12 understand that it, it was -- that, that the -- that this
13 wasn't -- I don't know the legal system.

14 Q. That's fine. I understand, and the same with the
15 blood levels of ARD and the estimate ---

16 A. Yes.

17 Q. --- for WOD?

18 A. Yes.

19 Q. Let's look at that slide, particularly where it's got
20 -- and I believe this one on my list, those slide
21 numbers...

22 MR. ZELENKA: Court's indulgence.

23 (A PAUSE.)

24 BY MR. ZELENKA:

25 Q. It's number 45 the way I count. And you created on

1 that a line of lead test values for the defendant's
2 brother, correct?

3 A. Yes. Those are average, yearly average to correspond
4 to the yearly averages in the Cincinnati data because he
5 had multiple lead tests each year.

6 Q. And do you recall when he had those lead tests?

7 A. I think they began at age two, and he had tests during
8 his second, third, fourth, and fifth years, I believe.

9 Q. Okay.

10 THE COURT: Mr. Zelenka.

11 MR. ZELENKA: Yes, sir.

12 THE COURT: Let's get this, for the record,
13 straightened out. That's the order in which they appeared
14 on the powerpoint according to ---

15 MR. ZELENKA: Okay.

16 THE COURT: --- my law clerk.

17 MR. ZELENKA: Make sure my numbers and your numbers
18 are the same.

19 (A PAUSE.)

20 MR. ZELENKA: Thank you, Judge.

21 BY MR. ZELENKA:

22 Q. And what I'm referring to as slide number 46, and that
23 would be the copy of the slide you have in front of you, I
24 believe. And where did you get the information of Armon's
25 blood levels?

1 A. It was in material that was provided to me by the
2 defense counsel or the...

3 Q. Okay, and did that include a January 7, 1993 -- 1983
4 test of Armon when he was two years old of a level of 48?

5 A. I'm not sure how to answer if I -- I'm afraid that I
6 don't remember the exact number. But it -- if I -- I felt
7 like at age two he had one of 70 and one in the 40s, but I
8 don't remember which dates are the exact ---

9 Q. Okay.

10 A. --- values but I could, I could provide that
11 information from the records.

12 Q. Can you get that quickly? Is it ---

13 A. It's on my computer.

14 Q. Okay.

15 (A PAUSE.)

16 A. So, 1983 is the year?

17 Q. Let's, let's start with November 16, 1982.

18 A. All right. So, this document shows -- is only saying
19 when he had the test done, so I have to look through the
20 various documents. I thought, I thought I knew exactly
21 what document, but I was incorrect here.

22 (A PAUSE.)

23 A. I may have been incorrect about how quickly I could
24 find this because these are not searchable documents
25 because they're scanned. So, I may have the correct one

1 here; I may not. I think there were maybe twelve or
2 fourteen documents that I got.

3 Here, yes. It is. So, the document says: MIT
4 outlines_lead exp_WOD.pdf. And this is where I got the
5 information, so.

6 Q. I was just ---

7 A. I think, I'm ---

8 Q. --- trying to figure out what these dots correlate to
9 and what your information is ---

10 A. Okay.

11 Q. --- on those dots ---

12 A. So.

13 Q. --- and the date the test was done.

14 A. Okay. So, the, the, the, the dots are related to
15 11/16/1982 blood lead testing of brother Armon, two years
16 old, blood lead 70. And then the next 11/23/1982 blood
17 lead level testing, brother Armon, three years old, lead
18 45.

19 Q. Okay that's ---

20 A. And ---

21 Q. --- one week later?

22 A. Uh-huh.

23 Q. Correct?

24 A. Yes.

25 Q. So, it drops from, within that particular time span

1 from 11/16/1982 to 11/23/1982, it drops from 70 to 45,
2 correct?

3 A. Yes. So, how many days is that? Did you...

4 Q. 16 and 23, that's one week later.

5 A. Yeah. Okay.

6 Q. And he's living at Bogard Street that time?

7 A. Uh-huh.

8 Q. Correct? And he's at the end of two years old, and he
9 just became three years old in that timeframe, correct?

10 A. Uh-huh.

11 Q. And his brother that same timeframe is six years old.

12 A. Yes.

13 Q. Correct?

14 A. That's what the document says.

15 Q. And you indicated that a primary time when infants or
16 children would be exposed to, to lead and, and have that
17 affect them is in that toddler stage, correct?

18 A. No. I, I noted that is a particularly relevant stage,
19 but the prenatal exposure through early infancy, the
20 research shows that, that there are adverse affects
21 throughout development.

22 Q. Okay, but their exposure -- they're acquiring, they're
23 eating, they're licking their fingers, they're crawling on
24 the floor ---

25 A. So.

1 Q. --- being exposed to the dust, that is a, that is a
2 factor during that time period that reduces as an
3 individual becomes older, correct?

4 A. Correct.

5 Q. Okay. When was the next test done?

6 A. January 7th of 1983.

7 Q. Okay, and at that time it was 48, and do you reflect
8 on your graph that it went up?

9 A. Well, I averaged the values to create closer to yearly
10 averages to be on the same scale as the way that they
11 reported the Cincinnati data. So, I didn't include the 70
12 value:

13 Q. That's not 70, your ---

14 A. No.

15 Q. --- first dot?

16 A. No. The scale, it's hard to see on that. That's --
17 is closer to 60 because I think that that averages 70 and
18 the 48.

19 Q. Okay, but then it goes up. You're not reporting that
20 it went up from 45 to 48?

21 A. Well, the 40 -- the, the next to -- the 48 and, and 33
22 are averaged. Well, I, I'll, I'll have to look back at my
23 notes, but the -- these represent the averages. Like at
24 age three, he got levels of, of 45, 48.

25 Wait. Oh, I see. These are -- yeah, these are not in

1 chronological order the way that the data are laid out, or
2 are because it says ---

3 Q. No, they're not. You see why I'm a little confused as
4 to ---

5 A. Well, yeah.

6 Q. --- the exposure timeframe?

7 A. Uh-huh. Yeah.

8 Q. And the manner of that exposure with that child would
9 be important, wouldn't it?

10 A. Yes, and so I see ---

11 Q. At that particular age based upon your testimony?

12 A. Right.

13 Q. And all that information you have, he wasn't always
14 living at Bogard Court, was Armon?

15 A. I don't -- I didn't note that because I don't, I don't
16 -- I wasn't sure what the source of exposure was.

17 Q. Okay. One of the factors that you talked about was
18 there was some work done on the Bogard house.

19 A. Yes. That was the only reference to renovation that I
20 found in the material that I was reviewing.

21 Q. Okay, and when did that renovation occur?

22 A. I can find the date of the statement from Mr. Flood.

23 Q. Then while you're looking, if you can testify while
24 you're looking?

25 A. I might be able to.

1 Q. . Would that be a factor to increase the possibility of
2 lead exposure or decrease the possibility of lead exposure
3 when they're working on the internal part of the house like
4 that, or the house?

5 A. Unless you use very meticulous methods, then it will
6 almost certainly increase the lead exposure risk.

7 Q. Okay. So for that timeframe, it would suggest higher
8 levels, correct?

9 A. Right.

10 Q. With the half-lives during that time?

11 A. I'm not sure what you mean by -- what, what your
12 reference to the half-lives is.

13 Q. Well, you said when you're exposed on one day and
14 let's say you got a 60. If you had no further lead
15 exposure, that test, your next test would decrease?

16 A. Yes.

17 Q. That's what I meant.

18 A. Yes.

19 (A PAUSE.)

20 A. I'm looking through a 108-page document that is not
21 searchable, so it might take me a moment to find the
22 statement that I based my testimony on.

23 Q. Okay.

24 (A PAUSE.)

25 A. So, this is 12/14/07. Dale Davis interviewed Jerome

1 Flood, Armon Rasheed Dickerson's father, and it continues
2 with the interview of Jerome Woodrow Flood. Should I read
3 that into the record?

4 Q. Well, when does it -- when did it declare the date of
5 the work was on the Bogard Street house?

6 A. So, it says that it, it was at the time that William's
7 mother met Woody Flood, Woody Flood at the College of
8 Charleston and says Flood was living west of the Ashley in
9 an apartment, and he described the conditions of he first
10 went, went to 6 Bogard Street. So, and he said after
11 seeing the conditions, he couldn't bear to think of it.
12 So, it was at the time that he met -- around the time that
13 he first met and developed a relationship with William's
14 mother. So, I would have -- cross reference that with when
15 they met, which is in the record.

16 Q. Okay.

17 A. So.

18 Q. Do you, do you have information when DHEC directed
19 that work be done on the Bogard Street address?

20 A. Can you say that again, please?

21 Q. Do you have information that -- in those materials
22 when DHEC, the Department of Health and Environmental
23 Control, made a directive that work be done on the Bogard
24 Street house, and that would be around January 21, 1983.

25 A. Well, I, I recall reading that there was a directive,

1 but I didn't read any description that anything had been
2 done.

3 Q. Okay, and in May 1983, work had not been completed on
4 that?

5 A. Right, that I -- I didn't know if any work had been
6 initiated or it -- there wasn't enough description to
7 confirm that anything had actually been initiated.

8 Q. And you didn't have any information that work was
9 about to start June 10, 1983?

10 A. I -- my -- I can, I can refer to the document, but my
11 -- to the best of my recollection, there were several times
12 that there were references that there was -- to the -- that
13 some work needed to be done and was, you know, expected to
14 be done and hadn't been done. But I never read -- I don't
15 have any recollection of reading a description of work
16 completed and lead tests being done to confirm that, that
17 it was a successful remediation.

18 Q. Okay. What were Armon's lead tests from January 1983
19 through March 1983?

20 A. They were 70, 45.

21 Q. Wait, wait, wait.

22 A. When you, when you ---

23 Q. January 1983 he had a 70?

24 A. Oh, no, that was November of 1982 it was 70. In
25 January of 1983 it was 48. Then it was 33. Then it was

1 44.

2 Q. When was it ---

3 A. It was ---

4 Q. --- 33?

5 A. Okay, do you want me to state the date and the number?

6 Q. Yes.

7 A. Okay. So, January 7, 1983, the value was 48. April
8 27, 1983, it was 33. August 8, 1983, it was 44. November
9 8, 1983, it was 42. And March 21, 1984, it was 37.

10 Q. Okay, and in that timeframe, the -- Mr. -- the
11 brother, Armon, was what age?

12 A. Well, I see the document has years stated, but I
13 believe I put the -- when I created the data file for his
14 values, I think I used the dates to create ages. But I
15 would have to go back and look at the computations ---

16 Q. Okay.

17 A. --- that I made, but ---

18 Q. But let's assume he's three years old if his birth
19 date was November 25, 1980, during that time period?

20 A. Yes.

21 Q. Okay.

22 A. So, he was three and a half by the end of the time.

23 Q. All right, and in that timeframe, the defendant in
24 this case was six to seven years old. Is that correct?

25 A. Yes?

1 Q. . Would have started school at that time?

2 A. Yes.

3 Q. Would not have been in the house during significant
4 period of the day, correct, at Bogard Street?

5 A. I don't know. What, what -- how do you define
6 significant period?

7 Q. During the school day.

8 A. So, for six hours he was not there and, and for the
9 remainder of the time he was likely in and around the
10 house. So, for ---

11 Q. Correct.

12 A. Okay. So, eighteen hours.

13 Q. Okay. Let's back up. When did this defendant move to
14 Bogard Street?

15 A. I would have to check my records. I think that's in
16 evidence. Is that something that you want me to, to find?

17 Q. Well, I mean, you're trying to extrapolate his
18 brother's lead levels, lead levels during a timeframe. Was
19 the defendant even living in that house during that time
20 period from age -- up to age three?

21 A. Was the defendant living in the house on ---

22 Q. In Bogard Street?

23 A. --- Bogard Street, yes.

24 Q. Yes.

25 A. When I did my calculations, I calculated that he was

1 two and a half years old, around two and a half years old
2 at the time that Flood developed a relationship with his
3 mother. And, and it was stated in the materials that I
4 reviewed that as soon as he came into the house when he
5 first started this relationship, that it motivated him to
6 tear the walls out and, and re-sheet rock it. So, so that,
7 and that ---

8 Q. Which child, Armon or ---

9 A. No.

10 Q. --- the defendant?

11 A. William, when William was two and a half.

12 Q. Okay. So, he wasn't living on Calhoun Street during
13 that time?

14 A. I'll need to check the records.

15 (A PAUSE.)

16 WITNESS: Can I make a note of the page numbers for
17 these documents so that I don't lose my place? I need to
18 get a piece of paper. Could someone give me a piece of --
19 thank you so much.

20 (A PAUSE.)

21 A. What I have in the same document that shows Armon's
22 blood lead levels on page 19 of that document in my file
23 says -- describes the stable years with Jerome Flood.
24 William about three years old, and it says when Jerome
25 Flood moved in, life was better for William, and Flood

1 fixed up the house. Then it says here that William was
2 about three years old.

3 I believe that I found a better, more precise date
4 than that. I had set it at 2.5 in -- was how I remembered
5 it, but I think about three years old is ---

6 Q. So, you're confident that house was Bogard Street?

7 A. Well, based on that says when Jerome Flood moved in,
8 and that was the -- how I understood the description of
9 when he started the relationship and, and began to live in
10 the house on Orrs Street. That that's when ---

11 Q. On Orrs Street?

12 A. Bogard Street is when he found it disgusting and, and
13 tore it up.

14 Q. Okay. When did he move to Orrs Street?

15 A. Who is he?

16 Q. The defendant.

17 A. The defendant?

18 (A PAUSE.)

19 A. According to this document, it says Orrs Court August
20 6, 1984. William seven years old.

21 Q. Okay, and what was his brother's blood level at that
22 time in January -- excuse me.

23 A. No.

24 Q. August 1984.

25 A. August 16, 1984, Armon blood lead was 48.

1 Q. Okay. When was the next test on Armon done?

2 A. It was in March 18th of 1985, and his blood lead level
3 was 30.

4 Q. Okay. When was the next one of Armon done?

5 A. It was on July 11th of 1985, and the level was 29.

6 Q. Okay, and the next one, and are these charted on the
7 graph?

8 A. I, again I averaged these by year because there were
9 multiple per year, and I wanted to plot them in the same
10 way that the Cincinnati data were plotted.

11 Q. Okay.

12 A. So, do you want me to continue reading?

13 Q. Yes.

14 A. Okay. November 2, 1985, the blood lead was 43.
15 January 15th of 1986, lead was 26. April 22, 1986, the
16 lead was 25. July 22, 1986, the lead was 25. And October
17 30, 1986, the lead was 33.

18 Q. Okay, and what blood level test was done on the
19 defendant during that same timeframe?

20 A. There's none that was done within the timeframe of
21 Armon's levels.

22 Q. Okay. So, we do not know what the defendant's lead
23 level was at all until he was age eleven. There's no
24 testing to show exactly what his blood level was, is there?

25 A. Based on the scientific evidence, there is no measured

1 value, but measured values are not the, the final word. We
2 make a lot of -- a lot of science is based on understanding
3 what a value at one time means in relation to a lawful
4 pattern.

5 Q. Okay. Do you have any testing of any prenatal blood
6 level that his mother had?

7 A. I do not.

8 Q. Okay. Would that be a factor?

9 A. It might, but we have evidence that he was exposed at
10 an unsafe level at the age of twelve. So, we know he was
11 exposed. So, the question about how much more was he
12 exposed is, is less clear.

13 Q. Okay, but your testimony was even based on half-lives.
14 That can dramatically change during the time period based
15 upon the individual exposure just by your, your testimony
16 concerning Armon, correct?

17 A. Correct.

18 Q. And that was at a level at an age range when he was
19 more likely to be exposed during that childhood time
20 period, correct?

21 A. Who is he?

22 Q. Armon.

23 A. Okay. Could you restate the question, please?

24 Q. Well, his levels changed dramatically during weeks and
25 months during the age range of two to three years old, two

1 to four years old when he was tested, correct?

2 A. All was very high but fluctuating in the very high
3 range.

4 Q. Okay, and when the defendant was tested when he was
5 age eleven after he was living in the Orrs Street, Orrs
6 Court place, he tested at 9, correct?

7 A. Correct.

8 Q. And in 1988, a level of 9 was one that, according to
9 the Center for Disease Control, did not indicate concern
10 for pediatrics. Is that correct?

11 A. Yes. They've recognized their error.

12 Q. But at that time, they would not have required any
13 follow up, correct?

14 A. I'm actually not sure whether having a sibling with an
15 extremely high level like that, a competent environmental
16 scientist would have investigated William's levels while
17 Armon was in the -- was, was showing such high levels. And
18 it's, it's difficult for me to understand how they allowed
19 a six year old, five year old, six year old to not be
20 tested when they knew that there were extremely high levels
21 in the younger sibling.

22 Q. Okay, but they didn't test him, according to the
23 information you have. Is that correct?

24 A. Correct.

25 Q. And the only test that was done was one that was done

1 in 1988, and the level that he was determined to have fell
2 below the minimum requirements under the Center for Disease
3 Control at that time?

4 A. Yes, at that time.

5 Q. Okay. In your testimony, you talked about there was
6 -- you, you've related a lot of this to IQ level, correct?

7 A. Correct.

8 Q. And when the defendant was tested at one point in
9 time, his full-scale IQ was a 90, correct?

10 A. Correct.

11 Q. And you testified that there are a number of factors
12 that can affect the IQ level of an individual, correct?

13 A. Correct.

14 Q. And even with a 90 IQ done on a single WAIS-R test, it
15 could fluctuate five up and five down, correct? So, that
16 90 could reflect an actual IQ of anywhere from 95 to 85?

17 A. Was this a WAIS or a WISC at age twelve?

18 Q. You tell me what your ---

19 A. I'm not testifying, I'm not testifying to his IQ.

20 Q. Okay. Then let, let's just go to factors. Is a
21 mother's prenatal care a factor seen with IQs based upon
22 your knowledge and expertise?

23 A. It can be.

24 Q. Okay, and the defendant, when he was born, was born
25 premature. Is that correct?

1 A. I did read that in the records.

2 Q. Yes. He weighed 3 pounds, some ounces, correct?

3 A. I think it was over 3 pounds.

4 Q. Okay, and that is something that can have an impact on
5 IQ level, correct?

6 A. It can.

7 Q. Okay, and you also indicated there were factors about
8 parenting that also can reflect an IQ factor, whether it's
9 a nurturing environment essentially, correct?

10 A. Correct.

11 Q. And didn't you have information that the defendant was
12 repeatedly beaten by his mother as he was a child compared
13 to Armon?

14 A. Similar to subjects in the Rochester study and in the
15 Cincinnati study, there was widespread parental harsh
16 treatment and lack of caring and poor prenatal care. This
17 is very common and it's the sort of, sort of life history
18 that unfortunately we saw in our studies and ---

19 Q. But, but some individuals in that study even had IQs
20 of 120, correct?

21 A. Yes. Not necessarily the ones that were treated
22 harshly.

23 Q. Well, it's difficult to differentiate that because ---

24 A. I could look in the data and I could give you an
25 answer.

1 Q. Okay. Well, we know this defendant had a difficult
2 upbringing. Was beaten by his mother, correct?

3 A. I did read, I did read that. I didn't -- the extent
4 was not entirely clear, but it sounded pretty -- quite
5 problematic.

6 Q. Okay. Another factor was his father wasn't involved
7 with his development at all, was he?

8 A. I know he was away and in prison most of the time.

9 Q. Okay, and what type of environment did he have with
10 his father as he was growing up as a child?

11 A. I, I don't know. I don't, I don't remember reading
12 that he had much contact with him growing up, but it didn't
13 mention whether there were -- I don't recall reading about
14 visits or...

15 Q. Okay. You also had information that while his mother
16 was pregnant with the defendant, the father had kicked the
17 mother, correct?

18 A. Yes.

19 Q. That could have an effect, couldn't it?

20 A. It could.

21 Q. All right. What affect would drug use, illicit drug
22 use have on IQ, if anything?

23 A. By whom? When? Mother? Child? Age?

24 Q. Well, let's talk about the defendant. At the time of
25 this particular crime, the theory in the case was he was

1 suffering under cocaine psychosis, correct?

2 A. I've only heard of that. I haven't read a clinical
3 opinion or an analysis that -- a scientific analysis of
4 that.

