

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2019-001499

WILLIAM O. DICKERSON PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

APPENDIX
VOLUME 14 OF 22

ELIZABETH FRANKLIN-BEST

SC Bar No. 72555

Blume Franklin-Best & Young, LLC

900 Elmwood Ave., Suite 200

Columbia, SC 29201

(803) 765-1044

Counsel for Petitioner

MELODY BROWN

Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

Counsel for Respondent

INDEX

CHARLESTON COUNTY RECORD ON APPEAL.....	1
PRETRIAL HEARING, APRIL 3, 2009.....	31
TRIAL TRANSCRIPT DATED APRIL 17- MAY 7, 2009	
JURY QUALIFICATION.....	254
VOIR DIRE	
JUROR #383	
Examination by the Court.....	486
Examination by Ms. Wilson.....	491
Examination by Mr. Bloom.....	496
JUROR #370	
Examination by the Court.....	504
Examination by Mr. Bloom.....	515
Examination by Ms. Wilson.....	524
Examination by Mr. Bloom.....	530
JUROR #377	
Examination by the Court.....	567
Examination by Ms. Wilson.....	569
Examination by Mr. Bloom.....	570
JUROR #278	
Examination by the Court.....	574
Examination by Mr. Bloom.....	576
JUROR #386	
Examination by the Court.....	582
Examination by Ms. Wilson.....	591
Examination by Mr. Bloom.....	594
JUROR #228	
Examination by the Court.....	611
Examination by Mr. Bloom.....	622
Examination by Ms. Wilson.....	634

JUROR #133	
Examination by the Court.	642
Examination by Ms. Wilson.	652
Examination by Mr. Bloom.	657
JUROR #227	
Examination by the Court.	679
Examination by Mr. Bloom.	687
Examination by Ms. Wilson.	706
JUROR #372	
Examination by the Court.	712
Examination by Ms. Wilson.	722
Examination by Mr. Bloom.	727
Examination by Ms. Wilson.	734
Examination by Mr. Bloom.	740
JUROR #134	
Examination by the Court.	748
Examination by Mr. Bloom.	757
Examination by Ms. Wilson.	766
JUROR #19	
Examination by the Court.	772
Examination by Ms. Wilson.	781
JUROR #280	
Examination by the Court.	792
Examination by Mr. Bloom.	792
JUROR #232	
Examination by the Court.	800
Examination by Ms. Wilson.	814
Examination by Mr. Bloom.	820
JUROR #37	
Examination by the Court.	831
Examination by Mr. Bloom.	843
JUROR #65	
Examination by the Court.	854
Examination by Ms. Wilson.	856
Examination by Mr. Bloom.	857

JUROR #389	
Examination by the Court.	861
Examination by Mr. Bloom.	864
JUROR #197	
Examination by the Court.	870
Examination by Ms. Wilson.	871
Examination by Mr. Bloom.	874
JUROR #66	
Examination by the Court.	877
Examination by Mr. Bloom.	879
JUROR #101	
Examination by the Court.	884
Examination by Ms. Wilson.	896
JUROR #160	
Examination by the Court.	912
Examination by Mr. Bloom.	924
Examination by Ms. Wilson.	930
Examination by Mr. Bloom.	933
JUROR #207	
Examination by the Court.	941
Examination by Mr. Durant.	951
Examination by Mr. Bloom.	956
JUROR #92	
Examination by the Court.	960
Examination by Mr. Bloom.	973
Examination by Ms. Wilson.	980
JUROR #256	
Examination by the Court.	987
Examination by Ms. Wilson.	998
Examination by Mr. Bloom.	1001
Examination by Ms. Wilson.	1007
JUROR #402	
Examination by the Court.	1010
Examination by Mr. Bloom.	1022