5 Q. Okay. Are you aware of information that he was using
6 drugs in his youth?

7 A. Yes.

8 Q. And what information did you have, the type of drugs
9 that this defendant was using in his youth?

10 A. I read that there was marijuana and cocaine. I think
11 those are the, the...

12 Q. And at some point heroin?

13 A. I can't recall whether that was an arrest or a
14 possession or whether it was actual use.

15 Q. But you're aware of the cocaine? You're aware of the
16 - marijuana?

17 A. Uh-huh.

18 Q. What about alcohol? Was there any use of alcohol
19 reflected in any of the records that you saw in making your
20 assessment as to one of those factors that can play into a
21 person's IQ level?

22 A. So, are you -- so, what age is it that we're -- what
23 age is the drug use and what age is the IQ score that we're
24 talking about?

25 Q. You tell me what age you relied upon in making your

1 sorts of assessment about this defendant.

2 A. I wasn't -- I have not testified to his IQ.

3 Q. Okay. You testified to factors that may be involved
4 with this defendant.

5 A. Yes.

6 Q. And you said that those factors could affect his IQ.

7 A. Yes.

8 Q. And I'm asking you. What factors did you see in your
9 preparation for your testimony here today that would
10 include factors which could impact upon his IQ,
11 particularly related to drug and alcohol use at this point?

12 A. I'll have to look and see. The age at which the IQ
13 test was taken, I believe, was prior to any indication of
14 any drug and alcohol use. That's my recollection.

15 Q. Okay. Would this be the, the IQ test that was done on
16 June 26, 1990, full scale IQ of 90, verbal of 96,
17 performance IQ ---

18 A. Was that at the Hall facility?

19 Q. Yes, the Tara Hall.

20 A. Yes. That's the, that's the one I recall.

21 Q. Okay.

22 A. And what?

23 Q. And what was his status on drugs at that time?

24 A. I, I recall reading that he denied using drugs and
25 alcohol close to that time. I -- my recollection is that

1 it was after he left that school that the reports became
2 much more troubling in terms of his behavior.

3 Q. Okay. So, if, in fact, he received a lower IQ test
4 subsequently, it could have been impacted by drug use,
5 alcohol use, the impact it has on brain cells?

6 A. So, between 1990 and when?

7 Q. Today.

8 A. And today?

9 Q. Yes.

10 A. I mean, it's, it's, it's less likely that drug use
11 during adolescence is going to impact IQ the way that early
12 insults will because the child is more fully developed.
13 And as I said, there's the, the most risk for lead and for
14 most factors affecting development is early in life. And
15 so his drug and alcohol use, I think, was later in life and
16 less likely to impact his, you know -- or influence a
17 change in IQ. It would depend on the individual and the,
18 and the degree of drug use.

19 Q. Are you aware of a study that was done by Karen
20 Kohler, Terry Brown, Ann Spurgeon, and Lynn Levy concerning
21 recent developments in low-level lead exposure and
22 impairment in children?

23 A. I -- it doesn't sound familiar.

24 Q. Okay. Would you disagree with the concept ---

25 MR. GROSE: Your Honor, I'm going to object if he's

1 not aware of the study.

2 THE COURT: Overruled. He asked if he would disagree
3 with a concept.

4 BY MR. ZELENKA:

5 Q. Which you disagree with the concept of -- that:

6 From a public health perspective, exposure to
7 lead should be seen within the many other risk
8 factors impacting on normal childhood
9 development. In particular, in particular the
10 influence of the learning environment itself, and
11 that current lead exposure accounts for a very
12 small amount of variance in cognitive ability
13 where social and parenting factors account for
14 40% or more.

15 A. What is the question?

16 Q. Would you disagree with that concept?

17 A. With the concept?

18 Q. Yes.

19 A. You presenting it as a fact?

20 Q. That cognitive ability is drawn by parenting and those
21 factors more so than the exposure to lead?

22 A. I would agree to that, but it does not mean that lead
23 doesn't have independent influence above and beyond. And
24 that all the studies that I referenced have taken into
25 account parenting factors and early, other early

1 experiences in health to show that there is an additional
2 affect due to lead exposure. So, it has an independent
3 affect.

4 Q. It's a factor but it's not a fingerprint.

5 A. I'm not sure what you mean.

6 Q. Okay. It's not a guarantee, lead exposure, that
7 you're going to have decreased cognitive abilities.

8 A. Just like with decreased parenting quality, that's not
9 a guarantee or a fingerprint either. I mean, human
10 development is much more complex than that. That's why we
11 do the studies that take into account in every study as
12 many of these different factors as we can and try and
13 isolate the, the impact of, of various influences.

14 Q. Certainly. Certainly. In your study on violence that
15 you presented previously ---

16 A. Which one?

17 Q. Well, the study of the affect of gasoline lead and
18 violence with homicide, robberies, and the like and trying
19 to equate similar factors to those. There are many
20 variables that could go into that also. Is that not also
21 true?

22 A. Yes. That is correct.

23 Q. Access to guns, community development, various factors
24 that could play? Poverty levels?

25 A. Those were, were controlled for in that study in terms

1 of neighborhood and proportion of, and racial composition
2 of neighborhoods, and I would need to look back for the --
3 at the list but again the, the -- to the extent possible
4 what we -- I -- and that was Dr. Nevin's, Dr. Rick Nevin's
5 study.

6 What we try and do is not, not draw a conclusion that
7 has not already been tested for, you know, hasn't been
8 tested for as many of these other factors as we can in
9 order to make sure that we're not misattributing.

10 Q. Okay. You're not asserting that the defendant's role
11 in this particular crime was caused by his exposure to
12 lead, are you?

13 A. I'm, I'm not sure that I am. No. I wasn't testifying
14 to that.

15 Q. Okay.

16 A. I was testifying to the breadth of scientific
17 knowledge we have about the effects of lead and some of the
18 unique aspects of lead being linked to criminal and, and
19 antisocial behavior and how his history fits into that with
20 respect to lead exposure, which is my expertise.

21 Q. Okay, and you're not testifying the defendant's level
22 of lead exposure at the same particular age that his
23 brother was was the same, are you?

24 A. No. I was estimating, based on the best information I
25 could bring together, a range of possible exposures for him

1 early, and my scientific opinion is that the -- above the
2 Cincinnati Cohort average and probably below Armon's
3 average, but I don't -- that's just an estimate.

4 Q. Did you suggest that any testing be done on Mr.
5 Dickerson in preparation for your testimony?

6 A. No.

7 Q. Do you have any interest in knowing what his current
8 blood level is?

9 A. It -- I, I don't feel like it's, like it's -- the
10 timeframe, it's, it's been so long and we have very little
11 data on blood lead up to his age from childhood to, to do a
12 -- any kind of reasonable extrapolation. It would probably
13 require a bone lead measure, and I don't believe we have
14 data that would allow us to take bone lead measures at his
15 age, at his present age and correlate that with blood lead
16 measures during childhood.

17 Plus the fact that it's a twenty-five year half-life
18 we're, we're -- there's just too many uncertainties, I
19 felt, to make it worthwhile to get either a blood or a bone
20 measure.

21 Q. Okay. In your testimony you talked -- or I got the
22 sense that the impression you were trying to give this
23 court and potentially a jury, if there was a trial, that
24 the lead exposure that an individual has increases
25 hyperactivity, impulsivity, which could relate to some

1 conduct disorders. Is that a fair statement?

2 A. It would need to be -- these are, these are defined
3 clinical categories that, that do not allow one to say that
4 the impulsivity and the hyperactivity and the conduct
5 disorder are, are all, you know, the same or similar. So,
6 I wouldn't necessarily relate them because they are, you
7 know, they are, they are different categories. So, you
8 could be hyperactive and impulsive but not have conduct
9 disorder, for example. But if they, if they do, they are
10 comorbid. That is that children often have a combination
11 of, of symptoms.

12 Q. Okay. You suggested on one of your slides that the
13 effective lead exposure has an affect on the frontal cortex
14 of the brain, correct?

15 A. Correct.

16 Q. And, and what generally you're saying is the functions
17 of the frontal cortex of the brain?

18 A. Well, they're involved in what's called executive
19 functions that are -- with the analogy to an executive who
20 is in control of an organization so that the executive in
21 the brain controls memory and attention and assembles those
22 different lower-level cognitive abilities to do complex
23 tasks like solve problems, set goals, regulate behavior
24 within the context of social norms, and to sort of
25 negotiate between emotion and cognition so that, so that

1 behavior is effective and goal oriented. So, that's,
2 that's a general description.

3 Q. Okay, and were you aware that while he was at Tara
4 Hall under that environment, it was reported that the
5 defendant flourished? Was a very acceptable person,
6 followed a social norms. Are you aware of that during that
7 two-year timeframe when he was the in sixth and seventh
8 grade, critical time periods in an individual's life?

9 A. What do you mean by critical time periods?

10 Q. Well, sixth grade, seventh grade are usually
11 considered fairly critical time periods because you're
12 evolving in puberty. Is that not a fair statement?

13 A. Okay. I just wanted to understand what you were ---

14 Q. Okay.

15 A. --- what you were referring to.

16 Q. Very lay terms are coming from me.

17 A. Yes. That's ---

18 Q. Please understand.

19 A. Okay. So, I recall reading two things. One is that
20 he, that he was -- his behavior was good at, at Hall and
21 shortly thereafter there was a -- I think he came back in
22 for another evaluation and he was categorized as, as
23 impulsive and, and seemed much more disturbed at that time.

24 Q. Okay.

25 A. But, but during the time that he was at Hall, he had

1 good records and good observations.

2 Q. Are you aware that evidence was presented at trial to
3 suggest despite the levels, the purported level of lead
4 poisoning, that the defendant would, would act very well in
5 a structured environment, would not be violent to himself
6 and others?

7 A. I, I was aware that he had good reports at -- when he
8 was at the school, at Hall, and so that's what I recall.

9 Q. Okay. So, you're not aware of evidence, information
10 presented that, that he could be adaptable in prison, not
11 violent to himself and others?

12 A. What I, what I recall is that I sensed there were
13 periods when he was in a more structured environment. That
14 his -- that he was -- that his behavior was well regulated.
15 But it seems like it fluctuated, like it would -- like, go
16 from being docile, well-functioning child to being
17 completely out of control over -- I think it was a very
18 short period of time when he was sent back to live with his
19 mother.

20 And then my memory is of the, of the prison
21 environment is, is some disruptive behavior and, and -- but
22 I would have to, I would have to look back through the
23 testimony that I read in order to recall. I didn't focus
24 as much on his adult life; it was more on the childhood.

25 Q. Okay. Well, he had a history of violence. There's no

1 doubt about that. Isn't that the truth?

2 A. I'm not sure what, what particular -- what in
3 particular you're referring to.

4 Q. You're not aware of his criminal history?

5 A. I am but I didn't, I didn't, I didn't feel like -- I
6 didn't know what, what you were referring to. So, I was
7 hesitant to agree.

8 Q. Okay. Well, what information did you have about the
9 defendant's history of violence?

10 A. I saw a number of episodes that showed a relatively
11 high level of violence at certain times, these times when
12 it sounded -- I got the, the impression that he was on the
13 street running with a pretty dangerous crowd and was
14 participating in the kinds of activities that would be
15 considered violent.

16 Q. Okay, and does the fact of running with the crowd, if
17 individuals within that crowd are leaders, could that lead
18 him to violence, depending upon the crowd he's hanging out
19 with? Isn't that a sign of the environment?

20 A. I'm, I'm not sure. Can you rephrase that?

21 Q. Well, he's not acting alone when he's in with a crowd,
22 is he?

23 A. I don't -- I have no knowledge of what -- the social
24 dynamics of the crowd he was running with.

25 Q. There may be peer pressure by him as a leader or by

1 him as a follower to be involved in criminal conduct,
2 correct?

3 A. There might be.

4 Q. All right, and that's independent of any lead
5 exposure. It's dependent ---

6 A. I wouldn't ---

7 Q. --- upon the crowd he's hanging around ---

8 A. I wouldn't ---

9 Q. --- at that particular ---

10 A. I wouldn't say that. I don't -- my scientific opinion
11 is that, that the lead exposure is an important contributor
12 to the child's ability to recognize the consequences of
13 their actions, to think about long-term goals, and to
14 regulate themselves in a way that isn't destructive but --
15 and so lead exposure, as well as parental abuse, as well as
16 health problems, and prenatal status, those all function
17 together to help determine whether a child will engage in
18 certain behaviors.

19 Q. Okay.

20 A. It's highly complex, and so I just wouldn't say that
21 it's independent of lead exposure. My belief is that it is
22 not.

23 Q. Okay, but at the time he committed these crimes, he
24 wasn't a child, was he?

25 A. No, but he had the permanent brain damage from lead

1 exposure that made him a different kind of, well, older
2 child or young adult.

3 Q. Okay, yet people at Tara Hall thought that he was a
4 much different individual. They didn't perceive him as
5 being, in their exposure to him, as a violent individual.
6 They were concerned about once he got out of their
7 environment, that his home environment was something that
8 would negatively act upon this defendant and recommended
9 that he be placed somewhere else, correct?

10 A. I think there were several, several statements there,
11 and I'm not -- I -- would you like me to say what my view
12 is, the way I think of it as ---

13 Q. No. What was your understanding of the recommendation
14 that Tara Hall had after he was -- completed his time
15 there?

16 A. My understanding is that the recommendation was that
17 he not be placed back with his mother.

18 Q. Okay.

19 A. And I think the thing that struck me was the, the
20 movement from depression and suicidal ideation and, and
21 vocalizing suicidal intentions. That when he went into,
22 into the school, he, he was depressed and subdued. But
23 then when he came out, he seemed to change almost overnight
24 into, you know, being out on the streets and, and being a
25 completely different kind of person. So, that kind of a

1 wild fluctuation struck me as something akin to a, a, a
2 bipolar kind of -- what you often see with bipolar
3 patients, but I don't know if that was involved. There's
4 been no diagnosis.

5 Q. How were his grades at Tara Hall? Do you know?

6 A. I, I -- they, they were not bad. I think they were
7 average to above average. I could, I could be incorrect
8 about that. That's my recollection.

9 Q. All right.

10 MR. ZELENKA: Thank you very much. Appreciate it,
11 Doctor.

12 THE COURT: Redirect?

13 MR. GROSE: Yes and, Judge, it should probably be very
14 short if you're thinking about a lunch break or anything.

15 DIRECT EXAMINATION BY MR. GROSE:

16 Q. You made a comment on cross-examination, Dr. Canfield,
17 about brain damage being permanent.

18 A. Yes.

19 Q. All right, and which part of the brain or -- does lead
20 affect when it damages the brain?

21 A. There are -- it's likely that lead affects many, many
22 aspects of the brain. The most -- our best evidence for
23 the most severe damage is based on the Cincinnati study
24 that I reviewed in my testimony, which is areas in the
25 medial frontal cortex and anterior cingulate cortex.

1 Q. And what parts of the brain, what, what part -- what
2 do those parts of the brain regulate for us?

3 A. Well, they, they, again, they regulate -- they're
4 involved in executive functions and in regulating emotion
5 and cognition. So, decision-making and, and some
6 risk-taking, planning and goal setting and problem solving,
7 and being able to envision the consequences of your
8 actions. Those kinds of, those kinds of cognitive
9 operations are -- a large responsibility for those
10 operations are assigned to the frontal lobes and medial and
11 anterior cingulate.

12 Q. Okay, and what, what does an individual with deficits
13 in those parts of the brain, what affect does the
14 structured environment have on them?

15 A. It provides them with sort of an external executive.
16 They don't need to be responsible for organizing their own
17 behavior, but rather their, their, their lives are being
18 organized for them. So, it can provide them with the
19 support they need to, you know, to be relatively successful
20 and to, and to keep their behavior under control.

21 Q. So, these -- sort of this external executive helps
22 with some of the decision and the planning and reducing
23 impulsivity that they're not able to do themselves?

24 A. I would agree with that.

25 Q. Okay. Now, there were some questions about Armon's

1 blood levels, and I'm not going to go back through all of
2 those again but ---

3 A. Thank you.

4 Q. They started somewhere around 1983, I guess, and went
5 through 1986?

6 A. 1982 is the first one I have.

7 Q. Okay.

8 A. And 1986 is the last one.

9 Q. All right, and so the blood result that we had in
10 Applicant's Exhibit Number 1 for William was not until
11 1988?

12 A. Correct.

13 Q. All right. So, you've got Armon -- and every one of
14 Armon's levels was, was dangerously high?

15 A. He had two readings of 25.

16 Q. Okay.

17 A. And that's, certainly by today's standards that's
18 considered very dangerous, and it was considered borderline
19 at the time.

20 Q. All right, and I believe you made a comment, and I
21 don't remember exactly what you said, but about an
22 environmental control not checking William in this period
23 from '82 to '86 when Armon had these high levels. Is
24 that ---

25 A. Yes. I saw no evidence that there was any

1 acknowledgment that there was another young child in the
2 house, who any environmental technician would know is
3 likely to be exposed at a -- at an unacceptably high level
4 as well, especially with the very, very high levels of
5 Armon.

6 Q. And that's important because they, they, they would
7 talk about half-lives on cross. If, if, if somebody had --
8 if I had a high exposure today and it got into my blood and
9 then I wasn't exposed, that half-life, it would be gone in
10 a couple of weeks?

11 A. Well.

12 Q. From the blood.

13 A. It would have -- you would have half as much lead in
14 your blood in about twenty-five days.

15 Q. Okay, and so -- but what we're seeing here from '83 --
16 or '82 to '86 with Armon at various data points is evidence
17 of a constant exposure?

18 A. That was my interpretation because they are taken
19 quite frequently and they do fluctuate, but they're very
20 high and they are consistent in my mind with, you know, an
21 exposure that was closer to the blood lead reading one --
22 on one test and farther away from another.

23 There is also potentially evidence of some
24 seasonality. There are seasonal fluctuations in lead,
25 depending on how much time the kids are spending inside the

1 house versus outside the house. So, one could do a
2 seasonal adjustment for these and kind of get a seasonally
3 adjusted value, and then they would look less variable.

4 Q. And one of the things I'm getting at is, is this is
5 pretty compelling evidence that Armon was exposed to it
6 over a very long period of time?

7 A. It would be almost impossible for me to believe that
8 there was not a high level of constant exposure to lead in
9 that house by Armon.

10 Q. And so during the period of time between '82 and 1986
11 when William was not tested, basically the authorities in
12 South Carolina kind of let William down, didn't they?

13 A. I ---

14 MR. ZELENKA: Object. Calls for speculation.

15 THE COURT: All right. I agree.

16 BY MR. GROSE:

17 Q. Should William have been tested during the period
18 between '82 and '86?

19 A. Absolutely.

20 Q. Okay.

21 MR. GROSE: That's all I have, Your Honor.

22 THE COURT: All right. You may come down. Thank you
23 very much.

24 WITNESS: Thank you.

25 (THE WITNESS EXITS THE STAND.)

1 THE COURT: May this witness be excused, or will he be
2 subject to recall?

3 MR. GROSE: Well, as a practical matter, I drove him
4 here from the hotel this morning. He does not have a car,
5 and his flight is not until tomorrow.

6 THE COURT: Well, as far as ---

7 MR. GROSE: So, so he is not ---

8 THE COURT: As far as the court is concerned, he can
9 be excused.

10 MR. GROSE: Right. Okay.

11 THE COURT: All right, and just to protect the state,
12 that he ---

13 MR. GROSE: I understand.

14 THE COURT: --- would not be recalled.

15 All right, let's take a lunch break at this time.
16 Let's be back at 2:45. That will give you almost an hour
17 for lunch, and the applicant needs to get something to eat,
18 too.

19 (OFF THE RECORD.)

20 THE COURT: Mr. Grose, you may proceed.

21 MR. GROSE: Yes, sir, Your Honor. We would call Dr.
22 Marlyne Israelian.

23 MARLYNE K. ISRAELIAN, BEING DULY
24 SWORN, TESTIFIES AS FOLLOWS:

25 THE COURT: Please be seated. State your full name

1 for the record.

2 WITNESS: My name is Marlyne Israeliian.

3 VOIR DIRE EXAMINATION BY MR. GROSE:

4 Q. And, Dr. Israeliian, how are you employed? What is
5 your profession, in other words?

6 A. I'm a clinical psychologist who specializes in
7 developmental neuropsychology. I am in private practice.

8 COURT REPORTER: Speak up, please.

9 MR. GROSE: You need to speak up a little bit for her.

10 WITNESS: What part did you miss?

11 COURT REPORTER: Just from this point on.

12 WITNESS: All right.

13 BY MR. GROSE:

14 Q. All right, is that microphone working? I'm not sure
15 I'm hearing it.

16 A. Yes.

17 Q. All right. Now, you're in private practice. Do you
18 also teach some, too?

19 A. I do. I teach at Emory University. I help prepare
20 the graduate students; I help train them both in
21 psychotherapy and in psychological assessment. I'm also
22 part of the Pine River Psychotherapy Training Institute,
23 where we participate and provide continuing education for
24 advanced level therapists in the Atlanta area.

25 Q. All right, and do you treat patients?

1 A. I do. I, I diagnose and treat patients.

2 Q. And do you also consult on cases in the criminal
3 justice system?

4 A. I do. I, I consult on cases in the criminal justice
5 system, and I am from time to time retained to do forensic
6 evaluations.

7 Q. Okay. Let's step back and go through your education
8 for a minute. Where did you go to undergraduate school?

9 A. So, I received my bachelor of science from McGill
10 University in Canada and while I was there, my
11 concentration was very heavily on brain development,
12 neurophysiology, neuropsychology, very sort of
13 science-based, and I did my honors thesis on sort of the
14 phantom limb phenomenon, looking at neural representations
15 of self and space. Graduated with first class honors,
16 which is the equivalent of a summa cum laude.

17 Immediately after graduating from my -- from McGill
18 for my undergraduate, I entered into the graduate program
19 at Emory University, where I began a dual masters and Ph.D.
20 course of study. My masters degree -- the thesis, my
21 masters thesis was on sort of neonatal hypothalamic
22 pituitary adrenal cortical reactivity distress. So, we
23 were looking at newborns and it was a cross-cultural study.
24 We looked at African-American children, Caucasian children,
25 and Asian children from Hong Kong, looking at their stress

1 response from birth to being pricked in the heel for a
2 blood draw.

3 Upon completing that, I began my dissertation, and it
4 was based on a grant that I submitted to the National
5 Institute of Mental Health, and I was awarded a national
6 research service award which funded my two-year
7 longitudinal study that looked at patterns of fetal
8 movement and habituation to repeated stimulation, and how
9 those affected things like birth weight, Apgar scores, and
10 cognitive functioning at birth, at one month, at eight
11 months.

12 Q. Okay. So, prenatal and after birth?

13 A. Yes.

14 Q. Okay, and as part of your earning your Ph.D., did you
15 do any type of internship?

16 A. I did. Part of a requirement for a Ph.D. in clinical
17 psychology is a year at an internship site where you will
18 -- just doing practicum. My program was specifically
19 designed as a scientist-practitioner model. So, in our
20 earlier years we really focus on the science of how to, how
21 to design studies, how to analyze studies, how to interpret
22 them. And then subsequent to that, the clinical portion
23 starts with quite heavy practicums, and the internship is
24 one of those.

25 I did my internship at the University of Alabama in

1 Birmingham, and I focused on developmental neuropsychology.
2 So, I performed neuropsychological evaluations for adults
3 and children with a variety of medical conditions:
4 epilepsy, head injuries, developmental disorders, learning
5 disorders. And also as part of that program, I worked at a
6 clinic that was specifically designed to work with
7 children, high-risk children or children that had
8 identified with having genetic disorders, environmental
9 disorders, family problems, inborn problems. So, we worked
10 with them from eight months until twelve years of age.

11 And I also did rotations in adolescent inpatient
12 psychiatry where I worked in the hospital, and also child
13 psychology where I saw and treated children and their
14 families.

15 Q. Okay, and at some point you earned your Ph.D.?

16 A. I did.

17 Q. All right, and what year was that in?

18 A. I completed my dissertation and graduated in 2000.

19 Q. Okay, and I always forget this. A fellowship comes
20 before or after the Ph.D.?

21 A. It comes after. So after my receiving my Ph.D., I
22 embarked on a two-year fellowship in, in neuropsychology
23 where I participated in the neuropsychological evaluation
24 of college students and adults in the, in the university
25 school system. So, it was at the Regent Center for

1 Learning Disorders at Georgia State. And basically they
2 came in and had very comprehensive social, emotional,
3 intellectual, academic achievement, neurocognitive
4 batteries in order to determine whether or not they were --
5 they qualified for academic accommodations which we
6 recommended in the cases that were appropriate so that
7 they could finish school and to do so without much
8 suffering.

9 Q. Okay, and your Ph.D. was in psychology?

10 A. Yes. .

11 Q. Okay, and you're in private practice now, and we
12 touched on what you do a little bit, but can you tell the
13 judge about your employment history since your fellowship?

14 A. Right after finishing my fellowship, I was recruited
15 for a position as a research coordinator at Georgia State
16 University looking at the acquisition of reading in
17 school-age children. I worked at that, in that capacity
18 for two years and while I was doing that, I began my
19 private practice at the same time, eventually transitioning
20 completely to a private practice, which I have now even
21 though I continue to teach, which is a passion of mine.

22 And in my private practice I diagnose and treat mental
23 illness, emotional problems, transitional disorders in
24 adults mostly, some young adults, but I focus on the adult
25 population. And I continue from time to time to do

1 neuropsychological evaluations, again specializing in
2 attention deficit disorder, head injury, learning
3 disabilities, and such. And from time to time I'm called
4 to do some forensic work, and I will participate in that if
5 I'm available and feel that I could be useful.

6 Q. Okay. Now when we started off about your profession,
7 you said you were a psychologist with a specialty in
8 developmental neuropsychology.

9 A. Yes.

10 Q. Can you explain to the court what that specialty in
11 development neuropsychology is?

12 A. Certainly. So basically as a neuropsychologist, I
13 study brain behavior relationships, how one relates to the
14 other and vice versa. Developmental neuropsychology is
15 absolutely fascinating to me because the brain is changing
16 so rapidly and growing exponentially, while at the same
17 time cells are dying and pruning off to match the
18 environment. This is a very dynamic period of time.

19 Prenatally there's a lot going on, and I study tratogens
20 [phonetic]. So, anything prenatally that could derail ---

21 Q. What's a tratogen [phonetic]?

22 A. So, a tratogen is any sort -- any insult prenatally
23 that might derail the developmental process before the
24 child is born and cause permanent damage. Postnatally, as
25 I said, we looked at stress responding and how that

1 evolves. We looked at -- and then I've also looked at, you
2 know, how -- what's a six-year-old's brain like compared to
3 an eight-year-old because we know that our brains continue
4 to grow and develop well into our mid-twenties, and then
5 unfortunately they go back a little. But that dynamic
6 aspect of it fascinated me.

7 Q. I'm going to hand you a document. Do you recognize
8 this?

9 A. This is my CV.

10 Q. Okay, and that covers your education, your
11 professional experience, some of your publications, and
12 that sort of thing?

13 A. Yes.

14 Q. And I don't think I asked you this. Are you licensed?

15 A. Yes, I am licensed.

16 Q. Okay.

17 MR. GROSE: At this time, Your Honor, I would offer
18 Dr. Israelian's CV as -- I believe it will be Applicant's
19 Exhibit Number 4 in evidence.

20 THE COURT: Any objection?

21 MR. MABRY: No, sir.

22 THE COURT: Without objection.

23 (CV OF DR. ISRAELIAN MARKED INTO EVIDENCE AS
24 APPLICANT'S EXHIBIT NUMBER 4.)

25 MR. GROSE: All right, and, and at this time, Your

1 Honor, I would offer Dr. Israelian as an expert in
2 psychology with a specialty in developmental
3 neuropsychology.

4 THE COURT: Any voir dire?

5 MR. MABRY: No, sir.

6 THE COURT: All right. Go ahead.

7 DIRECT EXAMINATION BY MR. GROSE:

8 Q. Now, I guess through your practice treating patients,
9 as well as some of your forensic work, cases come to you
10 through referrals?

11 A. Yes.

12 Q. All right, and in this case, we got to you through a
13 referral from Dr. Agharkar, and Ms. Franklin-Best contacted
14 you about working on this case?

15 A. That is correct. I was contacted.

16 Q. All right, and so before we get into some of the
17 specifics, I want to ask you. When you do a, an evaluation
18 like you did for William, is there a process that you
19 follow?

20 A. Well, I ask for any relevant documents, depending on
21 the question, and basically review those and go in and do
22 an extensive battery of testing. And then subsequent to
23 that if I need more testing or need more information, I
24 follow up as necessary.

25 Q. And as part of your testing, is there clinical

1 interview that's involved?

2 A. Yes, there is.

3 Q. All right, and did you follow that process here with
4 William?

5 A. I did. I followed that process with William.

6 Q. Okay. Now, I may be jumping a little bit ahead here.
7 There was questioning earlier about some prior IQ testing,
8 an earlier witness that William had. Was that part of the
9 information that you had?

10 A. Yes. I had that information.

11 Q. Okay, and at the beginning of your process, how do you
12 use the prior psychological testing?

13 A. I briefly review the psychological testing just to get
14 an idea of what sort of global intellectual functioning
15 this person might have.

16 Q. Okay. Is there a more thorough or more complete
17 review that you do at some point?

18 A. Yes. I do what I, I refer to as sort of a pattern
19 analysis once I have my data. I don't do it before because
20 I don't want to be influenced; I'd like to go in as
21 objective as possible. So, beforehand I'll look at global
22 measures. I'll look at averages but subsequent to my
23 assessment, and I go back and review a lot of records. I
24 specifically review the testing. I look at specific items,
25 specific subtests and there are -- depending on whether

1 they administered just the necessary requisite items or the
2 additional optional ones as well. I may have between ten
3 and fifteen individual discrete subtests with scores that I
4 will look at for a pattern to get a sense of what I may be
5 -- to get a sense of what this person's strengths and
6 witnesses are as a launching pad for the rest of my
7 assessment. Actually interpretation. Doesn't launch my
8 assessment. My assessment is done at that time.

9 Q. All right, and so when we sort of get to the end and
10 you begin to look back at some of the documents that you
11 have, you can kind of actually compare the results that
12 somebody got previously with results that you got today?

13 A. Yes. Granted that they have used a standardized
14 measure that is comparable and is based on norms that are
15 acceptable and on instrument that is valid and reliable,
16 and one that we as a profession rely upon to look at
17 specific skills that I'm looking to assess.

18 Q. Okay, and, and in talking about prior testing, there
19 was questions earlier. There was a, an IQ test that you
20 had access to from when William was in Tara Hall.

21 A. Yes.

22 Q. And there was a, a IQ test subsequent to that from --
23 that was done by what we then called in South Carolina the
24 Department of Youth Services?

25 A. Yes.

1 Q. Okay, and other than the testing, you also had other
2 information about William, didn't you?

3 A. I did.

4 Q. And, and can you give His Honor an idea of what some
5 of that information was, types of information?

6 A. I had information about his educational background,
7 school, his school records to the best that they were able
8 to get them for me. I had his inpatient hospitalization
9 records. I had records from Tara Hall. I had records from
10 the youth detention center. I had records from MUSC when
11 he was first admitted. I reviewed those. I've reviewed
12 the trial transcript from the sentencing and some other
13 medical documents and records that I had. I had a lot of
14 information.

15 I was really focusing -- because my expertise is in
16 developmental neuropsychology, I was really focusing on
17 maybe the first eighteen or so years to be able to explain
18 or understand his brain and how it functions.

19 Q. All right, and can you -- and we're going to go
20 through a lot of your opinions in more detail later, but
21 can you summarize after you reviewed all this information,
22 had your clinical interview, conducted your own testing,
23 summarize the conclusions that you came up with?

24 A. Well, on the basis of my review of William's
25 development history and on the results of my

1 neuropsychological testing, I came to the conclusion that
2 he has suffered from brain damage secondary to lead
3 toxicity.

4 Q. Okay, and what, what is lead toxicity?

5 A. Well as we heard earlier, it's the poisonous impact
6 that lead has on the human body. Lead is readily
7 accessible. Enters into the bloodstream. Stays in our
8 bones for multiple decades. Just the -- we, we believe as
9 far back that -- this is what brought down the Roman
10 empire. They lined their water pipes with lead, which is
11 where we get the word plumber because PV is the element
12 name for lead.

13 So, lead comes into the body, and lead is extremely
14 devastating because lead, as we heard, can mimic calcium
15 and zinc. And calcium is critical for functioning of many
16 organ systems and in our brains especially, and in the
17 control of elements that can enter our brain, that
18 blood-brain barrier that's so critical to protect our
19 nervous system.

20 Lead comes in and it's an imposter; the body doesn't
21 recognize it as such. Body recognizes it as calcium or
22 zinc. It engages with it and it, as we heard again, can
23 have neurotoxic effects: that it can stimulate cell death,
24 spontaneous cell death. It can in the developing human
25 impact things like brain structure and functioning. We

1 were born with many more brain cells than we have. They
2 get pruned off and -- based on what our environment is and
3 what our experiences demand of us. Our brains are very
4 plastic; they're very malleable when we're born. We're
5 also born with brains that don't have very many connections
6 between our neurons. We're born with all the neurons we're
7 ever going to have, but what we specialize in is the
8 connection and the messages and the little dendrites that
9 we send out.

10 Lead can wreak havoc with all of us and often does.
11 Lead, lead also has an impact on the neurochemistry of the
12 brain neurotransmitters, which are important for such
13 processes as learning, memory, and emotion regulation.
14 Within the body, lead has an impact on the cardiovascular
15 system, the digestive system, on the genital system. It --
16 you'd be hard-pressed to find a system that it doesn't
17 impact negatively.

18 Q. All right, and so when we talk about lead toxicity,
19 we're talking about the impact that it can have on --
20 anywhere on the body, I guess?

21 A. Yes. Lead is a poison and it has toxicity anywhere in
22 the body that it -- it has -- as you saw, minuscule,
23 minuscule values can have devastating impact.

24 Q. All right, and when we talk about lead neurotoxicity,
25 what are we talking about?

1 A. Well, in that instance you're really talking about --
2 as I said, lead is, lead is readily absorbed and passes the
3 blood-brain barrier, enters the brain. The brain is part
4 of that soft tissue system. Lead circulates in our blood,
5 but it also deposits in our soft tissues. It can enter in
6 our brains and stay very long time. The half-life of lead
7 in the brain is much, much longer than that in the
8 bloodstream.

9 What -- the levels that were set historically as
10 acceptable levels or levels below which we thought lead was
11 not causing any harm were really based on the impact of
12 lead on the organ systems, not the brain. Things like
13 colic, the visible symptoms and signs of lead. How much
14 lead do you need in order to have swelling of the brain, to
15 be in a seizure, to have gastrointestinal problems. That's
16 what we knew because that's what we saw. Based on that, we
17 set our limits, so we started at 70 and then 50 and 25 and
18 all the way down. We know now there is no safe level of
19 lead for the brain.

20 Q. And we, we saw in the earlier presentation how those
21 levels were, were decreased over time, and, and it seemed
22 like that lagged far behind the research.

23 A. Well, as you saw in many -- some of the
24 advertisements, the Little Dutch boy, lead was
25 multibillion-dollar industry. People were making a lot of

1 money and as we know, when industry's involved, most of the
2 time -- not all the time -- the research lags behind policy
3 because we have lobbying, and we have people who are going
4 to battle science because it's their livelihood. It's
5 similar to what we saw in the tobacco industry. For years
6 and years they told us that it was safe to smoke, and we
7 know that not to be true anymore.

8 Q. All right. Now, and I think you may have already
9 covered this, but specifically talking about lead
10 neurotoxicity, did William present as, as meeting a pattern
11 for that?

12 A. Yes. William presented with a pattern of behaviors
13 historically, developmentally, and in his testing with me
14 that was very consistent with lead neurotoxicity.

15 Q. All right, and again we're jumping a little bit ahead
16 and we're going to talk about your opinions in more detail,
17 but when we get to that point in the presentation, will you
18 have an opinion or do you have an opinion on whether
19 William's suffering from lead neurotoxicity played a role
20 in the allegations that he was tried for in 2009?

21 A. Yes, I do have an opinion on how his neurotoxicity
22 played a role in the crime and the allegations that he was
23 tried for.

24 Q. Okay. Before we get to that, let's kind of go through
25 some of the history. And, and even though you might have

1 analyzed some of the testing later, I think from a
2 chronological standpoint it helps to go through things as
3 far as William's life.

4 And earlier in the prior witness, the prosecution team
5 asked questions about William being premature. Did you
6 have information about that? When I say premature,
7 premature birth.

8 A. Yes. I had information that his mother was due to
9 deliver him in October; she delivered him in August. He
10 arrived approximately two months or between eight and ten
11 weeks premature. At that point, a fully mature on average
12 male child is approximately 8 pounds, 11 ounces. William
13 was a little bit over 3 pounds, which puts him in terms of
14 both the gestational week in which he was born, sort it
15 would be sort of the lower end of thirty, and his weight in
16 the very low birth weight, high risk premature group.

17 Q. And can you give us an idea of the size that he would
18 have been at at 3 to 3 and a half pounds?

19 A. He would've been approximately this big.

20 Q. Okay.

21 A. Maybe. Yeah.

22 Q. Could he easily fit into your ---

23 A. Two hands.

24 Q. --- two hands?

25 A. Easily.

1 Q. Okay, and as a psychologist with a specialty in
2 developmental neuropsychology, was William's low birthrate
3 something that was significant to you?

4 A. Well, clearly, as I said, you know much of my research
5 was focused on prenatal development and the teratogens, the
6 things that could derail or impact negatively the normal
7 developmental process. A human being is not meant to be
8 born at thirty-one weeks. Many organ systems are not
9 developed. It's -- outcomes until very recently were very
10 poor.

11 Q. Can you give us a sense of some of the reasons that
12 can cause a child to be born prematurely?

13 A. Well, I don't want to give you the impression that
14 it's one or the other thing, but typically we look at three
15 sources, three possible sources. We will look at maternal
16 sources or factors that may impact her to having delivered
17 early. We will look at sort of the fetus. Is there
18 something about the baby genetically that is driving this
19 process? And we look at the environment. Is there
20 something in the environment that is separate from the
21 mother or the fetus? And as I said, it's not quite that
22 simple. We also want to look at possible interactions
23 between those factors.

24 Q. Okay. Let's take those factors one at the time. The
25 first one you talked about was maternal. When you looked

1 at William's history, what you know about it, was there
2 any, anything that gave you concerns from a maternal
3 standpoint?

4 A. Yes. There was evidence that his mother had suffered
5 from domestic violence during her pregnancy with William.
6 In records from his hospitalization, she reports it as a
7 very difficult pregnancy. She was severely beaten at
8 times.

9 She was under a tremendous amount of stress, more --
10 above and beyond the violence that she was subjected to.
11 She was quite poor. She was struggling financially, and
12 she was very young. She was, I believe -- I don't want to
13 say, but I, I don't -- can't remember exact age, but she
14 was young.

15 Q. Okay.

16 A. All those factors contribute to stress. We know that
17 stress impacts premature delivery directly through that.
18 Remember I said I studied the hydro -- the hypothalamic
19 pituitary adrenal cortex? Well, that HPA axis, the human
20 stress response axis, axis, when -- if that is chronically
21 stimulated during your pregnancy, we know that it can
22 stimulate premature delivery. So, that was one hypothesis
23 or one area of -- potential contributing factor that I
24 looked at.

25 Q. All right. The second thing -- just going through how

1 you listed them earlier -- the second one was the fetus or
2 genetics?

3 A. Yes.

4 Q. All right. Was there any concerns about that here?

5 A. Well, William was born about two months early. He
6 spent two months in the hospital and was promptly
7 discharged. Subsequent to that time, there was a well baby
8 visit at about sixteen weeks, I believe, and he had -- he
9 was growing. He was developing, he had put on weight,
10 which is a good indicator to me that they didn't need to
11 keep him very long. It didn't seem like he needed a lot of
12 intervention or treatment as a, as a premie. And once he
13 was out, he was growing at the rate that you would expect
14 and was healthy.

15 Q. So, not a lot from that?

16 A. No. Wouldn't be something that I would consider to be
17 significant.

18 Q. All right. How about the third thing that you listed,
19 environmental?

20 A. Yes.

21 Q. Was there any concerns from your review of the --
22 William's history?

23 A. Yes, there was and to be specific, William was at a
24 very high risk group demographically for lead exposure.
25 This is based on a study, I think, that was referenced

1 earlier, but also on just a large body of literature now
2 that says that groups that are most susceptible to lead
3 exposure and poisoning are non-Hispanic, African-American
4 males living in houses built before 1940 in urban centers.