JUROR #385	
Examination by the Court.	1040
Examination by Ms. Wilson.	1043
JUROR #363	
Examination by the Court.	1048
Examination by Mr. Bloom.	1092
Examination by Ms. Wilson.	1101
JUROR #378	
Examination by the Court.	1106
Examination by Ms. Wilson.	1119
Examination by Mr. Bloom.	1124
MOTIONS.	1140
JUROR #315	
Examination by the Court.	1146
Examination by Mr. Bloom.	1148
Examination by Ms. Wilson.	1156
Examination by the Court.	1160
Examination by Ms. Wilson.	1166
JUROR #306	
Examination by the Court.	1183
Examination by Mr. Durant.	1196
Examination by Mr. Bloom.	1200
JUROR #398	
Examination by the Court.	1209
Examination by Mr. Bloom.	1213
Examination by Mr. Durant.	1216
JUROR #124	
Examination by the Court.	1226
Examination by Mr. Bloom.	1242
JUROR #330	
Examination by the Court.	1253
Examination by Mr. Bloom.	1268
JUROR #121	
Examination by the Court.	1278

JUROR #209	
Examination by the Court.	1282
Examination by Ms. Wilson.	1295
Examination by Mr. Bloom.	1300
JUROR #54	
Examination by the Court.	1314
Examination by Mr. Bloom.	1316
JUROR #343	
Examination by the Court.	1328
Examination by Ms. Wilson.	1343
Examination by Mr. Bloom.	1346
JUROR #358	
Examination by the Court.	1354
Examination by Ms. Wilson.	1358
JUROR #149	
Examination by the Court.	1362
Examination by Mr. Bloom.	1377
Examination by Ms. Wilson.	1385
JUROR #314	
Examination by the Court.	1389
Examination by Ms. Wilson.	1403
Examination by Mr. Bloom.	1409
JUROR #157	
Examination by the Court.	1420
Examination by Mr. Bloom.	1437
JUROR #392	
Examination by the Court.	1449
Examination by Ms. Wilson.	1452
JUROR #381	
Examination by the Court.	1461
Examination by Ms. Wilson.	1477
Examination by Mr. Bloom.	1485

JUROR # 247	
Examination by the Court.	1491
Examination by Mr. Bloom.	1506
Examination by Ms. Wilson.	1510
JUROR #177	
Examination by the Court.	1513
Examination by Ms. Wilson.	1517
JUROR #221	
Examination by the Court.	1524
Examination by Mr. Bloom.	1539
Examination by Ms. Wilson.	1544
JUROR #289	
Examination by the Court.	1552
Examination by Ms. Wilson.	1561
JUROR #364	
Examination by the Court.	1570
Examination by Mr. Bloom.	1584
Examination by Ms. Wilson.	1588
Examination by the Court.	1626
Examination by Ms. Wilson.	1626
JUROR #234	
Examination by the Court.	1643
Examination by Ms. Wilson.	1665
Examination by Mr. Bloom.	1669
JUROR #8	
Examination by the Court	1667
Examination by Mr. Bloom.	1692
Examination by Mr. Durant.	1698
JUROR #50	
Examination by the Court	1703
Examination by Mr. Durant.	1709
Examination by Mr. Bloom.	1711
JUROR #262	
Examination by the Court	1715

JUROR #4	
Examination by the Court	1719
Examination by Mr. Bloom.....	1735
Examination by Mr. Durant.....	1741
JUROR #72	
Examination by the Court	1746
Examination by Mr. Durant.....	1765
Examination by Mr. Bloom.....	1768
JUROR #246	
Examination by the Court	1787
Examination by Mr. Durant.....	1804
Examination by Mr. Bloom.....	1806
JUROR #331	
Examination by the Court	1815
Examination by Mr. Bloom.....	1829
Examination by Mr. Durant.....	1834
JUROR #264	
Examination by the Court	1840
Examination by Mr. Durant.....	1851
JUROR #272	
Examination by the Court	1859
Examination by Mr. Bloom.....	1861
JUROR #148	
Examination by the Court	1868
Examination by Mr. Durant.....	1886
Examination by Mr. Bloom.....	1888
JUROR #357	
Examination by the Court	1895
Examination by Mr. Bloom.....	1898
JUROR #11	
Examination by the Court	1905
Examination by Mr. Durant.....	1924
Examination by Mr. Bloom.....	1927