5 Q. Okay.

6 A. And he met that criteria.

7 Q. And when you talk about the study that was referenced
8 earlier, I'm going to show you Applicant's Exhibit Number
9 2. Is that the study that you're talking about?

10 A. This is not the study I'm talking about. The study
11 I'm talking about just looked at demographic risk.

12 Q. Okay.

13 A. In -- across the US and in urban centers and rural
14 areas, but this is the study that I -- that my inquiry led
15 to.

16 Q. Okay.

17 A. Because I knew that he was from Charleston and there
18 are quite old houses there, and he was living in an urban
19 center, and he's an African-American male.

20 This study was very interesting because they use
21 something called geographic information systems to plot
22 high risk areas within urban communities. So, what they
23 did is they identified houses that were built before 1950
24 because we -- those houses are more likely to be painted
25 with lead-based paint. And they used the information that

1 they got from tax records to then plot the houses based on
2 their longitude and latitude onto a map of Charleston
3 County. And on top of that, they superimposed identified
4 cases of children who had been exposed to high levels of
5 lead and had been identified as having lead poisoning. And
6 they superimposed the latitudes and longitudes of the
7 addresses of those children on top of their map of the
8 older, older housing.

9 Q. Okay, and earlier Dr. Canfield had that superimposed
10 map from the study in his, his slideshow, didn't he?

11 A. Yes, he did.

12 Q. And is this an enlarged view of, of the peninsula of
13 Charleston from the study that's in Exhibit 2?

14 A. Yes, it is. This is an enlarged view of the
15 peninsula, and it shows the housing in black and the lead,
16 the confirmed lead cases in white.

17 Q. Okay.

18 MR. GROSE: At this time I would move this into
19 evidence as Applicant's Exhibit Number 5.

20 MR. MABRY: Isn't it -- I thought it was already in
21 under 2. Is that not right?

22 MR. GROSE: Well, it's as part of 2. She's going to
23 use it as part of -- I'll mark it for identification.

24 MR. MABRY: I thought it was out in under 2.

25 (MAP OF CHARLESTON PENINSULA MARKED AS APPLICANT'S

1 EXHIBIT NUMBER 5 FOR IDENTIFICATION.)

2 BY MR. GROSE:

3 Q. All right, and just for the record, Doctor, what's
4 Applicant's Exhibit Number 5? If you could turn back to
5 that page in the, in the study and just read the page
6 number for this exhibit into -- that matches this exhibit?

7 A. It is page 118.

8 Q. Okay. Is it ---

9 A. No, I'm sorry, it's not. Is page 224.

10 Q. Or is it actually this -- well, okay, yes, it's ---

11 A. No, it's this one that I ---

12 Q. --- this one.

13 A. --- enlargement.

14 Q. And it's an enlarged. The middle portion that's
15 showing the Charleston ---

16 A. Yes.

17 Q. --- Peninsula? Okay, whereas what's in the study
18 actually shows a little wider view of Charleston?

19 A. It shows all of Charleston County, and I ---

20 Q. Okay.

21 A. --- focused on the Peninsula.

22 Q. All right and, and -- will Applicant's Exhibit Number
23 5 sort of help you explain to the judge a little bit about
24 where William grew up?

25 A. Yes.

1 Q. Okay.

2 A. So, they -- in plotting the houses, the housing and
3 then the identified, verified cases of lead poisoning, they
4 found that the ZIP code that had the highest percentage of
5 cases over the -- so, they looked at the number of children
6 that were screened and the number of identified cases based
7 on this screening, and the ZIP code that had the highest
8 percentage of identified cases was this 29403 ZIP code. It
9 had -- 21.2% of all the children screened had blood levels,
10 blood lead levels above 10. And it was -- only a
11 neighborhood slightly adjacent to it had 15.7%. So, much
12 less than this, but this area code was the highest lead
13 concentration, old houses and identified poisoning cases.

14 Q. And which ZIP code was that, that...

15 A. It was ZIP code 29403.

16 Q. All right, and we had some testimony earlier that --
17 and I'm probably not going to get it right -- Bogard Street
18 address was in this ZIP code?

19 A. Yes.

20 Q. All right and, in fact, I think that Dr. Canfield's,
21 Canfield's slideshow showed a comparison of that, right?

22 A. It did.

23 Q. All right, and there was a lot of talk earlier about
24 the Orrs Court address?

25 A. Yes.

1 Q. I'm going to show you a Google Map that has the Orrs
2 Court address on it. Is that also in that same ZIP code
3 with ---

4 A. It is at the absolute heart of that ZIP code.

5 Q. Okay.

6 MR. GROSE: At this time I would move the Orrs Court,
7 20 Orrs Court map into evidence as Applicant's Exhibit
8 Number 6, I believe.

9 MR. MABRY: No objection.

10 THE COURT: Without objection.

11 (MAP OF ORRS COURT MARKED INTO EVIDENCE AS APPLICANT'S
12 EXHIBIT NUMBER 6.)

13 BY MR. GROSE:

14 Q. So, you earlier had testified that William was in a
15 high risk group, and that lead you to this Charleston
16 study, and did that confirm your suspicions about him being
17 in this high risk group?

18 A. Yes, and also, you know, his mother delivered
19 prematurely. We know historically there is ample evidence
20 that lead leads -- lead exposure prenatally through the
21 mother's bones -- because, as Dr. Canfield explained, in
22 pregnancy the bones leech out the lead. It's part of what
23 the body does to support the growth of this organism. So,
24 mothers' bloodstreams, when they're pregnant, have higher
25 concentrations of lead. So, when I identified that he was

1 in the highest risk neighborhood, part of what I was
2 thinking also was that it's possible that his mother living
3 in that same neighborhood probably could have, possibly
4 could have had an early pregnancy because of the lead in
5 her system.

6 In fact, in the 1940s they used to give women lead
7 pills, sell them illegally to induce abortion.

8 MR. MABRY: Your Honor, I'm going to object at this
9 point. We have never been provided any discovery that
10 this witness is going to opine what caused his mother to
11 deliver ---

12 MR. GROSE: Whoa, whoa.

13 MR. MABRY: --- prematurely.

14 MR. GROSE: Whoa, whoa. You, you, you deposed her.
15 You had every chance ---

16 MR. MABRY: Yes, I did.

17 MR. GROSE: --- to ask.

18 MR. MABRY: She did not testify to any of this. She
19 didn't mention anything about the ---

20 MR. GROSE: If you ---

21 MR. MABRY: --- causes of premature birth.

22 THE COURT: One at the time. One at the time.

23 MR. GROSE: Judge, this is -- they, they were told
24 that she -- they had her CV. They were told that she's a
25 psychologist with a specialty in developmental

1 neuropsychology. They were offered her for a deposition;
2 they took her deposition.

3 Clearly Mr. Zelenka has made an issue about the
4 premature birth during the last questioning of Dr.
5 Canfield, and this is something that is -- the premature
6 birth is something that is significant to ---

7 THE COURT: You can't testify.

8 MR. GROSE: Huh?

9 THE COURT: You can't testify.

10 MR. GROSE: Well, I believe she has already testified
11 that this is significant to her as a -- with a specialty
12 ---

13 THE COURT: It sounds to me like she's going beyond
14 that to mother's ingestion of -- exposure to lead toxicity.

15 MR. GROSE: Well, well, she ---

16 THE COURT: Which I think is perhaps the basis for the
17 objection.

18 MR. GROSE: Well, she had testified that there's three
19 reasons that she knows of in her profession for premature
20 birth: the maternal, having to do with the fetus or
21 genetics, and the third one being environmental. And we're
22 testifying about the environmental at this point.

23 THE COURT: Well, she's testified to that.

24 MR. GROSE: Okay.

25 THE COURT: And I'm sustaining the objection.

1 MR. GROSE: Okay.

2 THE COURT: Move on.

3 MR. GROSE: All right.

4 BY MR. GROSE:

5 Q. You also said when you listed those three areas that
6 there could be an interplay between some of them?

7 A. Yes, I did.

8 Q. And is there an interplay here between any of the
9 three that you listed?

10 A. It seemed very possible to me, and in addition to
11 plotting Orrs Court, I actually plotted all four of the
12 addresses that I had for William based on his records, his
13 medical records, his school records. Every single one of
14 his addresses fell in that area code, and it fell in the
15 highest concentration of identified lead cases.

16 Q. Okay, and when you say an area code, you mean the ZIP
17 code?

18 A. Yes. I apologize.

19 Q. And, and there is a table in the Charleston study that
20 reflects the, the ZIP code results?

21 A. It does.

22 Q. And that's on what page of that document, Doctor?
23 Well, don't pull it apart. Just...

24 A. It's on page 226.

25 Q. Okay. All right, let's move into the first six years

1 of William's life. With the materials that you were
2 presented and as a psychologist with a specialty in
3 development neuropsychology, was there anything that you
4 found significant during the first six years of William's
5 life?

6 A. There wasn't anything that I found particularly
7 significant in the first six years of his life. Not to say
8 that it didn't exist, but there was nothing that reflected
9 in his record.

10 Q. Okay. What was going on during that period of time?

11 A. Well, as we've heard previous testimony, William's
12 mother was very abusive to him. He's named after his
13 father, the person who abused her during her pregnancy and
14 even subsequent to that. She used to call -- his mother
15 used to call him Little Man. Spent most of his childhood
16 telling him how he was like his father, how he would not
17 amount to anything.

18 Mother sounds quite -- in both William's account and
19 in affidavits and testimony from other members of the
20 family or people who were around, very unstable, quite
21 unpredictable, volatile in a way that you couldn't see it
22 coming. William talked about always feeling on edge, that
23 punishment was never really discipline. It was typically
24 disproportionate to whatever crime he committed, whatever
25 offense as a child. That he was selectively abused,

1 whereas his younger brother, Armon, was not. And, in fact,
2 there were instances he said where Armon was the one that
3 would misbehave, and he would get the beating for it.

4 Q. Okay. Was there any stabilizing influence going on in
5 the first six years of William's life?

6 A. It seemed like the time in which the family lived with
7 Mr. Flood, who is Armon's father. So, between the ages of
8 two until sometime middle elementary, Mr. Flood moved in
9 with them. Two years, I think, after he moved in, Armon
10 was born.

11 And it sounded like Mr. Flood really was a buffer for
12 him. That he ran interference, maybe called the mother out
13 on some of her behaviors that were not appropriate. And
14 the literature suggests that's always helpful to have
15 someone that is a witness and can be a buffer. Those early
16 years, probably was protected for him to have Mr. Flood
17 there.

18 And clearly we heard that, you know, this was a
19 gentleman who came in, saw a bad situation. Apparently the
20 mattress was on tin cans. You could hear rats in the walls
21 at night. They were heating the house with the oven, and
22 he took it upon himself to tear down the walls, to put
23 insulation in them, and he took -- I think it was a closet
24 and converted it into a room for William.

25 Q. And, and through, I guess, the first six grades, up to

1 the sixth grade, how did William do in school?

2 A. William was an average student. Not an A student, not
3 a D student. Average Bs and Cs, which were consistent, and
4 he was learning at the rate that you would expect so that
5 at the end of the first grade, he was reading at a
6 first-grade level and he was achieving at the, let's say,
7 lower end of the average/low-average range which is where
8 his grades placed him. And he -- at the second grade he
9 was reading at the second-grade level, the third and the
10 fourth and the fifth and so on.

11 In addition, there was no indication that he was a
12 behavioral problem whatsoever. There weren't any notes in
13 his school record; no one commented on how he had been a
14 bad kid or a distracted kid. It was quite a clean
15 transcript for him.

16 Q. Did that change?

17 A. Seems to change quite dramatically in his sixth-grade
18 year.

19 Q. And, and we do have some information available to us
20 and the records from that, don't we?

21 A. We do.

22 Q. Okay.

23 (A PAUSE.)

24 MR. MABRY: No objection.

25 MR. GROSE: No objection to it coming in. I move it

1 into evidence as Applicant's Number 7, and then we'll
2 discuss it.

3 THE COURT: Identify it for the record or have her
4 identify it.

5 MR. GROSE: I, I...

6 MR. MABRY: Go ahead identify it.

7 MR. GROSE: Okay, I thought he was not objecting ---

8 MR. MABRY: Judge doesn't even know what we're talking
9 about.

10 MR. GROSE: Fair enough. I thought he was agreeing it
11 could come in, but....

12 THE COURT: It may but I still want you to identify it
13 for the record.

14 MR. GROSE: Okay.

15 (PSYCHIATRIC EVALUATION MARKED AS APPLICANT'S EXHIBIT
16 NUMBER 7 FOR IDENTIFICATION.)

17 BY MR. GROSE:

18 Q. Dr. Israelian, do you recognize Applicant's Exhibit
19 Number 7?

20 A. I recognize it as a psychiatric evaluation that was
21 conducted on May the 12th, 1988, at MUSC when William was
22 brought in by his mother.

23 Q. Okay, and is that report of significance to you in, in
24 your profession?

25 A. There are several things in this report that I found

1 important to notice and consider. There is mention that --
2 of change in behavior from the past.

3 Mother indicates that it's been approximately five
4 months that he's behaving differently than he has before.
5 He is now -- he's running away. He's very impulsive. He
6 keeps running to his grandmother's house. He's depressed;
7 he's a sulky. He has stopped sort of -- he's lost some of
8 his friends, not interacting with him. He's quite
9 withdrawn from them. He's complaining of problems with his
10 appetite, weight loss, sleep.

11 There is clearly something different about William.
12 It's noticed and she's having a hard time managing it and
13 has asked for help, and this is one way that -- you know,
14 she's brought him to the emergency room because he has --
15 he was sitting on a ledge and was threatening to throw
16 himself off.

17 Q. All right, and was William involuntarily committed?

18 A. He was involuntarily committed because they felt that
19 his suicide threat was significant and that he needed to be
20 hospitalized for his safety.

21 MR. GROSE: Can you mark these as numbers 8 and 9 for
22 identification?

23 (SOCIAL HISTORY MARKED AS APPLICANT'S EXHIBIT NUMBER 8
24 FOR IDENTIFICATION.)

25 (SUMMARY MARKED AS APPLICANT'S EXHIBIT NUMBER 9 FOR

1 IDENTIFICATION.)

2 (A PAUSE.)

3 BY MR. GROSE:

4 Q. Dr. Israeli, I'm going to hand you Applicant's
5 Exhibits 8 and 9 for identification. Is this in the same
6 general timeframe as the MUSC report that's in the previous
7 exhibit?

8 A. Yes, it is.

9 Q. Okay, and how close in time is, is that?

10 A. So, he was seen at MUSC, as I said, on May 12, 1988,
11 and at that time he was in significant distress with no
12 previous psychiatric history or problems noted. Very sad
13 and tearful and exhibiting some somatic symptoms of
14 gastrointestinal problems and sleep disturbances. And then
15 subsequent to the time that he spent there, he was admitted
16 to the William S. Hall Psychiatric hospital to the
17 children's unit there, and he was there from May 26, 1988,
18 to June 10, 1988.

19 Q. Okay, and I want to show you what's already in
20 evidence as Applicant's Exhibit Number 1. Is -- which is
21 the lead test. Is, is that from that William S. Hall --
22 contemporaneously with the William S. Hall?

23 A. This lead level, this blood lead test was done while
24 he was at William S. Hall Psychiatric hospital, yes, and it
25 was conducted on, I believe, June 1st -- June 2nd.

1 Q. Okay. Now, we, earlier we talked about lead toxicity
2 and lead neurotoxicity. With the records that you have,
3 obviously the Applicant's Exhibit 1 goes to the brain, to
4 the neurotoxicity, right?

5 A. Yes.

6 Q. All right. You've talked about a number of symptoms
7 that William presented with at this time. Of those
8 symptoms, either from the toxicity standpoint ---

9 MR. MABRY: I'm going to object to the form of the
10 question. I haven't heard her say anything about symptoms.
11 I think she described some behavior that he had, but I
12 haven't heard anything about symptoms.

13 MR. GROSE: Okay.

14 THE COURT: Rephrase your question.

15 MR. GROSE: All right.

16 BY MR. GROSE:

17 Q. We're going to do it this way. Let's, let's just step
18 back for a second and let's talk about the MUSC report,
19 which I believe was Applicant's Exhibit Number 7. Is that
20 correct?

21 A. That is correct.

22 Q. All right. Can behavior be a symptom of lead
23 toxicity?

24 A. There is no other way to see the symptom. A symptom
25 is a behavioral manifestation of some underlying cause.

1 Q. Okay. In the MUSC records, in the contemporaneous
2 William S. Hall records, whether it's a behavioral
3 observation or a symptom, do you see any evidence of lead
4 toxicity in those records?

5 A. I do see some evidence of lead toxicity in these
6 records, and one of the first things that stands out, as I
7 mentioned before, is that this is a child who previous to
8 this hospitalization was quite normal, and now mother says
9 it's been five months. Later we hear it's approximately --
10 it may be a year this behavior began that he is running
11 away from home, he's uncontrollable in his behavior, he's
12 failing at school for the first time.

13 He's, let's see, he's having difficulty regulating his
14 emotions, so he's intensely sad. He's withdrawing from his
15 friends. He reports that he's unhappy. He's unhappy at
16 home. He's feeling like he can't tolerate things like the
17 way that possibly he did. He feels sad; he's crying. His
18 appetite is poor. He has lost weight. He's not sleeping
19 well. He is questioning, sort of feeling very hopeless in
20 his presentation.

21 The past medical history states:

22 William has been a healthy boy since birth, with
23 no major medical or surgical problems. Based on
24 the mother's report, he met his developmental
25 milestones on time. He sat up on time walked on

1 time, spoke on time.

2 There is -- the social history states that: He denies
3 using alcohol, cigarettes, or drugs. The mental status
4 states that: He is well-built; he's appropriately
5 nourished, looks his stated age but he is sad. His
6 shoulders are slouched. He's got this down gaze, and when
7 his mother is present, he's very sort of reserved. He
8 doesn't make eye contact. Answers yes/no questions but
9 when she leaves, he's much more forthcoming and has more
10 information to share.

11 And the diagnosis they give him at this time is a
12 major depressive disorder because they feel that he met
13 criteria for that based on the aforementioned symptoms.
14 And they point out that clearly there's evidence that this
15 is a relationship with the mother that is not healthy for
16 him as there is clear indication that he's being abused.
17 And based on that and based on his suicidal ideation, and
18 actually a clear intent by sitting on the edge of that
19 ledge, that he needs to be hospitalized.

20 And there is mention of wanting to transfer him to
21 more an inpatient setting and to begin treating both he and
22 his mother with antidepressant medication.

23 MR. GROSE: Let's mark this as Applicant's Exhibit
24 Number 10, I believe.

25 (BLOOD TEST RESULTS MARKED AS APPLICANT'S EXHIBIT

1 NUMBER 10 FOR IDENTIFICATION.)

2 BY MR. GROSE:

3 Q. Dr. Israeli, I'm going to hand you Applicant's
4 Exhibit Number 10 for identification. Do you know what
5 those are?

6 A. These are the results of some of the blood tests that
7 he was administered on June 2nd while he was a patient at
8 William S. Hall Psychiatric hospital.

9 Q. And what are the significance of, of those records?

10 A. So, in addition to doing the lead test, blood lead
11 test which indicated a high level of lead at 9 micrograms
12 per deciliter, they did routine blood work on just -- very
13 sort of comprehensive blood work, and they identified that
14 his serum iron level is low. He's not absorbing iron in
15 his system. He's anemic and they -- there was an indicator
16 also. They're called microcytes which are often seen in
17 anemia. These are smaller red blood cells that suggested
18 to them that he needed supplementation. So, they gave him
19 a prescription for ferrous oxide 300 milligrams, I believe,
20 for several weeks, three or more weeks for his anemia.

21 There was also ---

22 Q. Let me stop you there before you move on.

23 A. Uh-huh.

24 Q. Is anemia related to lead toxicity?

25 A. Children who are exposed to high levels of lead,

1 adults as well, do have anemia and problems with anemia and
2 iron absorption, as I believe Dr. Canfield testified to.

3 Q. Okay. You were about to go into another test result.

4 A. There was, in addition to his blood counts and such
5 and iron absorption, they did a thyroid test on him,
6 thyroid profile and there was a significantly low
7 thyroid-stimulating hormone level. It was 0.04, where the
8 normal range is .45 to 6.2.