JUROR #104	
Examination by the Court	1935
Examination by Mr. Bloom.	1953
Examination by Mr. Durant.	1958
JUROR #69	
Examination by the Court	1962
Examination by Mr. Durant.	1981
Examination by Mr. Bloom.	1985
JUROR #22	
Examination by the Court	1992
Examination by Mr. Bloom.	1995
JUROR #252	
Examination by the Court	1998
Examination by Mr. Bloom.	2000
JUROR #90	
Examination by the Court	2005
Examination by Mr. Durant.	2023
Examination by Mr. Bloom.	2024
JUROR #287	
Examination by the Court	2029
Examination by Mr. Bloom.	2033
JUROR #317	
Examination by the Court	2036
Examination by Mr. Bloom.	2038
JUROR #63	
Examination by the Court	2040
JUROR #319	
Examination by the Court	2045
Examination by Mr. Durant.	2053
Examination by Mr. Bloom.	2055
JUROR #38	
Examination by the Court	2060
Examination by Mr. Bloom.	2062

JUROR #26	
Examination by the Court	2066
Examination by Mr. Durant.....	2079
JUROR #281	
Examination by the Court	2084
Examination by Mr. Bloom.....	2094
Examination by Mr. Durant.....	2096
JUROR #304	
Examination by the Court	2099
Examination by Mr. Durant.....	2107
COLLOQUY.....	2112
JUROR #133	
Examination by the Court	2120
JUROR #19	
Examination by the Court	2152
JUROR #247	
Examination by the Court	2157
COLLOQUY.....	2158
SELECTION OF JURY.....	2166
OPENING REMARKS BY THE COURT.....	2183
OPENING STATEMENTS BY MS. WILSON.....	2215
OPENING STATEMENTS BY MR. CARROLL.....	2230
KANESHIA SINGLETON	
Direct Examination by Ms. Wilson.....	2254
Cross Examination by Mr. Bloom.....	2266
Redirect Examination by Ms. Wilson.....	2266
SHAREEN ROPER	
Direct Examination by Ms. Wilson.....	2267

STEVO RIVERS

Direct Examination by Mr. Durant.	2281
Cross Examination by Mr. Carroll.	2299
Redirect Examination by Mr. Durant.	2306
Recross Examination by Mr. Carroll.	2314

BENJAMIN DRAYTON

Direct Examination by Mr. Durant.	2318
Cross Examination by Mr. Carroll.	2328

ANTONIO NELSON

Direct Examination by Ms. Wilson.	2339
Cross Examination by Mr. Carroll.	2392
Redirect Examination by Ms. Wilson.	2412

DEVON KEELING

Direct Examination by Mr. Durant.	2415
Cross Examination by Mr. Carroll.	2431
Redirect Examination by Mr. Durant.	2443

COLLOQUY.	2459

TOMISHA "SHELLEY" NELSON

Direct Examination by Mr. Durant.	2494
Cross Examination by Mr. Bloom.	2535
Redirect Examination by Mr. Durant.	2571
Recross Examination by Mr. Bloom.	2579

DARREN PROIETTI

Direct Examination by Ms. Wilson.	2584
Cross Examination by Mr. Bloom.	2594
Redirect Examination by Ms. Wilson.	2603

KIMBERLY RENEE GREGG

Direct Examination by Ms. Wilson.	2603

STEVEN ARCHIE

Direct Examination by Mr. Durant.	2614
Cross Examination by Mr. Carroll.	2631
Redirect Examination by Mr. Durant.	2641
Recross Examination by Mr. Carroll.	2649

TYRE JOHNSON	
Direct Examination by Ms. Wilson.	2648
OCTAVIO FABISIEWICZ	
Direct Examination by Ms. Wilson.	2685
Cross Examination by Mr. Bloom.	2690
DONTAIRE ANDERSON	
Direct Examination by Mr. Durant.	2701
Cross Examination by Mr. Carroll.	2711
Redirect Examination by Mr. Durant.	2716
MARLINA PINCKNEY	
Direct Examination by Mr. Durant.	2717
Cross Examination by Mr. Carroll.	2726
Redirect Examination by Mr. Durant.	2730
PATRICK PONTERI, SR.	
Direct Examination by Ms. Wilson.	2732
Cross Examination by Mr. Carroll.	2741
STEVEN HOOD	
Direct Examination by Mr. Durant.	2745
Cross Examination by Mr. Bloom.	2843
Redirect Examination by Mr. Durant.	2885
JEFFERY MILLER	
Direct Examination by Mr. Durant.	2892
Cross Examination by Mr. Bloom.	2916
JUDITH GORDON	
Direct Examination by Mr. Durant.	2920
MICHAEL R. SHERMAN	
Direct Examination by Mr. Durant.	2930
Cross Examination by Mr. Hood.	2943
Redirect Examination by Mr. Durant.	2946
COLLOQUY.	2949
JUROR #234	
Examination by the Court.	2950

JENNIFER WOOLEY	
Direct Examination by Mr. Durant.	2956
Cross Examination by Mr. Bloom.	2962
ANITA MAESTAS	
Direct Examination by Mr. Durant.	2965
Cross Examination by Mr. Bloom.	2972
RENEE CHARLES	
Direct Examination by Mr. Durant.	2974
RANDY UNTERBRINK	
Direct Examination by Mr. Durant.	2977
KINNEY KINSEY	
Direct Examination by Mr. Durant.	2979
Cross Examination by Mr. Bloom.	3010
LILLY SMALL GALLMAN	
Direct Examination by Mr. Durant.	3030
Cross Examination by Mr. Bloom.	3068
Redirect Examination by Mr. Durant.	3094
Recross Examination by Mr. Bloom.	3096
CYNTHIA SCHANDL	
Direct Examination by Ms. Wilson.	3098
Cross Examination by Mr. Bloom.	3157
Proffer Examination by Mr. Bloom.	3163
Proffer Cross Examination by Ms. Wilson.	3165
ARMON RASHAD DICKERSON	
Direct Examination by Mr. Durant.	3171
MOTIONS.	3268
ARMON RASHAD DICKERSON	
Direct Examination by Mr. Durant.	3275
Cross Examination by Mr. Carroll.	3288
Redirect Examination by Mr. Durant.	3331
COLLOQUY.	3334

ARMON RASHAD DICKERSON	
Redirect Examination..	3353
Cross Examination by Mr. Carroll..	3354
SELENA KERISE ROUSE	
Direct Examination by Ms. Wilson.	3356
Cross Examination by Mr. Carroll..	3423
Redirect Examination by Ms. Wilson.	3451
Recross Examination by Mr. Carroll..	3455
RASHID ABDUL MALIK	
Direct Examination by Ms. Wilson.	3468
Cross Examination by Mr. Carroll	3513
SANDRA FOKES	
Direct Examination by Ms. Wilson.	3529
Cross Examination by Mr. Bloom.	3536
AVEN ROPER	
Direct Examination by Ms. Wilson.	3543
Cross Examination by Mr. Bloom.	3542
MOTIONS.	3566
EXAMINATION OF DEFENDANT.	3569
COLLOQUY.	3581
CLOSING ARGUMENTS BY MS. WILSON.	3605
STATEMENT BY MR. DICKERSON..	3641
CLOSING ARGUMENT BY MR. CARROLL.	3644
JURY CHARGE.	3682
VERDICT.	3762
MOTIONS.	3770
IN CHAMBERS CONFERENCE..	3786