9 They were not able to make sense of that. There was a
10 question mark next to that, and the report says that they
11 assumed that it might be due to laboratory error.

12 Q. Is there another explanation? I mean, they didn't
13 have a laboratory error on any of the other blood results
14 ---

15 A. No, they ---

16 Q. --- did they?

17 A. --- took all the other measures from this laboratory,
18 even on the same day, on the same as being valid, but this
19 one was quite unusual, and...

20 Q. And is that consistent with lead toxicity?

21 A. We know that lead interferes with thyroid functioning.
22 So, I, I believe that if the person who was looking at
23 these values had more knowledge about the impact of lead on
24 the endocrine system, that they might have followed up with
25 that level, or at least, at the very least ordered a repeat

1 test to rule out whether it is error of laboratory or if he
2 truly is functioning with a thyroid-stimulating hormone
3 that is that low.

4 Q. Okay, and while we're still talking about what
5 happened at William S. Hall, the -- there was evidence of
6 running away. Does that fall into the category of
7 impulsivity?.

8 A. Yes. He was impulsively leaving home, going
9 consistently to his grandmother's house. He did indicate
10 to me when I met with him that her house was a place of
11 refuge for him; he frequently would go there when things
12 were bad with his mother. Unfortunately, he was always
13 returned. He was quite emotional when he talked about
14 being returned.

15 So, yes, he is -- he ran away, I believe, ten times in
16 the last five weeks. Let me get that right. I don't want
17 to overstate it or understate it.

18 (A PAUSE.)

19 A. Can't find the specific -- I may find it as we go on,
20 but it was very significant. High frequency over a short
21 period of time where he kept going to his grandmother's
22 house.

23 Q. All right, and we, we, we've heard that impulsivity
24 has a connection to lead neurotoxicity, right?

25 A. Yes, and this was really interesting because, you

1 know, he has -- he reports and in the declarations that I
2 looked at and in the trial testimony, there's clear reports
3 that his abuse began from birth.

4 You know, I forgot to mention. He was born, as I
5 said, approximately two months early; he spent his first
6 two months of life in the hospital. That -- those are --
7 that's a critical period for maternal bonding. This is
8 already a young woman who has been abused, is young, is
9 impoverished, and is having a baby from a man who
10 brutalizes her. Not the best circumstance for bonding. On
11 top of that, give birth to a frail child who is sick and
12 who is left in the hospital. That makes it even harder for
13 you to form any bond or attachment.

14 That bond at attachment was more than just feelings of
15 warmth. It's very biochemically, neurochemically driven.
16 The neurochemicals that are raging through your brain when
17 that baby's born -- and when you breast-feed a baby, those
18 we know are critical for the establishing of a bond and the
19 feeling of wanting to protect.

20 Q. All right, and ---

21 A. So, I'm sorry. I didn't finish my thought. He's been
22 abused since he was born.

23 Q. Okay.

24 A. There isn't a time he remembers his mother not being
25 cruel to him, but now he's running away every day. That's

1 significant to me because now I'm seeing a behavior that is
2 extreme and quite impulsive and not very productive.

3 Q. And, and we're not saying that there's no history of
4 childhood maltreatment at all, are we?

5 A. Not at all.

6 Q. All right, and there certainly is evidence in the MUSC
7 and the William S. Hall records of childhood maltreatment.

8 A. Yes, there is. In fact, they -- when he was seen at
9 MUSC and then later at William S. Hall, they identified
10 marks on him that were made by a belt buckle that she had
11 used to hit him with. He had other scars on him. They
12 placed a complaint with the Department of -- I usually get
13 this -- DSS, and he and the mother were being investigated.

14 They very, very strongly multiple times throughout the
15 medical records from his hospitalization stated that he
16 should not be returned to the mother, that he was not safe
17 in her home, and they tried to place him with his aunt, but
18 it never quite happened. He was returned to the home
19 within a night that -- from his discharge.

20 Q. All right. So, then, when you're seeing the running
21 away or the impulsivity added to that, that raises a
22 concern to you about lead toxicity?

23 A. Yes. The behavior, the way in which he's coping with
24 it has changed. And again what's important to note is that
25 it's not productive. It's not resulting in anything that

1 is useful for him. It's actually hurting him because she's
2 becoming more and more irate that he's running away.

3 Q. And you also testified earlier about sleep, weight
4 loss, appetite, somatic-type symptoms, right?

5 A. Uh-huh.

6 Q. Is, is that connected to lead toxicity?

7 A. Some of the earliest signs of lead toxicity is
8 precisely kind of -- stupor, lethargy, difficulty
9 regulating mood which includes depression. Clearly
10 depression is a mood. Stomach upset, appetite suppression,
11 sleep disturbances, there is a dysregulation.

12 Q. And I think nausea came up at some point, too?

13 A. I believe so, yes.

14 Q. All right. Would that be connected to that toxicity?
15 Can it be?

16 A. It is one of the earliest sort of signs that, that a
17 person has been exposed to lead.

18 Q. All right. Now, I think you said a minute ago that it
19 was recommended that William not go home. They returned
20 him to an aunt, and then he was immediately returned home,
21 wasn't he?

22 A. Yes, he was, within a night. Barely.

23 Q. He ended up back in the hospital?

24 A. Within four days, he was back at the hospital.

25 A. Okay. Before I move on, was there evidence at this

1 point that William himself, a sixth grader, was asking for
2 help?

3 A. Yes, there was and, you know, what was very
4 interesting -- and again what I didn't mention is that it
5 didn't take very long for his vegetative, his somatic
6 symptoms to go away once he was admitted into the hospital.
7 And that's another sign that we see when children are
8 removed from the lead environment. They improve in their
9 somatic symptoms so that the things that are outside of the
10 brain, the blood, and organs in the body -- as he was
11 improving, he was participating in therapy. He was going
12 to group therapy. He was doing art therapy. He was eating
13 voraciously. He was engaged with the other children. He
14 was engaged with the nursing staff. He became more
15 animated. It was clear he didn't really want to leave,
16 which is unusual in a child to not want to leave a mental
17 hospital. So, I don't know if I answered your question.

18 Q. He was working on himself?

19 A. He was working on himself, and in multiple reports,
20 almost every single mental health professional who met him
21 and evaluated him recommended individual therapy or group
22 therapy for him and family therapy to work on his
23 relationship with his mother.

24 And too, also, as he got older, recommendations that
25 he be seen for anger management. That someone teach him

1 impulse control, that he learn how to express his feelings
2 well that his dependency needs were not being met, that he
3 was frustrated by not getting what he needed, didn't know
4 how to express how he was feeling, and was behaving in
5 self-defeating ways.

6 Q. And these recommendations were being made as early as
7 when he was in the sixth grade?

8 A. Yes, and in all of them there is -- he is asking for
9 help and willing to participate, and again for a
10 twelve-year-old, thirteen-year-old, fourteen-year-old boy,
11 this is not something they sign up for. He was open to it
12 and motivated.

13 Q. All right. Was there -- was any of this therapy
14 followed up on?

15 A. No, it was not. The only therapy he received was
16 during his hospitalization. As soon as he was out, it
17 ended. All involvement ended unless there was yet another
18 hospitalization, as in this case.

19 Q. Let me get these exhibits back from you. And I
20 believe you have the Charleston study that's already in
21 evidence?

22 MR. GROSE: At this time, Your Honor, I would move
23 Applicant's Exhibit Number 7, which is the MUSC report,
24 Numbers 8 and 9, which are separate records from William S.
25 Hall, and Applicant's 10, which is two pages that's

1 additional blood testing that was ordered while William was
2 at William S. Hall.

3 MR. MABRY: No objection.

4 MR. GROSE: Thank you, Your Honor.

5 (PSYCHIATRIC EVALUATION MARKED INTO EVIDENCE AS
6 APPLICANT'S EXHIBIT NUMBER 7.)

7 (SOCIAL HISTORY MARKED INTO EVIDENCE AS APPLICANT'S
8 EXHIBIT NUMBER 8.)

9 (SUMMARY MARKED INTO EVIDENCE AS APPLICANT'S EXHIBIT
10 NUMBER 9.)

11 (BLOOD TEST RESULTS MARKED INTO EVIDENCE AS
12 APPLICANT'S EXHIBIT NUMBER 10.)

13 BY MR. GROSE:

14 Q. Now, after, after William S. Hall, it's fairly quickly
15 that William goes to Tara Hall?

16 A. Yes.

17 Q. Okay, and, and do you know what Tara Hall is?

18 A. It's a residential treatment facility for children.
19 It's, it's run on a -- it's, I think it's a charitable --
20 you don't pay for the service, and they live there. They
21 receive treatment there; they go to school there. It's a
22 way to give them a second chance.

23 Q. Okay, and the power of suggestion, I'm going to get
24 some of that water, too.

25 Did you have records to review from Tara Hall?

1 A. Yes, I did.

2 Q. And, and how did William do at Tara Hall?

3 A. William did extremely well at Tara Hall emotionally.
4 He was, based on their reports of his behavior and his own
5 personal recollection of the time there, the happiest that
6 he's been and the most regulated in his mood and in his
7 behavior.

8 Q. And you may have said this but, William S. -- I mean,
9 not William S. Hall. Tara Hall is a residential setting,
10 correct?

11 A. Yes, it is.

12 Q. And it provides education. There's a lot of structure
13 is what I'm getting at.

14 A. There is.

15 Q. Okay. Now and we, we kind of foreshadowed this
16 earlier, but Tara Hall -- well, how long was William at
17 Tara Hall?

18 A. So, soon after he was admitted to the psychiatric
19 hospital, I think that the staff realized that he shouldn't
20 be returned to the house. And while he was there they
21 placed -- they submitted an application for Tara Hall.
22 That application was submitted. He came back to the
23 hospital after he was initially released very suicidal,
24 very depressed. They took him back in, and then subsequent
25 to that he was admitted to Tara Hall on July 13, 1988.

1 Q. And how long did he stay there?

2 A. He stayed there just shy of two years, which is
3 typically how long children are housed and, and treated at
4 that facility.

5 MR. GROSE: I'm not sure what the next number is,
6 but...

7 (PSYCHIATRIC EVALUATION MARKED AS APPLICANT'S NUMBER
8 11 FOR IDENTIFICATION.)

9 BY MR. GROSE:

10 Q. And since she's asking for the -- let me get the
11 Charleston study back from you.

12 A. Oh, yes. Sorry.

13 Q. They get away if we're not careful.

14 So, all right, sort up early on we talked about -- and
15 the prosecution team asked about a psychological evaluation
16 at Tara Hall. Did William receive one?

17 A. Yes. He received a psychological evaluation just
18 prior to being released back to his mother.

19 Q. Okay. I'm going to hand you what's been marked as
20 Applicant's Exhibit Number 11 at this time for
21 identification. Do you know what that is?

22 A. Yes. This is a psychological evaluation that was
23 conducted of William on August 24th. No, sorry, that's his
24 birthday. August 24, 1976, is his birthday. This was
25 conducted on May 28, 1990, by Kay Rivers, I believe. Yes,

1 Dr. Kay Rivers.

2 Q. And this was close in time to when William was going
3 to be released?

4 A. It was.

5 Q. Okay, and, and just to go back. From the William S.
6 Hall records, we know that alcohol and drugs is really not
7 a factor in William's life at, at this point?

8 A. Yes. As I said, they did a full sort of analysis of
9 his blood, and part of that analysis included toxicology
10 screening for blood -- alcohol and drugs.

11 Q. And the history was negative for it as far as what was
12 reported, too?

13 A. The history was negative, and the blood test was also
14 negative.

15 Q. Okay, and presumably during this two-year period where
16 William is in Tara Hall, I mean, that's structured. It's
17 supervised. There should not be access to alcohol and
18 drugs?

19 A. No. He did not have access to alcohol and drugs while
20 he was there.

21 Q. All right. Now, I understand that you didn't really
22 drill down into this psychological evaluation at Tara Hall
23 until much later, but since we're sort of going
24 chronologically, I want to ask you. Now that you've had
25 that opportunity to go through everything, is there

1 anything that's significant about this evaluation?

2 A. Well, a couple of things. So, once I have done my own
3 evaluation, I go back and try to look at consistencies or
4 inconsistencies. I found a great many consistencies with
5 my testing.

6 Q. Okay.

7 A. One of the main things in there are sort of -- one of
8 the things is that -- his demeanor during testing. He says
9 he's tense. He's anxious. The evaluator needed to
10 progress with -- mildly with encouragement and praise. He
11 had an inconsistent style of working so that on some things
12 he would show care and deliberation, but it was -- stood
13 out to her that on certain tests or certain questions that
14 were easier, he missed the answers. Wouldn't get them and
15 then on harder items with harder questions, he got them.

16 Q. Okay. Now, was there any indication that he was not
17 putting forth a good effort, and that was the result?

18 A. No. She states very clearly, and this is something
19 that we're very careful to do when we do evaluations. She
20 states:

21 It's assumed that a valid and reliable sample of
22 true ability and optimal performance was
23 obtained.

24 Q. Okay. So, she believed the results were reliable?

25 A. Yes, she did.

1 Q. All right.

2 A. And valid.

3 Q. All right, and so what you're just describing, does
4 that also -- could that be explained as inattention?

5 A. Well, we see this pattern in children with attention
6 deficit disorder and other attentional problems are because
7 their level -- they can't sustain a steady level of
8 attention. As attention comes in and out of focus for
9 them, let's say, that they will present in a way or perform
10 in a way that's puzzling because they will miss things that
11 they shouldn't and get harder things or, or they'll get
12 really hard things and then make careless mistakes on
13 subsequent things. So, this variability, this variability
14 in functioning both within tests and between tests is a red
15 flag that this is an attentional problem, part of this is
16 an attentional problem.

17 Q. As far as a person not being able to keep their
18 attention focused?

19 A. Right. The sustained attention on task that is
20 necessary to perform consistently.

21 Q. And this is something that we see with lead toxicity?

22 A. Well, attentional problems are very prominent. It's
23 one of the hallmarks of lead neurotoxicity.

24 Q. Okay. Now, there was a IQ test that was administered
25 at this time, right?

1 A. Yes. There was an IQ test..

2 Q. All right, and now we, we've already heard just some
3 discussion in a general context that there's different
4 types or different additions of IQ tests. What IQ test was
5 administered to William in May of 1990?

6 A. So, William was administered the Wechsler Intelligence
7 Scale for Children, the revised edition, and this was the
8 appropriate test to give him. He was thirteen years, nine
9 months old. This is the gold standard for IQ measures for
10 children of this age, and it is to this day still in use in
11 its now fourth edition.

12 Q. Okay, and it's a standardized test?

13 A. It's a standardized, normative battery that is, as I
14 said, gold standard for our profession and widely used and
15 very valid and reliable.

16 Q. Okay, and what was William's full scale IQ on this
17 test?

18 A. All right, on this administration of the Wechsler
19 Intelligence Scale for Children Revised, William's
20 full-scale IQ was 90.

21 Q. All right, and what was his verbal IQ?

22 A. William's verbal IQ, which is comprised of five
23 subtests that look at a child's ability to problem solve
24 with verbal -- in verbal problems, to reason verbally was
25 96, and that was an average performance.

1 Q. And his performance IQ?

2 A. So, his performance IQ is a measure of his nonverbal
3 reasoning abilities, and on that scale he received an 86,
4 which placed in the below-average range.

5 On these tests, average is 100. At a score of 100,
6 the child is at the 50th percentile, so right in the middle
7 of the distribution, and there is a standard deviation of
8 fifteen points. So, below fifteen points or below thirty
9 points are areas where we recognize and identify such
10 things as mental retardation. He is in that lower average,
11 average range of functioning.

12 MR. GROSE: Let me mark these.

13 (TESTING PROTOCOL MARKED AS APPLICANT'S EXHIBIT NUMBER
14 12 FOR IDENTIFICATION.)

15 BY MR. GROSE:

16 Q. Now, I'm probably going to butcher how I ask you this
17 question, but as a psychologist and a developmental
18 neuropsychologist, are you able to get more information out
19 of these tests that's significant to you other than just
20 the full scale, the verbal, and the performance IQs?

21 A. Yes. So, as I said, the -- one of the things I do is
22 I, I look at sort of pattern of behavior across measures.
23 So, he has been administered ten subtests. Five of those
24 subtests are averaged to derive the verbal IQ score. Five
25 of those -- the other remaining subtests are used to derive

1 the nonverbal IQ score, and then all ten of them are
2 averaged to derive the full scale score.

3 So, when I look at the, the scaled scores for those
4 subtests, the mean on those scores is a scaled score of 10,
5 which places a child at the 50th percentile. So, I look at
6 where he's performing compared to that to get an estimate
7 of how he's functioning compared to his peers. But also
8 within these subtests, each of which is designed to assess
9 a different cognitive faculty and intellectual faculty ---

10 Q. All right, let's talk ---

11 A. --- I look at a pattern of strengths and weaknesses.

12 Q. All right, can you, can you break that down for us,
13 what you're looking at as a cognitive faculty and
14 intellectual faculty, the patterns of strengths and
15 weaknesses? What does that mean exactly?

16 A. Okay. So, there are, as I said, ten subtests. I'd
17 like to look at what is the highest score that he achieves
18 and to see if that's significantly different from the mean
19 and from the average of his other scores.

20 His score on a subtest that assesses eye-hand
21 coordination was a 13. I said the mean is 10; the standard
22 deviation in this instance is 3. He has one full standard
23 deviation, which means he's functioning at the 84th
24 percentile compared to same age peers on that subtest. And
25 based on the scoring of this exam and the difference

1 between that score and his mean, that was identified as a
2 significant strength for him.

3 Q. Okay. Were there weaknesses?

4 A. Yes. So, in looking at the rest of them, the scores
5 that really stand out are a score of 4 on the Object
6 Assembly Test, which is one of the tests that's factored
7 into the perceptual IQ measure, and it looks at a child's
8 ability to analyze and synthesize information. It's a very
9 much like a -- puzzle pieces but they're not jigsawed, so
10 you can't use the shapes as they fit into each other to
11 piece it together. So, you have to look at what you're
12 presented, be able to analyze it to understand, appreciate
13 what it's supposed to be, and then construct it. He scored
14 a 4 on that.

15 Q. Which is high or low?

16 A. It's very low. A score of 4 is two standard
17 deviations below the mean. It's at the 2nd percentile.
18 This is significantly below average functioning. That
19 stood out for me. Also ---

20 Q. Now, now, before we move on, does this subtest
21 correspond to any area of the brain?

22 A. Yes. This is a subtest that relies heavily on sort of
23 the visual processing areas of the brain and the
24 integration of visual information, so that the answer is
25 yes. This is a visuospatial subtest, and it is more sort

1 of occipital lobe and some parietal involvement.

2 This is a subtest that looks at concrete stimuli.

3 It's pictures of an elephant, a face. I can tell now

4 because we don't -- it's not violation of copyright. The

5 abstract version of that is the test called Block Design.

6 In Block Design he's given pictures of blocks that have

7 different colored sides on them, and they are put together

8 and form different designs, and he's given a set of -- his

9 own little set of blocks, and he has to rapidly put them

10 together so that the design on the top of the blocks

11 matches the design in the diagram that he's shown. Again

12 analysis, synthesis, visuospatial relations, and he scored

13 a 6 on that, which was also pretty low for him.

14 So, I'm getting a sense of someone who is very quick

15 in terms of eye-hand coordination but not so quick when he

16 has to process information to respond, with a distinct

17 weakness in visuospatial construction, analysis, and

18 synthesis.

19 Q. And what does that specific weakness tell you?

20 A. It tells me that he's having difficulty with his

21 primary visual areas and in integrating that information

22 with more association areas in order to guide his behavior.

23 Q. Okay. From the other subtests, are there -- is there

24 anything that's significant?

25 A. No. He scores in the average, low average range on

1 the majority of the rest of the subtests. Nothing was --
2 nothing that stood out as particularly noteworthy.

3 Q. Okay. With, with what you've talked about -- and, and
4 by the way. As far as this test, I'm going to show you
5 Applicant's Exhibit Number 12. Is that some additional
6 information that related to this test?

7 A. Yes. This is the actual testing protocol.

8 Q. Okay.

9 A. So, the examiner records his responses in this booklet
10 when she is giving him the test and then uses it to
11 tabulate his scores and generate standard scores based on
12 the, the standardized procedure.