LEESTER WILLIAMS (<i>IN CAMERA</i>)	
Direct Examination by Mr. Durant.	3791
Cross Examination by Mr. Carroll	3804
MICHAEL HUGGINS (<i>IN CAMERA</i>)	
Direct Examination by Mr. Durant.	3821
Cross Examination by Mr. Carroll	3824
MOTIONS (<i>IN CAMERA</i>).....	3828
SENTENCING PHASE	
OPENING STATEMENT BY MR. DURANT.....	3851
OPENING STATEMENT BY MR. BLOOM.....	3856
EDWARD HASELDEN, JR.	
Direct Examination by Mr. Durant.	3865
Cross Examination by Mr. Carroll.....	3869
IAN F. TRAYNOR	
Direct Examination by Mr. Durant.	3870
Cross Examination by Mr. Carroll	3889
RONALD HULL (<i>IN CAMERA</i>)	
Direct Examination by Mr. Durant.	3887
Cross Examination by Mr. Carroll.....	3889
Redirect Examination by Mr. Durant.....	3891
GEORGE FORDHAM (<i>IN CAMERA</i>)	
Proffer Examination by Mr. Durant.....	3895
Proffer Examination by Mr. Carroll.....	3900
Proffer Redirect Examination By Mr. Durant.	3904
LEON FLUDD	
Direct Examination by Mr. Durant.	3911
Cross Examination by Mr. Carroll.....	3915
ANTONIO NELSON	
Direct Examination by Ms. Wilson.	3918
Cross Examination by Mr. Carroll.....	3928

RASHID MALIK	
Direct Examination by Ms. Wilson.	3930
Cross Examination by Mr. Carroll.	3935
Redirect Examination by Ms. Wilson.	3936
JOHN SCARBOROUGH	
Direct Examination by Mr. Durant.	3937
Cross Examination by Mr. Carroll.	3947
CAROLS CESPEDES	
Direct Examination by Mr. Durant.	3953
Cross Examination by Mr. Carroll.	3963
JEFFERY MILLER	
Direct Examination by Mr. Durant.	3967
MOTIONS.	3972
CEDEDRICK DAVIS (<i>IN CAMERA</i>)	
Proffer Examination by Mr. Durant.	3980
Cross Examination by Mr. Bloom.	3982
Redirect Examination by Mr. Durant.	3985
JUROR #234 (<i>IN CAMERA</i>)	
Examination by the Court.	3992
LAWRENCE GAINEY	
Direct Examination by Mr. Durant.	3995
Cross Examination by Mr. Bloom.	4007
CEDERICK DAVIS	
Direct Examination by Mr. Durant.	4008
Cross Examination by Mr. Bloom.	4012
Redirect Examination by Mr. Durant.	4015
Recross Examination by Mr. Bloom.	4015
TOMIESHA NELSON	
Direct Examination by Mr. Durant.	4016
Cross Examination by Mr. Bloom.	4022
LESTER WILLIAMS	
Direct Examination by Mr. Durant.	4026
Cross Examination by Mr. Carroll.	4033

Redirect Examination by Mr. Durant.	4037
Recross Examination by Mr. Carroll.	4038
MICHAEL HUGGINS	
Direct Examination by Mr. Durant.	4039
Cross Examination by Mr. Bloom.	4043
Redirect Examination by Mr. Durant.	4048
MOTIONS (<i>IN CAMERA</i>)	4049
SHAREEN ROPER	
Direct Examination by Ms. Wilson.	4084
CYNTHIA SCHANDL, MD	
Direct Examination by Ms. Wilson.	40110
MOTIONS (IN CAMERA).	4136
WILLIAM DICKERSON (<i>IN CAMERA</i>)	
Examination by the Court.	4140
JOSEPH LADSON	
Direct Examination by Mr. Bloom.	4146
Cross Examination by Mr. Durant.	4149
JOHN HEWITT	
Direct Examination by Mr. Bloom.	4151
Cross Examination by Ms. Wilson.	4153
STACY SIMMONS	
Direct Examination by Mr. Bloom.	4154
Cross Examination by Ms. Wilson.	4155
CURTIS HOOD	
Direct Examination by Mr. Bloom.	4156
Cross Examination by Mr. Durant.	4158
DAVID GADEIC	
Direct Examination by Mr. Bloom.	4159
Cross Examination by Mr. Durant.	4161

JAMES AIKEN

Direct Examination by Mr. Bloom.	4163
Cross Examination by Mr. Durant.	4186
Redirect Examination by Mr. Bloom.	4193
Recross Examination by Mr. Durant.	4196

BARRY BRITT

Direct Examination by Mr. Carroll.	4205
Cross Examination by Mr. Durant.	4210

ALEXANDER MORTON

Direct Examination by Mr. Bloom.	4214
Cross Examination by Mr. Durant.	4283
Redirect Examination by Mr. Bloom.	4293

JOHNETTE R. WATSON

Direct Examination by Mr. Bloom.	4295
Cross Examination by Ms. Wilson.	4303

TIERRA MCINTOSH

Direct Examination by Mr. Bloom.	4304

JOHNNIE K. RIVERS

Direct Examination by Mr. Bloom.	4311
Cross Examination by Mr. Durant.	4328
Redirect Examination by Mr. Bloom.	4339
Recross Examination by Mr. Durant.	4343

MOTIONS.	4346

MARY E. RANKIN

Direct Examination by Mr. Bloom.	4357
Cross Examination by Mr. Durant.	4365
Redirect Examination by Mr. Bloom.	4368

MARJORIE HAMMOCK

Direct Examination by Mr. Bloom.	4369
Cross Examination by Mr. Durant.	4425
Redirect Examination by Mr. Bloom.	4440

DORIS GAMBLE

Direct Examination by Mr. Bloom.	4445
Cross Examination by Ms. Wilson.	4448

Redirect Examination by Mr. Bloom.....	4449
JIMMY MITCHELL	
Direct Examination by Mr. Bloom.	4450
JAMES DUNN	
Direct Examination by Mr. Bloom.	4453
Cross Examination by Ms. Wilson.	4461
Redirect Examination by Mr. Bloom.....	4465
ROBERT PHILLIPS	
Direct Examination by Mr. Bloom.	4472
Cross Examination by Ms. Wilson.	4508
MARK CUMMINGHAM	
Direct Examination by Mr. Bloom.	4530
Cross Examination by Ms. Wilson.	4580
ADELE WATSON	
Direct Examination by Mr. Bloom.	4603
WILLIAM DICKERSON	
Examination by the Court.	4608
MOTIONS.....	4615
CLOSING ARGUMENT BY MR. DURANT.	4632
CLOSING ARGUMENT BY MR. BLOOM.....	4646
JURY CHARGE.	4671
VERDICT SENTENCING PHASE.....	4699
MOTION FOR A NEW TRIAL HEARING, JULY 7, 2009.....	4711
INDICTMENTS.....	4722
MOTION FOR A NEW TRIAL.	4728

EXHIBITS

STATE’S EXHIBIT 307, TRANSCRIPT OF PHONE CALL BETWEEN WILLIAM DICKERSON AND TOMISA NELSON.	4731
STATE’S EXHIBIT 319, AUTOPSY DIAGRAM.	4733
STATE’S EXHIBIT 320, AUTOPSY DIAGRAM.	4734
STATE’S EXHIBIT 321, AUTOPSY DIAGRAM.	4735
STATE’S EXHIBIT 322, AUTOPSY DIAGRAM.	4736
JUROR QUESTIONNAIRES.	4737
STATE’S EXHIBITS 141, 153, 160, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, AND 336 (AUTOPSY PHOTOGRAPHS ADMITTED DURING PENALTY PHASE); AND STATE’S EXHIBIT 78 (PHOTOGRAPH OF VICTIM’S BODY AT DISCOVERY SITE) HAVE BEEN TRANSPORTED TO THE COURT	
<i>STATE V. WILLIAM O. DICKERSON, JR.</i> , 395 S.C. 101, 716 S.E.2d 895 (2011).	5203
THIRD APPLICATION FOR POST-CONVICTION RELIEF.....	5212
STATE’S MOTION TO STRIKE AND OR IN THE ALTERNATIVE TO DISMISS CLAIM NOT COGNIZABLE IN POST-CONVICTION RELIEF.....	5222
MEMORANDUM IN RESPONSE STATE’S MOTION TO STRIKE AND OR IN THE ALTERNATIVE TO DISMISS CLAIM NOT COGNIZABLE IN POST-CONVICTION RELIEF.	5281
REPLY TO RESPONSE TO MOTION TO STRIKE AND OR IN THE ALTERNATIVE TO DISMISS CLAIM NOT COGNIZABLE IN POST-CONVICTION RELIEF.	5289
JULY 15, 2014 HEARING.	5297
FEBRUARY 2, 2015 HEARING.	5332
MAY 8, 2015 HEARING.	5359
SEPTEMBER 18, 2015 HEARING.....	5376
NOVEMBER 20, 2015 HEARING.....	5422