13 Q. All right. So, you had a good bit of information
14 about this test that was done at Tara Hall?

15 A. Yes. It's a standard IQ test that we routinely give.

16 Q. All right. Are you able to draw any conclusions from
17 these test results about how William's brain functioned in
18 May 1990?

19 A. Okay, it's very unusual to have such a discrepant
20 score on any one subtest. Typically what you see --
21 because you are looking at a brain that you are hoping is
22 intact -- is that most of the brain is operating at the
23 same functional level. So, you, if you have a person who's
24 scoring in the average range, you want them to be within
25 one or two points of that average score because that's how

1 we know a healthy brain functions.

2 When you find someone who is scoring two whole
3 standard deviations, placing him the 2nd percentile,
4 meaning, for example, if he -- we had a hundred people we
5 were lining up in terms of their ability, he would be
6 second in line, and there would be 98 people in front of
7 him. Very significant when in almost all of the other
8 subtests -- except for Block Design, which he does poorly
9 on but not as poor. He's right in the middle of the line.
10 That indicates to me that there is compromise to that -- to
11 those occipital areas and the visual association areas of
12 the brain. This is significant because we know that lead
13 affects selectively that area of the brain as one of the
14 areas in which it is selectively toxic.

15 Q. Is there anything about these test results that gives
16 you any information about William's executive function?

17 A. No. These tests are not designed to assess things
18 like executive functioning. What I do see is that he is,
19 he's reluctant. He's hesitant. He's -- when, when
20 children know that there's something wrong, they don't like
21 to be tested.

22 Q. Okay.

23 A. And I got the same type of behavior from him when I
24 examined him: that this was not someone who was eager to
25 demonstrate his deficiencies.

1 Q. And he's being confronted with his weaknesses?

2 A. Yes.

3 Q. By having to answer some of these tests?

4 A. Yes, and it's not like, oh, I'm poor at this. It's
5 that I'm abysmal.

6 Q. Okay.

7 A. So, let me just look at this just to -- where is that
8 -- here.

9 (A PAUSE.)

10 A. Yeah, he, he -- his score on that subtest is very,
11 very low just in terms of the raw score, and also in the
12 standardized score that you get when you compare his
13 performance to the average, the mean group, other children,
14 13.9, and the standard deviation that you would expect.

15 When a child is doing this task, if they're performing
16 that poorly, if their functioning is that low, they know
17 it. They know it because they can feel it and they see it.

18 Q. Okay, and the area of the brain that he had that
19 deficiency is an area of the brain Dr. Canfield talked
20 about earlier that's affected by lead neurotoxicity?

21 A. Yes. We -- one of the hallmarks of lead neurotoxicity
22 is visuospatial, visual-perceptual deficits and deficits
23 with orientation and with construction.

24 Q. Okay, and so at, at this point in 1990, if, if you
25 look at, I guess, all of that different data that's emerged

1 between MUSC, William S. Hall, the Tara Hall testing, are
2 you seeing information that's indicative of lead toxicity?

3 A. Well, it certainly suggests it.

4 Q. Okay. Is there a convergence of that information?

5 A. Yes. Between his changes in his behavior, the
6 impulsivity that -- that part of the executive dysfunction.
7 So, part of executive dysfunction is to regulate your
8 impulses, to control your behavior. It's also to be able
9 to control and regulate your affect, your mood so you don't
10 feel things and extremes like his extreme depression or his
11 extreme suicidality. There is a, an ability to modulate.
12 That was missing when he was hospitalized, and he just
13 showed, just, disturbances that were not previously noted.

14 Look, he was in elementary school for five full years
15 and Headstart the year before that. It's not like teachers
16 are not ready and willing to write down children's
17 misbehavior. There wasn't anything in his record.

18 Q. All right, and, and so I guess what I'm getting at is,
19 is even if you had never actually done any testing, you
20 could have looked at the records to this point in William's
21 life and, and seen a presentment of lead toxicity?

22 A. Well, you know, as I mentioned when we started, I
23 trained in the science-practitioner model. The way I
24 approach an evaluation is very much like a scientist. I am
25 collecting data points, and this is -- this would have been

1 a data point, a data point that I would have placed a lot
2 of value on, a lot of weight on because it is such a big
3 discrepancy that I, I would have marked that as let me
4 consider this and see how it fits with some of my other
5 data points so that I can look for convergence and
6 consistency in order to explain this in a way that is
7 physiologically, anatomically, neuropsychologically sound
8 and parsimonious. And this is one that fits that
9 converging information that's coming from multiple,
10 different sites that I have now identified for you.

11 Q. Okay.

12 MR. GROSE: At this time, Your Honor, I would move
13 Applicant's Exhibit 11 and 12 into evidence.

14 MR. MABRY: No objection.

15 THE COURT: Without objection.

16 (PSYCHOLOGICAL EVALUATION MARKED INTO EVIDENCE AS
17 APPLICANT'S EXHIBIT NUMBER 11.)

18 (TESTING PROTOCOL MARKED INTO EVIDENCE AS APPLICANT'S
19 EXHIBIT NUMBER 12.)

20 BY MR. GROSE:

21 Q. So, after two years at Tara Hall, what happened with
22 William next?

23 A. So, he is discharged on June 1st, and he returns live
24 with his mother.

25 Q. Okay, and what happens when he returns home to his

1 mother? .

2 A. When he returns to his mother and he goes back to
3 school, so he enters the eighth grade.

4 Now, he failed the sixth grade. When he entered Tara
5 Hall for two years, he repeated the sixth grade in Tara
6 Hall and completed the seventh grade at Tara Hall. When he
7 comes out of Tara Hall, back into his home environment, he
8 enters into the eighth grade. Let me see if I can -- he
9 enters into the eighth grade and contrary to his
10 functioning before this period in his life, he fails almost
11 everything in the eighth grade, and he is sent to summer
12 school such that his performance on summer school will then
13 determine whether or not he's promoted.

14 It seems as though he went to summer school and was
15 promoted socially because I don't see any sort of
16 indication that he scored or performed any differently.

17 Finished the eighth grade. That was last grade he
18 finished. He entered the ninth grade. Could not perform
19 and dropped out of school at that point.

20 Q. All right. So, I take it that this change from grades
21 one through six, what you saw repeating six and then
22 seventh and then now afterwards, is significant?

23 A. Yes.

24 Q. And, and why is that significant?

25 A. Because that doesn't ever happen by chance. You don't

1 by chance go from functioning adequately to not functioning
2 at all.

3 Q. And, and do you attribute that to the lead?

4 A. We know that lead toxicity contributes to significant
5 deficits in learning and memory, and he is someone who,
6 prior to this hospitalization, was learning. His academic
7 achievement was commensurate to his grade; his reading
8 level was commensurate to his grade. His scores on
9 standardized tests, the Iowas that they give at school,
10 were consistent with a B/C level student, sort of in that
11 range of the array, and subsequent to that he's not
12 learning. He's getting sort of variable scores on things.

13 You don't see the same linear progression in academic
14 achievement in line with his grade and his age. It's much
15 more variable and not very predictable. There is not a
16 pattern to it. He's failing at school, and it's very
17 different from the child that he was previous to fifth
18 grade.

19 Q. And you attribute that to a problem with his brain?

20 A. I would say that it would -- a brain problem would be
21 -- probably be a cause of this type of presentation, yes.

22 Q. Okay. Did William have problems with behavior after
23 he was released from Tara Hall?

24 A. Yes, he did. He did and, you know, they, they did
25 this evaluation of him at Tara Hall before they discharged

1 him. And one of the things that they noted was that he was
2 extremely well regulated, got along very well, was
3 respectful, functioned very well in that environment, and
4 that he had worked hard at his studies while he was there.
5 Had applied himself. Again we see lots of variability in
6 his functioning.

7 And they stated that it seems like the way in which
8 his brain works is a model that is very sequential. It's
9 one thing after another. It's not simultaneous. You
10 cannot consider simultaneous things. In order to
11 understand them, to step back. It's the forest for the
12 trees phenomenon to solve problems.

13 And the sequential way of doing things works very well
14 with people who have problems with executive functioning.
15 And the note was William has done well at Tara Hall because
16 our model of education follows this sequential model. That
17 they did not expect him to do as well in the public school
18 because they do not follow the sequential model.

19 Q. So, it, it's kind of like what Dr. Canfield testified
20 to earlier, that the structure at Tara Hall helped him make
21 decisions and helped with the executive functioning?

22 A. Yes. Now, so we talked about executive dysfunction as
23 being the purview of the frontal lobes, and they are
24 responsible for such things like planning, strategy,
25 organization, self-control, self-monitoring, mental

1 flexibility. These are higher-order functions. The
2 frontal lobes are the part of the brain that are the last
3 to develop. They also the last area that was -- you know,
4 we went from a cortex that was relatively smaller in the
5 past with the frontal lobes being smaller in size. As we
6 have advanced, as we have language, as we have abstract
7 thought, as we have reasoning, that frontal lobe has grown.
8 So, now it is one of the biggest lobes, and it is critical
9 for a person to function well in the world.

10 He's showing deficits in those functioning -- those
11 functions, those abilities that involve coordination, of
12 processes of different areas of the brain that then have
13 to be integrated and analyzed and then make -- form
14 judgments of mind to then guide behavior in a goal-directed
15 fashion.

16 There are more connections from the frontal lobes to
17 the other areas of the brain than anywhere else, anywhere
18 else in the brain. This is where every -- all the
19 information is sent forward, and if you can't process that,
20 you're going to be at a loss. And the older you get, the
21 more demand there will be on you to function in that way
22 because this is what we want. We want to educate children
23 to be independent, to use judgment, to use reasoning, to
24 step back and analyze the situation before they act.

25 By the time a child is in sixth, seventh, and eighth

1 grade, a lot of the instruction is geared to give them
2 opportunities to develop this. And typically when children
3 fail in those grades, it's because they have a selected
4 weakness in that level of organizing, planning, and
5 strategy.

6 When you are in a place like Tara Hall, there is no
7 demand. It's sequential. It's logical. It's predictable.

8 MR. MABRY: Your Honor, I'm going to object at this
9 point. She has never taught at Tara Hall; she's not an
10 administrator at Tara Hall. I don't know how she can
11 testify as to what's going on at Tara Hall.

12 THE COURT: Well.

13 MR. GROSE: I'll, I'll, I'll, I'll, I'll move on.

14 THE COURT: Clarify it.

15 BY MR. GROSE:

16 Q. All right, let me just ask you this.

17 THE COURT: Where is the sequential ---

18 Q. You, you, you ---

19 THE COURT: --- basis for testimony about Tara Hall?

20 BY MR. GROSE:

21 Q. And what's your basis for that testimony?

22 A. It is in the last sentence of the psychological
23 evaluation that was conducted by the psychologist who saw
24 him two days before he was released.

25 Q. And we're talking about Applicant's Exhibit Number 11?

1 A. Yes. I believe that's the one.

2 (A PAUSE.)

3 A. Yes. She writes in her educational recommendation,
4 her very last line: A superiority. She mentions previously
5 that he is a sequential versus a simultaneous processor:

6 A superiority of sequential over simultaneous
7 mental processing skills indicates that
8 instruction should focus on the well-developed
9 strengths of logic, step-by-step thinking, and
10 using explicit rules and facts to help learning.
11 Details and specific sequences of events are
12 likely to be recalled better than the concepts
13 and -- he sees of a story or assignments.

14 So, not big picture. Little pieces that are logically
15 aligned so that you follow them.

16 Comprehending the concepts and -- sorry.

17 Comprehending the meaning by using context and
18 generalizing or stating the idea of a passage are
19 likely to be more difficult and may be a focus
20 for future remediation after progress is made.

21 Q. Okay.

22 A. There is also another note, and I don't know where it
23 is, where she specifically says that she doesn't think he
24 will do well in the public school system because of the
25 greater demand for sequential reasoning. And if you'll

1 give me a second, I may be able to find it, if you would
2 like.

3 Q. Take your time.

4 A. Here it is.

5 (A PAUSE.)

6 A. Okay, it says:

7 The educational programs at Tara Hall were
8 obviously geared for William's logical thinking
9 processes and his need for structure, with
10 specific rules and guidelines. The public school
11 system may not be as appropriate for William's
12 style of learning. The overall expectation in
13 the public system, however, would be grade-level
14 average grades for his placement.

15 Q. And what you're looking at is, in fact, the last page
16 of Applicant's Exhibit Number 11, which is a letter that
17 was actually written on June 26, 1990, by Dr. Rivers, who
18 is the examiner that gave the, the evaluation?

19 A. Yes, and this is written it looks -- seems like maybe
20 a couple of weeks after she did her evaluation. And it
21 looks very much like the type of letter that we write when
22 we have evaluated a child and are giving recommendations to
23 the school on how best to teach this child. So, I have
24 written many letters such as this where I highlighted
25 child's strengths and weaknesses and then offer guidelines

1 as to what is the best mode of instruction.

2 Q. And so Dr. Rivers is actually predicting that William
3 might not do well academically because of what she's
4 learned about these tests?

5 A. She's identifying that his strength is in this --
6 having this very predictable, structured, step-by-step,
7 logical, obviously logical, not one where he has to infer
8 logic ---

9 Q. So, the ---

10 A. --- process like at Tara Hall, she said.

11 Q. So, the Tara Hall model versus what we see in the
12 public schools sometimes?

13 A. Yes.

14 Q. Okay. Eventually did -- after leaving Tara Hall, did
15 William get into a situation where there was involvement
16 with what we used to call the Department of Youth Services
17 in South Carolina?

18 A. Yes. He left Tara Hall, and as I mentioned before was
19 experiencing school failure, and then he got into some
20 legal troubles and I believe -- he got into some legal
21 trouble. He was placed on probation as a first offender.
22 I could be wrong, but that's my recollection, and I believe
23 as part of that probation, the judge ordered him to have
24 another psychological evaluation.

25 Q. All right.

1 MR. GROSE: Can we mark these as the next two
2 exhibits?

3 (SOCIAL WORKER'S REPORT MARKED AS APPLICANT'S EXHIBIT
4 NUMBER 13 FOR IDENTIFICATION.)

5 (EVALUATION BY SOUTH CAROLINA DEPARTMENT OF YOUTH
6 SERVICES MARKED AS APPLICANT'S EXHIBIT NUMBER 14 FOR
7 IDENTIFICATION.)

8 BY MR. GROSE:

9 Q. Doctor, I'm going to hand you Applicant's Number 13
10 and Number 14, which appear to be Department of Youth
11 Services documents. Have you reviewed those?

12 A. Yes, I have reviewed these documents from the
13 Department of Youth Services and from the Reception and
14 Evaluation Center.

15 Q. All right. Is one of those documents a social
16 history?

17 A. In a sense. One is sort of summarizing, I think, why
18 he's court ordered and what has happened, and it's just a
19 social work report, and the other is an actual report of
20 the evaluation.

21 Q. Okay, and so the social work report is Number 13, and
22 the report of the evaluation is Number 14?

23 A. That is correct.

24 Q. Okay. All right. You, you talked, when you were
25 talking about the -- well, first of all, let me ask you

1 this. What -- did they give an IQ test at this time?

2 A. Yes. They give him the Wechsler Adult Intelligence
3 Scale Revised, which is the IQ test that you give to
4 sixteen and older. So, the Wechsler Intelligence Scale for
5 Children is -- takes you up to -- I think it starts at six
6 and goes up to sixteen and several months, and then
7 subsequent to that you can graduate to the adult version.
8 He is not quite sixteen at this point that they give him
9 the adult version of the IQ test.

10 Q. Okay. So, this is a standardized test, but it may not
11 have been the most appropriate one for him?

12 A. Based on standard administration, it wasn't the most
13 appropriate one for him.

14 Q. Okay. Now, when you talked about the IQ testing at
15 Tara Hall, you talked about, you know, how William
16 approached it. You know, that they, you know -- that I
17 guess he had some stress in taking parts of the test. Did
18 you see anything like that with the Department of Youth
19 Services test?

20 A. Let's see.

21 (A PAUSE.)

22 A. Okay, something that was consistent across assessments
23 that he's had both as a juvenile, as a child, and with me
24 is this pattern of answering questions but in a hesitant,
25 slow manner and not being very communicative. So, this

1 says he didn't really initiate conversation with the
2 examiner. There's also -- so, William has been
3 hospitalized. He's had psychiatric treatment. He's got
4 problems with his mother. DSS has been called. He went to
5 boarding school of sorts for children with problems for two
6 years. He gets out. He's failing at school. He gets into
7 legal trouble. Then he got -- gets ordered to have this
8 evaluation. His mother doesn't take him. He misses ---

9 MR. MABRY: Your Honor, I'm going to object. This is
10 not responsive to the question.

11 MR. GROSE: All right.

12 THE COURT: Well ---

13 WITNESS: I'm trying to explain some of his ---

14 THE COURT: Just hold it.

15 MR. GROSE: Let me, let me just ---

16 THE COURT: Just hold it. Just answer his question.

17 WITNESS: Sure.

18 MR. GROSE: Okay. All right.

19 BY MR. GROSE:

20 Q. Let, let me ask you. In -- is there evidence in this
21 evaluation, this social work history and the evaluation, is
22 there evidence that the child had been maltreated?

23 A. He is clearly denying any psychological problems.

24 He's denying being admitted to a hospital. He's denying
25 ever having had psychiatric care. He's denying ever been

1 in a residential treatment placement. He is clearly trying
2 to present himself as psychologically healthy.

3 Q. Right, and why do you think that is?

4 A. Well, as I was beginning to say, he missed -- he did
5 not show up to have the evaluation as it was ordered by the
6 judge. And when he was called back in after they had to
7 assign a guardian ad litem because his mother would not
8 appear at court even though she had accused him of being
9 incorrigible, the judge ordered him to forty-five days of
10 being sort of held at the, the Reception and Evaluation
11 Center to have a -- what would have been maybe a three or
12 four-hour psychological test in the community.

13 Q. Okay. All right, and whose, whose responsibility was
14 it to get William to the community test?

15 A. I believe he wasn't driving, and I don't know sort of
16 the dynamics of it entirely, but when I see a fifteen,
17 sixteen, seventeen year old, typically they are accompanied
18 by a parent.

19 Q. All right, and did you have evidence that William's
20 mother was not showing up for court appearances?

21 A. Yes and, and there's quite a bit of testimony in the
22 sentencing portion of his trial where the public defender
23 that was assigned to his case is talking about how
24 irresponsible she is, how she doesn't show up, how
25 frustrating it is. That she and William show up and

1 because the mother's not there, it gets delayed and
2 postponed and so on and so forth.

3 Q. Okay. So, there's at least some evidence of neglect
4 or inattention at this point?

5 A. There is evidence of neglect and, and inattention to
6 him, not meeting his needs throughout his childhood and
7 adolescence.

8 Q. Okay. Now the, the test that was administered, what
9 were the results of that test?

10 A. So, they administered the Wechsler Adult Intelligence
11 Scale. He achieved a full scale IQ of 83 with a verbal IQ
12 of 81 and a performance IQ of 89.

13 Q. All right. Now, this is different from the results
14 that we saw at the Tara Hall IQ test?

15 A. Yes. Let me go back to that. Can I -- since you have
16 it?

17 Q. I will hand you Applicant's Exhibit Number 11.

18 A. Thank you. All right, his full-scale IQ in Tara Hall
19 when he was given the IQ test that is appropriate for his
20 age was 90. On this administration, his full-scale IQ was
21 83. Okay, we consider a significant difference being a
22 fifteen point spread between scores with that full scale of
23 90 on the appropriate test for his age where the norms are
24 appropriate so you can compare with him another thirteen
25 year old, whereas we don't have those same norms when we

1 are giving a test that's for an older child, the range that
2 would be considered appropriate where we would expect
3 because there's error and variability depending on many,
4 many things. That if you give that test to him,
5 ninety-five out of a hundred times his score will fall
6 anywhere between 85 and 95.

7 He is scoring an 83 at this point, which is lower than
8 what you would predict with an age-appropriate test but
9 still, in my opinion, consistent with his intellectual
10 functioning, which overall is low average to average at
11 best.

12 Q. Okay. So, let me, let me break that down. There's a
13 problem in comparing the, the Tara Hall test to the DYS
14 test because the DYS test was not an age-appropriate test?