DECEMBER 7- 8,2015 HEARING.....	5441

RICHARD R. CANFIELD

Voir Dire Examination by Mr. Grose.	5448
Direct Examination by Mr. Grose.	5450
Cross Examination by Mr. Zelenka.	5537
Redirect Examination by Mr. Grose.	5572

MARLYNE K. ISRAELIAN

Voir Dire Examination by Mr. Grose.	5578
Direct Examination by Mr. Grose.	5585
Cross Examination by Mr. Mabry.	5664
Redirect Examination by Mr. Grose.	5725

CALVIN A. CARROLL

Direct Examination by Ms. Franklin-Best.....	5809
Cross Examination by Mr. Mabry.	5820

JEFFERY BLOOM

Direct Examination by Ms. Franklin-Best.....	5827
Cross Examination by Mr. Mabry.	5851
Redirect Examination by Ms. Franklin-Best.....	5870
Recross Examination by Mr. Mabry.	5876

ROBERT DUDEK

Direct Examination by Ms. Franklin-Best.....	5878
Cross Examination by Mr. Zelenka.	5885

EXHIBITS

APPLICANT’S EXHIBIT #1, LEAD TEST.....	5908

APPLICANT’S EXHIBIT #2, USING GEOGRAPHIC INFORMATION SYSTEMS TO ASSESS RISK FOR ELEVATED BLOOD LEAD LEVELS IN CHILDREN.....	5909

APPLICANT’S EXHIBIT #3, CHILDHOOD LEAD EXPOSURE: CAUSES AND CONSEQUENCES	5918

APPLICANT’S EXHIBIT #4, CV OF DR. MARLYNE ISRAELIAN.....	6021

APPLICANT’S EXHIBIT #5, CHARLESTON COUNTY MAP.....	6027

APPLICANT’S EXHIBIT #6, MAP OF 20 ORRS COURT.....	6028

APPLICANT’S EXHIBIT #7, PSYCHIATRIC EXAMINATION OF WILLIAM DICKERSON, DATED 5/12/88.....	6029
APPLICANT’S EXHIBIT #8, SOCIAL HISTORY OF WILLIAM DICKERSON.	6032
APPLICANT’S EXHIBIT #9, WILLIAM S. HALL PSYCHIATRIC INSTITUTE DOCUMENTS.....	6035
APPLICANT’S EXHIBIT 10, MEDICAL RECORD.....	6038
APPLICANT’S EXHIBIT #11, PSYCHOLOGICAL EVALUATION.....	6040
APPLICANT’S EXHIBIT #12, WECHSLER INTELLIGENCE TESTING.	6046
APPLICANT’S EXHIBIT #13, SOCIAL WORK REPORT.	6054
APPLICANT’S EXHIBIT #14, PSYCHOLOGICAL EVALUATION MARCH 31,2016 HEARING.	6057
APPLICANT’S EXHIBIT #15, LETTER TO OFFICE OF APPELLATE DEFENSE FROM DEFENSE COUNSEL, BLOOM.	6060
APPLICANT’S EXHIBIT #16, <i>WHEN LIGHTNING STRIKES BACK: SOUTH CAROLINA’S RETURN TO THE UNCONSTITUTIONAL STANDARDLESS CAPITAL SENTENCING REGIME OF THE PRE-FURMAN ERA</i> , 4 CHARLESTON L.REV. 479 (2010)..	6064
RESPONDENT’S EXHIBIT #1, HOSPITAL DISCHARGE SUMMARY.	6123
RESPONDENT’S EXHIBIT #2, ADMISSION TO ADDICTION TREATMENT UNIT....	6186
RESPONDENT’S EXHIBIT #3, <i>JONES V. GDCP WARDEN</i> , 753 F. 3D 1171 (11 TH CIR. 2014).	6191
RESPONDENT’S EXHIBIT #4, <i>K.C. V. FULTON COUNTY SCHOOL DIST.</i> , NOT REPORTED IN F.SUPP.2D (2006).	6209
RESPONDENT’S EXHIBIT #5, PSYCHIATRIC EVALUATION, 5/12/88.....	6222
RESPONDENT’S EXHIBIT #6, APPLICATION FOR EMERGENCY ADMISSION....	6225
RESPONDENT’S EXHIBIT #7, MOTION TO BAR THE DEATH PENALTY BASED UPON RACE.....	6237