15 A. Partly, yes, but also this is where I think pattern
16 analysis comes ---

17 Q. Okay, that's ---

18 A. --- in handy.

19 Q. --- what I want to get to next. Can you take it from
20 there on the pattern analysis?

21 A. So, what -- and they do not report his individual
22 subtest scores, but they say:

23 Among the subtests, his highest achievement was
24 in the area of psychomotor speed.

25 Which is again that coding test that he scored a 13 on

1 in Tara Hall. It's his strength, identified strength on
2 this administration, which is approximately three or four
3 years later, and the exact score that he achieved for me
4 when I assessed him this past July.

5 Q. Okay. So, as far as his strength, that's consistent
6 between really all three tests?

7 A. Yes.

8 Q. The Tara Hall, the Youth Services, and, and even your
9 test. As far as weaknesses, is there any consistency
10 between -- right now let's talk about Tara Hall and the
11 Youth Services test.

12 A. Well, as I mentioned, Tara Hall, the weaknesses in
13 visuospatial functioning, analysis, synthesis, reasoning.
14 Yes, that was consistent also with my findings. Because
15 their -- they have not provided me with the subtests scores
16 on the Youth Services test, I can't say much more than he
17 -- his strength was in that psychomotor speed. And then
18 there is a relative weakness they mention on a task:
19 tapping, common sense reasoning. And again without seeing,
20 again, the profile, the pattern, I can't say much more than
21 that. But what I can say is he scored couple points below
22 the expected range on a test that I would expect him to
23 perform a little bit lower on because it's not normed for
24 his age. So, if I'm going to compare a sixteen year old to
25 an eighteen year old, I'm going to expect that he's going

1 to fall out lower.

2 Q. Did they to anything called projective test?

3 A. They did. They gave William -- so, we have two types
4 of tests basically. We have objective tests where you --
5 there are a set number of answers. There's a way of
6 scoring them right or wrong based on the specific answer.
7 It is scored compared to a normative sample. It's quite
8 sort of clear cut. And we have subjective tests where the
9 person is -- the person responds and then the examiner,
10 based on their experience, their background, their
11 training, interprets what they say and makes a
12 determination about their character or their emotional
13 status. These are projective tests. So, we give them
14 ambiguous tests where we expect them to project onto that
15 some psychological aspect of themselves that might not
16 otherwise be apparent. They gave him a number of these
17 tests.

18 They gave him a number of these tests. They gave him
19 an achievement test. Let me just go back. They gave him
20 an achievement test, and his achievement was sort of as
21 this reading level that varied between sort of the eighth
22 and tenth grade level. Again, I don't have his scores. I
23 don't know. There's no table of anything of this kind.

24 But the projective test is interesting because it says
25 -- let me see. Okay, says here:

1 William generally has the ability to interpret
2 his environment in a conventional manner and no
3 evidence of psychotic functioning was noted.

4 When you get very bizarre responses -- I know many of
5 us know about the ink blot test, the Rorschach. When you
6 get very bizarre responses that we see with psychotic
7 people, we look for those, that bizarre sort of aberrant
8 style. Apparently he's not and he wasn't given the
9 Rorschach; but it's projective test. It adds:

10 He appears to be an angry young man who may
11 express this anger covertly in the form of
12 oppositional behavior. He is expressing this.
13 He is impulsive, possesses poor planning
14 abilities, and tends to act without thought of
15 the consequences for his behavior. The data
16 further suggest that William is emotionally
17 inaccessible and unlikely to reveal his true
18 feelings to others. He tends to be anxious in
19 social situations and has dependency needs which
20 are presently frustrated.

21 To translate, he -- his reasoning is not out of touch
22 with reality. He is having difficulty regulating his
23 anger, regulating his emotions. He is acting out these
24 emotions in his oppositional behavior, and he's impulsive.
25 He's not reasoning. He doesn't anticipate or see the

1 potential consequences for what -- for his actions, which
2 speaks to, again, that aspect of executive functioning of
3 planning, reasoning, judgment, sequence, of orchestrating,
4 and maneuvering in a way that is going to increase the
5 likelihood of you getting your needs met. He's -- his
6 behavior is self-defeating, and it says he's emotionally
7 inaccessible, which is something we see with children
8 who've been abused. They are -- they don't learn how to
9 express their feelings. They don't trust other people with
10 their feelings, and his dependency needs are not being met,
11 which means he's not being taken care of. That's what
12 dependency is, being dependent on someone to take care of
13 you in a way that makes you feel cared for and safe.

14 Q. All right, but this -- and again we're not saying that
15 there isn't any neglect or maltreatment going on here, but
16 what we're seeing here in this examination by the
17 Department of Youth Services, does that give you any
18 information regarding lead neurotoxicity?

19 A. Well, is a very consistent with previous evaluations,
20 and it is giving us even more of a window into the
21 executive dysfunction, the emotional dysregulation, the
22 impulsivity, and the lack of judgment. So in that regard,
23 yes, it's consistent.

24 Does it give us a little more information about intra
25 psychic things like needs aren't being met and he doesn't

1 know how to communicate his feelings and, and that is
2 something that we see with abused children? Yes. It, it
3 gives us additional information, but what it does give us
4 is not inconsistent with previous assessments, with
5 behavior that he's exhibited, and with my own assessment of
6 him.

7 Q. All right, and, and looking back in time at William's
8 life, we're looking back at Tara Hall, we're looking back
9 at William S. Hall, we're looking back at MUSC and what got
10 him into that situation, and this is all consistent?

11 A. Yes.

12 Q. Okay.

13 A. Consistent.

14 Q. All right. Okay. Through the records and through
15 your clinical interview, did you learn any information
16 about William's history of, of drug use?

17 A. Yes, I did. What he reported to me was very
18 consistent with what I saw in the records in the regard --
19 with respect to the fact that when he was seen at MUSC and
20 when his blood was tested at William S. Hall, there was no
21 drugs or alcohol in his system, and he was at that point
22 eleven, twelve or such. He didn't do any drugs while he
23 was in Tara Hall because he didn't have access to them.
24 Even if he wanted to, they wouldn't have been available to
25 him.

1 Once he gets out of Tara Hall when he is fourteen and
2 not doing well in school, he begins to hang around with
3 other kids who are out of school and dealing in drugs, and
4 he begins to use marijuana very heavily, and he experiments
5 with heroin. But he tells me, he told me that that was not
6 his drug of choice. He did not like the way that it made
7 him lethargic. That it was marijuana and heavy doses of
8 it.

9 Q. Okay, and what about cocaine?

10 A. Cocaine came subsequent to the marijuana and that he
11 had an unusual reaction to him from his contemporaries. He
12 had an unusual reaction to cocaine from his contemporaries
13 because he could do cocaine and still sleep. It didn't
14 activate him in the same way that it activated his
15 contemporaries. But he does at that point -- he is using
16 drugs, and he mentioned that he never liked the taste of
17 alcohol, and that was not something that he would prefer,
18 and I didn't see indications -- I didn't see any DUIs, I
19 didn't see any -- I didn't see anything in the record that
20 was consistent with someone who had a drinking problem.

21 Q. All right. Now, you said he reacted to the cocaine
22 differently than some of his peers did. Is there a
23 difference with how people who have brain damage from lead
24 toxicity react to cocaine?

25 A. There is a body of evidence that --- as I mentioned

1 before, the toxic impact of lead, it has an impact on the
2 brain structure, the brain function, and the brain's
3 neurochemicals. The way that cocaine operates in the brain
4 is to stimulate a very large sort of release of dopamine in
5 the brain's reward centers, the same thing that happens
6 when you engage in anything that's pleasurable. The
7 cocaine just dumps it in a big dose, which is why you get
8 that high right away.

9 Well, lead interferes with neurotransmitter
10 functioning storage and reception, and we know that
11 dopamine, among some of the others like neurotransmitters
12 that are important for learning, for example -- and
13 neurotransmitters that are important for the regulation of
14 mood are negatively impacted by lead. A body of literature
15 suggests that in individuals who have early exposure to
16 lead, that they do not respond equally to those who do not
17 when they experience cocaine because their brain has almost
18 a depletion so that they need, they need much more of the
19 drug to get the same response. And when he tells me it
20 did nothing for me, I could sleep on it when everyone
21 else is bouncing on the walls, it tells me that -- again,
22 it's another piece of information, another piece of data
23 that fits this consistent, convergent pattern that is
24 building.

25 Q. And you got some of this information from both your

1 review of the records and your clinical interview?

2 A. Yes.

3 Q. Okay, and as part of your clinical interview, did you
4 get information about childhood maltreatment?

5 A. I did. I got it some from William. As is typical
6 with children who've been abused, and especially when on
7 top of that they are not very good at regulating their
8 emotions, they don't want to talk about the abuse. They
9 don't want to be upset. They will ask why are we doing
10 this. This is in the past. I don't want to go there. I
11 got some resistance from him, but yet it was obvious and
12 with time we were able to get to more and more information.

13 But in looking at declarations and trial testimony and
14 all the Tara Hall records, the William H. -- when a case
15 worker is writing repeatedly in a medical file he should
16 not be released to the mother, significant to me. So,
17 there's collateral information that supports what he's
18 telling me.

19 Q. Okay. So, again coming from both sources, the
20 collateral information and what William reports?

21 A. That's right.

22 Q. All right.

23 MR. GROSE: Judge, I can do what you want me to do,
24 but this would be a good breaking point.

25 THE COURT: Approach the bench.

1 (OFF-THE-RECORD BENCH CONFERENCE.)

2 MR. GROSE: Let me do this before we adjourn, if it's
3 okay. I may not have moved the Department of Youth
4 Services records into evidence.

5 MR. MABRY: As long as it's -- that's all of them,
6 right?

7 MR. GROSE: Right. Well, it's the ones that she
8 talked about.

9 MR. MABRY: Okay.

10 MR. GROSE: Which is ---

11 MR. MABRY: I don't have any objection.

12 MR. GROSE: --- 13, 14.

13 MR. MABRY: Yes, Your Honor.

14 THE COURT: Without objection.

15 MR. GROSE: All right. Thank you.

16 (SOCIAL WORKER'S REPORT MARKED INTO EVIDENCE AS
17 APPLICANT'S EXHIBIT NUMBER 13.)

18 (EVALUATION BY DEPARTMENT OF YOUTH SERVICES MARKED
19 INTO EVIDENCE AS APPLICANT'S EXHIBIT NUMBER 14.)

20 THE COURT: All right, we'll stand adjourned until
21 9:30 in the morning.

22 (WHEREUPON, THE CASE IS AT EASE.)

23 TUESDAY, DECEMBER 8, 2015

24 (COURT RESUMES AT 9:28 A.M.)

25 MS. FRANKLIN-BEST: Charles is outside trying to see

1 exactly where our expert witness is.

2 THE COURT: I wondered that.

3 MS. FRANKLIN-BEST: She's probably doing an Uber to
4 get here to the courthouse. So, apologize for that, Your
5 Honor.

6 (A PAUSE.)

7 THE COURT: Anything else of a pretrial nature -- I
8 mean, a prehearing nature, housekeeping?

9 MS. FRANKLIN-BEST: You know, maybe we could use this
10 time productively. I can go ahead and inform the court and
11 also opposing counsel which claims we will not be going
12 forward on.

13 THE COURT: Are you referring to your email of the
14 30th or the third-amended application?

15 MS. FRANKLIN-BEST: The third-amended application,
16 Your Honor. So, these are ones that will be abandoned.

17 THE COURT: All right.

18 MS. FRANKLIN-BEST: And on page 3 -- excuse me -- so,
19 claim 11.B.1, which is the Dr. Johnny Rivers claim.

20 THE COURT: Okay.

21 MS. FRANKLIN-BEST: Claim 11.B.6, which is the Dr.
22 Mark Cunningham claim.

23 THE COURT: Okay.

24 MS. FRANKLIN-BEST: PTSD claim. Also claim number 7,
25 which is the Mark Cunningham prison adaptability claim. We

1 are also giving up 11.B.8, which is generational social
2 history claim.

3 THE COURT: Okay.

4 MS. FRANKLIN-BEST: And then on the next page. So,
5 this would be appellate claims. We will not be going
6 forward on claim 11.C.4, which is counsels' objections to
7 the admission of Keeling [phonetic] and Armon Dickerson's
8 statements, and then also claim 6 regarding the DNA sample
9 in that hearing.

10 THE COURT: Okay.

11 MS. FRANKLIN-BEST: But we are prepared to go forward
12 on with -- except for the Batson claim we've already
13 discussed, we are prepared to go forward on the rest of
14 these.

15 MR. ZELENKA: Okay, so I understand, those are being
16 abandoned with consent of the applicant?

17 MS. FRANKLIN-BEST: Yes.

18 THE COURT: Good.

19 Mr. Grose, what do you have for the court?

20 MR. GROSE: She is using Uber as transportation, and
21 she was en route when this was beginning a second go, so I
22 imagine she'll be here in just a minute or two.

23 THE COURT: Where is she coming from?

24 MR. GROSE: She's staying at a hotel in the Vista, so
25 it's only a few blocks away. So, you know.

1 THE COURT: All right. I see Mr. Dickerson is
2 shackled. Do you have any ---

3 MR. GROSE: Yes. We, we do want to ask that his
4 handcuffs or his hands be freed again. In talking with
5 security this morning, they needed your say again this
6 morning to go forward on that.

7 THE COURT: That's fine.

8 (A PAUSE.)

9 THE COURT: Any objection from the state?

10 MR. ZELENKA: No objection from the state.

11 (A PAUSE.)

12 MR. ZELENKA: Judge, is there any intent to go into
13 Wednesday on this hearing depending upon how the witnesses
14 play out today?

15 THE COURT: I'm available Wednesday.

16 MR. ZELENKA: Okay.

17 THE COURT: I have PCRs Thursday and Friday. I have
18 no ---

19 MS. FRANKLIN-BEST: I believe that we will be finished
20 today, and so what I was talking to Mr. Zelenka about was
21 making sure we can get a transport order for William to
22 return back to Lieber, where they're currently keeping him
23 in Super Max here, which is pretty Spartan accommodations.

24 THE COURT: At Alvin S. Glenn?

25 MS. FRANKLIN-BEST: No. Super Max on Broad River.

1 THE COURT: Okay. Well, I can't run your case for
2 you. If you feel that you can -- I mean, we're only going
3 to have one more hearing, to my knowledge.

4 MS. FRANKLIN-BEST: Absolutely, Your Honor.

5 THE COURT: If they finish today, they finish today.

6 MS. FRANKLIN-BEST: I just didn't know if we needed --
7 sometimes you actually get the physical proposed order.
8 That's kind of why I'm asking.

9 MR. ZELENKA: Historically if it's before 4:30 when
10 I'm able to get in touch with the legal advisor's office at
11 corrections, they can make the arrangements right then.

12 MS. FRANKLIN-BEST: So, that's how you do it.

13 MR. ZELENKA: Yeah, but after 4:30, there's nobody
14 home there. So, we'll just have to see the way we are at
15 that point. I mean, I can, I can get that done up to
16 4:30.

17 MR. GROSE: Well, let's revisit it. We'll know where
18 we are at lunch.

19 MR. ZELENKA: Right.

20 THE COURT: Well, we may abbreviate the lunch hour.

21 (A PAUSE.)

22 THE COURT: Call your witness.

23 MR. GROSE: All right. We would recall Dr. Israelian.

24 DIRECT EXAMINATION BY MR. GROSE RESUMES:

25 Q. Situated?

1 A. Yes.

2 Q. I think where we left off yesterday is, is we had gone
3 through a lot of history and had also gotten out
4 information from your clinical interview, and I was about
5 to transition into the testing that you performed. So, I,
6 I guess the first question I have is what constitutes a
7 neurological testing portion of the examination?

8 A. Okay. So, I think you mean the neuropsychological
9 portion.

10 Q. The neuropsychological, my apologies.

11 A. So, a neuropsychological evaluation basically is
12 applying principles of brain and behavior as we have come
13 to know them throughout several years of studying the brain
14 head injuries, bullet wounds and such, so that we know what
15 areas of the brain are important for different faculties:
16 attention, concentration, memory, learning. And even
17 within that, the different sides of the brain are
18 responsible for materials of different domains.

19 Typically in most people, most right-handed people,
20 the left hemisphere is responsible for processing verbal
21 information and the right hemisphere for visual. We know
22 that the frontal lobes are responsible for executive
23 functioning, and moving back from there we look at memory
24 in the temporal lobes, which are just back to that, a
25 little above and further. The parietal lobes, are things

1 like facial recognition, visuospatial processing, complex
2 visuospatial processing, and then going back the occipital
3 lobes, which is where visual information comes in and gets
4 funneled forward. So, we look at all of those areas, and
5 we look at motor functioning as well because that's an
6 important component.

7 Those five areas or more are assessed in addition to
8 assessing IQ because it's important. That's sort of a
9 global measure of functioning, not a very specific or
10 sensitive measure of brain functioning, but an important
11 one. And I also administer tests of academic achievement
12 to give me a sense of, given this person's potential which
13 we view as the IQ, have they been able to translate that
14 into functional, important faculty such as reading and
15 writing and mathematics.

16 Q. Okay, and, and do you test for malingering or putting
17 forth best effort?

18 A. Always.

19 Q. Okay.

20 A. So, one of the most important, most critical pieces of
21 a neuropsych evaluation is to do an assessment to see
22 whether or not the person is putting forth their best
23 effort and to assess whether or not they may be
24 exaggerating or feigning.

25 Q. Okay. .

1 A. This isn't valid or meaningful if the person is
2 exaggerating, feigning, creating artifacts. So, critical
3 in any neuropsychological evaluation, especially in legal
4 situations where there's much to be gained or lost based on
5 the outcome.

6 Q. Okay. All right. It helps me to kind of break things
7 into lists sometimes. Would it be fair to break this down
8 into sort of four areas? One for the -- what we just
9 talked about, the testing for malingering or putting forth
10 the best effort; two being sort of the intellectual
11 functioning, the IQ; three, the academic achievement; and
12 then four, where you look at the different areas of the
13 brain specifically.

14 A. Yes. That's correct.

15 Q. Okay. I'm going to try to go through them just from
16 an organizational standpoint that way and in that order.
17 So, let's start with the malingering. Did you administer
18 any test to determine whether or not William was putting
19 forth his best effort?

20 A. Yes, I did. I administered two such tests to him, one
21 on each day of testing.

22 Q. Okay.

23 A. We call them tests of effort, and the two that I
24 administered are ones that are very highly, typically used
25 in my profession.

1 Q. And you just brought up a good point. How long did it
2 take? You saw him over a two-day period, right?

3 A. I saw him over a two-day period. I believe I saw him
4 between four and five hours per day.

5 Q. Okay.

6 A. And -- yeah.

7 Q. All right, and so a test for malingering each day?

8 A. Yes.

9 Q. Okay.

10 A. I'm looking at my start and stop times, so I'm
11 thinking I saw him approximately five hours a day.

12 Q. All right.

13 A. I gave him a test of malingering each day, yes.

14 Q. All right, and, and which two tests were those again?

15 A. I gave him the test of memory malingering.

16 Q. All right, sometimes they call that the TOMM?

17 A. That's right.

18 Q. Which is an abbreviation?

19 A. Yes.

20 Q. All right, and how did William perform on the test of
21 malingering memory?

22 A. He did very well on that. By the subsequent trial
23 two, he obtained a score of 48 over 50, which is our cut
24 off for being valid, and he was clearly putting forth his
25 best effort.

1 When someone is trying to exaggerate or feign a
2 disability, typically what they'll do in such a test is
3 they'll, they'll score around 50%, which is chance.

4 Q. Right.

5 A. But the test is so easy that it, it would be
6 impossible unless you are really trying. Even head
7 injured, brain-damaged, demented people score well on this
8 test. So, his performance on that was very reassuring.

9 Q. Okay, and the other test for malingering or putting
10 forth effort, what was that?

11 A. So, I gave him the Victoria Symptom Validity Test.
12 It's a computerized test and it, again, it looks at a
13 person's ability to function at a level greater than chance
14 on a very simple test of memory. But this test is a little
15 bit more sophisticated than the TOMM in that there are
16 easier items and harder items so that if -- the
17 sophisticated malingerer won't do poorly on the easy items
18 but they will do poorly on the harder items, thinking,
19 well, it's a little harder, so maybe -- perfect score. No
20 errors whatsoever on any item.

21 Q. Right, and, and yesterday we talked about some of the
22 prior testing that William had at Tara Hall and the
23 Department of Youth Services. And in those tests, there
24 was evidence that he was putting forth his best effort
25 then, too, right?

1 A. Yes. Each of the evaluators reported that they felt
2 their findings were valid.

3 Q. All right, and, and, and you -- he, he behaved in the
4 same manner with you as far as putting forth his best
5 effort?

6 A. Yes, and his performance on these tests of effort and
7 also in his behavior, it seemed to me that he was very
8 invested in doing well. Often became frustrated, maybe a
9 little bit embarrassed when he wasn't doing well.

10 Q. And what was the reason for that, do you think, the
11 reason that he became frustrated?

12 A. Because it's -- no one really likes to sit and show
13 you all of their weaknesses back to back for this many
14 hours, and it's natural for people to be frustrated when
15 they don't succeed.

16 Q. And did he question why we were even doing some of
17 this?

18 A. Yes, he did. So, there were several sort of
19 back-to-back measures of reading because I was looking at
20 different aspects of reading, and we had done some writing
21 as well, and he looked at me at one point. Said what does
22 reading and writing to do with my case?

23 Q. All right, and I guess you kind of worked through all
24 of that, and he continued to participate?

25 A. Yes. I mean, it wasn't an unusual response, but he --

1 you know, with some encouragement and an explanation that I
2 was interested in learning how his brain functions in all
3 aspects, he persisted with me and really was patient.

4 Q. Okay. Let's move into the test or measure of
5 intellectual functioning or the IQ test. I understand you
6 did, from your earlier description, you administered an IQ
7 test?

8 A. I did.

9 Q. And, and which IQ examination did you use?

10 A. So, I administered the Wechsler Adult Intelligence
11 Scale, Fourth Edition.

12 Q. Okay.

13 A. Which is the most current addition of the adult IQ
14 test. That is the gold standard.

15 Q. Okay, and how did William perform on the WAIS-IV?

16 A. So, his performance on this addition of the WAIS was
17 very consistent with previous performances. He obtained a
18 full-scale IQ score of 86. Placed him in the low average
19 range of functioning. And on the verbal comprehension
20 score, the index score, he obtained a score of 91, which
21 placed him at the average range, the 27th percentile. His
22 perceptual reasoning -- so, his ability to think
23 rationally, solve problems -- nonverbally was 82, which was
24 in the low average range. And then on measures of his
25 ability to sustain attention and concentration, he scored

1 an 83.

2 And on measures of his ability to think quickly and
3 decide -- scan visual information, process it, and decide
4 -- make decisions, operate on that quickly, his composite
5 score was 100. And on that measure in that index was, as I
6 mentioned before, this one measure of visual motor,
7 eye-hand coordination, the same measure he had when he was
8 at Tara Hall. Same measure he had subsequently when he was
9 assessed at a later age, and again with me on each, each of
10 those trials he scored a 13, which again is at the 98th
11 percentile. This is a measure of the ability to look at
12 something and copy it quickly.

13 Q. All right, and so his strength, his big strength was
14 consistent through all of them?

15 A. Yes.

16 Q. And that also gives us some indication of putting
17 forth his best effort in all three of the tests, I would
18 assume?

19 A. Yes. Yes.

20 Q. Okay.

21 A. You -- it's very, very consistent, and then if I look
22 and break down his functioning in each of those -- as I
23 said, I gave you sort of a global view of the index
24 measures. We have low average intelligence overall. We
25 have average verbal comprehension 91. The 50th percentile

1 would be a score of 100. He's a 91, so he's at the 27th
2 percentile.

3 His perceptual reasoning, visuospatial processing and
4 such was lower, was an 82 in the low average range, the
5 12th percentile. He has problems indicated with attention
6 and concentration, which was an 83.

7 And then his processing speed score, and as I said --
8 so, we have these indices. Each of these indices has
9 several subtests that comprise them, and that index score
10 I'm telling you is an average of those subtests. His
11 processing speed was high because it contained that average
12 of that coding subtest that he had.

13 Q. Okay. Now just, just talking about the, the full
14 scale IQ for a second, I mean, some people would say an 86
15 and a 90 is different. Is it?

16 A. No, it's not different actually. An 86 -- when we
17 obtain our scores, we have a score that is the average, and
18 then we are given a range of scores that are the 95th
19 percentile, which means that if I administer the same test
20 to him 100 times, 95 out of 100, because it's normal for
21 people to have variability, his score will fall between an
22 82 and a 90. So, 95 out of 100 times he's going to have
23 scores falling in that range. An 86 is what he obtained
24 this time. Previously he has obtained scores that have
25 been lower, closer to the 82, and scores that have been

1 higher, closer to the 90. So, we're talking about
2 essentially the same estimate of his abilities.

3 Q. All right, now, and did you see any areas that might
4 reflect a change from, say, the Tara Hall examination?

5 A. I did.

6 Q. And are we looking at the subtest ---

7 A. Yes.

8 Q. --- for that?

9 A. We are looking at the subtest for this. So, in nearly
10 almost all of the subtest, his performance was very close
11 to identical with the exception of two scores. One was on
12 digit span, and the other one was on arithmetic, and these
13 are sort of tests of the ability to sustain attention and
14 concentration and exert mental control. They were not --
15 never an area strength of him, but on this administration
16 they were slightly lower.

17 Q. And is there any explanation for that?

18 A. In some people who have histories of chronic drug use,
19 these areas of sustained attention tend to be diminished.

20 Q. Okay, and are these areas something that you can tie
21 to a particular part of the brain?

22 A. Well, they have to do with the frontal lobes for --
23 in large part.

24 Q. Okay.

25 A. So, the ability to sustain attention, to concentrate,

1 and also this working memory component which is the ability
2 to hold information in mind long enough to operate on it
3 without having to write it. So, mental arithmetic,
4 repeating series of numbers backwards or in order.

5 Q. All right. Let's move on to the test for academic
6 achievement. Did you give William any of those tests?

7 A. I did. I gave William the Wide Range Achievement
8 Test, the test that he had been given also previously.
9 It's a very good sort of a quick measure of basic reading
10 skills, reading comprehension, math skills, and spelling.
11 On this administration, his basic ability just to read
12 words fell at the seventh grade, fourth month level.

13 Sentence comprehension, which was reading short sentences
14 and then answering -- or actually a short sentence with a
15 word that's missing, and he has to provide the word to
16 complete the meaning of the sentence. He scored in the
17 eleventh grade, eighth month range. His spelling was at
18 the eighth grade, sixth month. And his math computations
19 were at the sixth grade, eight month range.

20 And then there are a couple of interesting findings, I
21 thought, on his ability to read and spell. He made a
22 number of what we call errors of grapheme phoneme
23 translation. So, that's the ability ---

24 Q. Say, say that again. What was that?

25 A. Grapheme.

1 Q. Okay.

2 A. Phoneme translation. So, the grapheme is the visual
3 representation, the letter. The phoneme is the sound that
4 goes with the letter. To read, you have to be able to do a
5 grapheme phoneme translation well to go from the letter to
6 the sound. To spell, you have to go from the phoneme to
7 the grapheme.

8 He had difficulty. He was showing difficulty with
9 that level of phonological processing, and he also showed
10 orthographic errors. So in those types of errors in
11 spelling and reading, they're not the person pronounces the
12 sound. It's that the word that they produce doesn't really
13 even look like what's written, especially in the spelling
14 of it. It, it is off and, and you can't, when you try to
15 read it phonologically, it doesn't sound like the word that
16 you gave them to spell.

17 And so subsequent to that I, I did another measure of
18 academic achievement just to get more information, and I
19 gave him the Woodcock-Johnson Test of Achievement, which is
20 the fourth edition, and on this subtest my findings were
21 very consistent with the WRAT, his basic reading, which is
22 a measure ---

23 Q. When you say consistent with the WRAT, that's the Wide
24 Range ---

25 A. Yes.

1 Q. --- Achievement Test you just talked about?

2 A. Yes. Yes. So, the Wide Range Achievement Test, it
3 breaks down reading into more fundamental sort of aspects
4 of it. So, reading is assessed in terms of, one, the
5 ability to read words, real words. He scored seventh year,
6 sixth month. Seventh grade, sixth month, which was very
7 consistent with his WRAT word reading, seventh grade,
8 fourth month, okay?

9 But what the Woodcock-Johnson Test has is a measure
10 that looks specifically at his ability to read nonsense
11 words, and this is important because this really taps into
12 that phonological processing ability. To read words that
13 aren't real words, you have to be able to sound them out
14 correctly. And as I said, I noticed he was having errors
15 in the WRAT. On the Woodcock-Johnson, there's a word
16 attack test, and on that test he scored at the second
17 grade, fifth month level.

18 Q. And what does that tell you?

19 A. That he has extreme difficulty with phonological
20 processing.

21 Q. Okay.

22 A. The Passage Comprehension Subtest is very similar to
23 the Sentence Comprehension Subtest of the WRAT, so parallel
24 measures. Reads short sentences, provide a word that's
25 missing. He scored at the twelfth grade, sixth month level

1 and the WRAT he scored the eleventh grade, eight month
2 level. So, even though he has difficulty deciphering,
3 decoding words, when he has enough of them and there is a
4 context for them, he can extract enough meaning to
5 basically operate at the level of a high school graduate.

6 Q. Okay. Anything else about his academic achievement
7 testing that you want to cover before we move on?

8 A. Yes. So, again there were more indications that
9 reading is a, is a problem for him because his ability to
10 read fluently and quickly without making errors in
11 sentences fell at the third grade, nine month level. His
12 spelling was, again, an area where it seemed like his
13 development had stopped at the seventh grade level. So, it
14 was at the sixth grade, nine month, which is around the
15 time where he stopped attending school. That's where his
16 spelling ability was arrested. His ability to write
17 sentences fluidly and quickly was at the third grade, third
18 month level. His ability to do math calculations sixth
19 grade, fifth month level. Math problems seventh grade,
20 zero month level. So, essentially for the most part he's
21 operating at that, between that sort of sixth/seventh grade
22 level with a selective strength in when he is given a
23 sentence or given a paragraph and enough time -- because
24 none of those are timed. It would be very different if it
25 was timed. With enough time to slowly read and process, he

1 can extract enough meaning from it.

2 Q. Okay. So, we're not saying he can't read and write?

3 A. No, we're not saying that at all.

4 Q. And, and, and when you say enough time, he needs time
5 to look at sentences and paragraphs and put it into
6 context?

7 A. Because his processing of that information is very
8 slow.

9 Q. Now.

10 A. Yes.

11 Q. He, he, he reads *USA Today* on a regular basis. He has
12 a subscription to it. Does that fit in with what you're
13 talking about?

14 A. Absolutely. So, that is a newspaper that is about at
15 this grade level, that high school, and he has a lot of
16 time and we did -- because he enjoys it. So, I don't -- I
17 can see and I would suspect that probably some of this
18 increase in his passage comprehension has to do with the
19 fact that he in the situation that he's in, actually has
20 access to reading materials that he may not have had
21 previously. And it is something that he does as a past
22 time, and it has improved with time, given that he has so
23 much time.

24 Q. All right. Anything else about his academic
25 achievement before we move on?

1 A. No.

2 Q. Okay. Now, you gave a battery of tests that focused
3 on the different parts of the brain. Is that right?

4 A. That's right.

5 Q. That's this kind of fourth category that we talked
6 about, and it looks like a number of your tests, a large
7 number of your tests kind of fall into this category?

8 A. Yes. The majority of my tests are. That is, that is
9 the neuropsychological portion.

10 Q. Okay.

11 A. So as I said, we've got global measures of general
12 intellectual functioning that are not very sensitive to
13 brain damage. We have academic measures which tell us can
14 this person learn and retain information and function
15 adequately, and then we have the building blocks. What are
16 the building blocks? The elements of cognition that go
17 into the ability of a person to translate their potential
18 into achievement.

19 The cognitive processing areas that I assessed were
20 language, visuospatial processing, verbal and visual
21 memory, attention, executive functioning, and motor speed,
22 fine motor speed.

23 Q. All right.

24 A. And processing.

25 Q. So, how, how did you go about doing this? Let's walk

1 through some of your tests.

2 A. Okay. So, I -- let me just see. I administered, I
3 administered nine of these measures. Each of them -- many
4 of them, not all of them, many of them have multiple
5 subtests. So, on measures of language and on tests that
6 looked at specific aspects of language, I identified
7 deficits in two areas.

8 One is in confrontation naming. Confrontation naming
9 basically involves looking at a series of pictures,
10 drawings of objects, and asking him simply to name them.
11 This is important and is related to reading in the sense
12 that reading is not, not very different from looking at a
13 single unit and being able to name it quickly, access the
14 label for it. Okay, he had deficits in this, the ability
15 to rapidly sort of access the name. He scored in the 4th
16 percentile. This is very low.

17 And he also showed deficits in verbal fluency, and
18 this is a test where you give him a letter of the alphabet.
19 You ask him to please tell me as many words as you can that
20 begin with that letter of the alphabet. You have one
21 minute. Go. And it's again generation and rapid
22 retrieval. He had problems with that, and he had problems
23 with confrontation naming.

24 We also know, as I said, he had problems with
25 phonological processing. Those are the three things that

1 you really need to be able to read well -- to decipher and
2 decode letters into sounds -- and that's critical when
3 you're first learning to read. Then once you've read --
4 once you've learned to read, you don't read the word cat --
5 KAH-AT -- every time. You just say cat. You name it.
6 That's ---

7 Q. And, and just for the record, you're almost -- because
8 when this is typed up in a transcript, you were sounding
9 out the word cat.

10 A. Yes.

11 Q. As opposed to just saying it as we would naturally say
12 it.

13 A. Uh-huh.

14 MR. MABRY: Objection to the leading.

15 MR. GROSE: I'm just trying to clarify her ---

16 MR. MABRY: I still object to leading the witness.

17 THE COURT: All right. Don't lead the witness.

18 MR. GROSE: All right. Fair enough.

19 BY MR. GROSE:

20 Q. Is there a difference between him sounding it out and
21 saying the word as we normally would? Is that something
22 you were trying to explain?

23 A. Yes. I was just trying to give an explanation of sort
24 of a basic kind of fundamentals of reading acquisition. As
25 I mentioned previously, one of my areas of specialty is

1 reading acquisition, and it was one of the research studies
2 that I lead.

3 Children learn to read initially by sounding out
4 letters. So the word cat, which has the letters C-A-T,
5 they learn to read by knowing that the C has a KA sound,
6 the A has a AH sound, and the T has a TE sound. So, they
7 will initially and very laboriously and slowly do that over
8 and over again until it becomes automatic. And the
9 automaticity of it is that you no longer see that word as
10 discrete sounds. It becomes a whole; it's a whole word
11 reading. We go from sound to whole word reading. That's
12 how we call it, and the whole word reading is to see C-A-T
13 and view it as cat, not individual sounds and letters.

14 This confrontation naming taps into the ability to do
15 that: to see something and rapidly retrieve from your brain
16 the label for that. He has difficulty with that.

17 Q. Okay.

18 A. Clearly.

19 Q. All right.

20 A. He also has difficulty with the phonological sounding
21 out clearly, and he also has difficulty generating words,
22 any word. All of this together ---

23 Q. What do you mean by generate words?

24 A. Tell me all the words you can think of that start with
25 this letter of the alphabet.

1 Q. Okay.

2 A. Those ---

3 Q. Do you give him a letter and say, for example, if we
4 use cat, tell me all the words that you can name that start
5 with a C?

6 A. Exactly, and his performance on these language
7 measures helps explain why reading is difficult for him and
8 why he's so slow and behind.

9 Q. All right.

10 A. Okay.

11 Q. And so that kind of even loops back to the academic
12 achievement and stuff?

13 A. Exactly, because academic achievement on its own is
14 meaningless unless I can look at the cognitive faculties
15 that go into the abilities you need to be able to read and
16 explain why he's not reading. And that's what the value of
17 a neuropsychological evaluation is.

18 Q. All right, and what else did you do on this battery of
19 unique functioning tests?

20 A. So, the other area that I assessed was visuospatial
21 processing, and I did this on a number of different tasks
22 and looking at different aspects of visuospatial
23 processing.

24 So, what I noted in the IQ test that I gave him was
25 that the areas that he scored poorly on, poorest on the

1 Perceptual Reasoning Subtest, the subtests that looked at
2 the ability to reason nonverbally ---

3 Q. So, so you're looking at what he did on the IQ test
4 and drilling deeper?

5 A. Yes, and the areas that he scored poorly on were
6 consistent with the areas that he had scored poorly on at
7 Tara Hall and also subsequent to that. And they had to do
8 with visuospatial analysis, synthesis, and construction.
9 Putting things together, understanding how they fit
10 together, being able to take them apart, and reconstruct
11 them, and I assessed this on a test.

12 One of the tests was a complex figure. I wish I could
13 show it to you but I can't without violating copyright, but
14 it is a figure that has a rectangular shape, and inside
15 that rectangular shape there are details that are embedded
16 and added. And they are done in such a way that for
17 someone with an intact brain, well-functioning brain, they
18 will see the gestalt, we call it. They will look at it and
19 say, oh, that's a triangle with lots of details and will
20 draw a triangle and then add the bigger components in an
21 organized, systematic fashion to reconstruct that.

22 Q. So, they will start with the big picture and then add
23 in ---

24 A. That's right.

25 Q. --- the details?

1 A. Because they would be able to see the forest for the
2 trees, which is what -- we love that. It gives us a really
3 nice view into whether or not a person is able to
4 appreciate the big picture.

5 Q. Okay.

6 A. On this test, he -- all right, so you have a image.
7 The intact brain sees that, and the compromised brain
8 begins on this side of the image and draws this element and
9 then continues and draws in a very broken, piecemeal, one
10 thing at a time so that it's not cohesive. There -- the
11 order is not logical. It's not systematic, and there's no
12 sense of planning or organization that goes into it, and
13 that's the kind of figure he produced.

14 His initial copy placed his performance in less than
15 the 1st percentile when compared to same aged peers on the
16 norms that we have on this test. And I will go back to
17 this test because there are elements of this -- this is a
18 memory test, but the initial part of it gives us important
19 visuospatial processing information.

20 Q. Okay.

21 A. This is called the Rey-Osterrieth Complex Figure Test,
22 and that is called -- spelled R-E-Y dash
23 O-S-T-E-R-R-I-E-T-H.

24 Q. Okay.

25 A. In addition to that, I gave him three sort of

1 different subtests on a battery that is the
2 Neuropsychological Assessment Battery, and that battery has
3 different modules that lets you tap into dips. So, one of
4 the models is a spacial module. From the spacial module I
5 gave him three tests and on those three, again I saw that
6 same deficit. So, design construction was again looking at
7 figures and being able to analyze, synthesize, and
8 construct. He scored at the 1st percentile. Map reading.
9 Looking at a map, being told different directions, where to
10 go -- east, west and such -- in your mind and plotting or
11 deciding how you had to go or how far, okay?

12 So, all -- it's, it's, it's more complicated than just
13 looking at a design and saying, oh, it's this shape and
14 such. So, you have to have spatial reasoning and an
15 appreciation of relationships. He scored at the fifth
16 percentile. It's very hard for him. He became very
17 frustrated on that test, and ---

18 Q. And that was exposing a weakness?

19 A. Yes. Those two were really big weaknesses for him,
20 and then there's a test called the Benton Line Orientation
21 Test, and you show them lines, little segments of lines
22 that are pointing in different orientations. And they have
23 to look at that and compare it to a model and say which of
24 those lines in the model are the same. So, being able to
25 -- space and perceptual time and area. He had very -- it

1 was very difficult for him on that. He scored in the 5th
2 percentile.

3 . So, what we see is very significant, striking deficits
4 on measures of orientation, analysis, synthesis,
5 construction, and visuospatial reasoning, but intact facial
6 recognition. Facial recognition is a completely different
7 sort of ability that is housed in a different area of the
8 brain. And in that area he was completely intact. Ability
9 to look at different pictures of different faces from
10 different orientations with different expressions and
11 identify which of those are the same person, it's not an
12 easy task. He was fine in that. But what he's having
13 difficulty is in the basics: sort of breaking down and
14 understanding visuospatial relationships. So -- and that
15 again was consistent with his performance on the IQ measure
16 and in his historical deficits.

17 Q. Okay. What else did you test for?

18 A. I tested for verbal and visual memory, okay.

19 Q. What are you looking for when you do that?

20 A. All right. So, on that test -- most memory tests are
21 broken down into three elements. The first is looking at
22 encoding, the way in which this person encodes the
23 information so that they can remember it. What's their
24 process? The second looks at recall. Can they, once
25 they've encoded it, recall that information accurately.