RESPONDENT’S EXHIBIT #8, ROBERT DUDEK NOTES.	6246
MARCH 31, 2016 HEARING.....	6268
BARBARA O’BRIEN	
Direct Examination by Ms. Franklin-Best.....	6299
Voir Dire by Ms. Brown.	6308
Direct Continued by Ms. Franklin-Best.....	6312
Cross Examination by Ms. Brown.....	6347
Redirect Examination by Ms. Franklin-Best.	6388
Recross Examination by Ms. Brown.	6396

EXHIBITS

APPLICANT’S EXHIBIT #1, CV FOR BARBARA O’BRIEN.....	6432
APPLICANT’S EXHIBIT #2, MARCH 8, 2016 REPORT ON JURY SELECTION STUDY.	6438
APPLICANT’S EXHIBIT #3, JUROR SELECTION MATERIAL (ON FILE AT THE CHARLESTON COUNTY COURTHOUSE)	
APPLICANT’S EXHIBIT #4, ADDITIONAL JUROR SELECTION MATERIAL (ON FILE AT THE CHARLESTON COUNTY COURTHOUSE)	
APPLICANT’S EXHIBIT #6, EDDIE HASELDEN AFFIDAVIT.....	6465
APPLICANT’S EXHIBITS #7-#11 SEALED AND FILED WITH THE CHARLESTON COUNTY CLERK OF COURT’S OFFICE	
APPLICANT’S EXHIBIT #12, RONALD COULTER JURY SELECTION.....	6466
APPLICANT’S EXHIBIT #13, JEMOL BROWN JURY SELECTION.	6647
APPLICANT’S EXHIBIT #14, ETHAN MACK JURY SELECTION.	6686
APPLICANT’S EXHIBIT #15, MICHAEL JETER JURY SELECTION.	9569
APPLICANT’S EXHIBIT #16—FLASH DRIVE, IN THE POSSESSION OF THE CHARLESTON COUNTY CLERK OF COURT’S OFFICE	
APPLICANT’S EXHIBIT #17—SOUTH CAROLINA COMMISSION ON PROSECUTION COORDINATION SUBPOENA PRIVILEGE LOG	6755

MAY 12-13, 2016 HEARING.....	6760
BARBARA O'BRIEN (VIA SKYPE)	
Direct Examination by Ms. Franklin-Best.....	6772
Cross Examination by Ms. Brown.....	6775
Redirect Examination by Ms. Franklin-Best.....	6806
Recross Examination by Ms. Brown.....	6808
SCARLETT WILSON	
Direct Examination by Mr. Grose.....	6809
Cross Examination by Ms. Brown.....	6860
Redirect Examination by Mr. Grose.....	6872
Recross Examination by Ms. Brown.....	6882
JEFFERY BLOOM	
Direct Examination by Ms. Brown.....	6909
Cross Examination by Mr. Grose.....	6970
Redirect Examination by Ms. Brown.....	7003

EXHIBITS

APPLICANT'S EXHIBIT #1, AMENDED REPORT ON JURY SELECTION STUDY, DATED MAY 5, 2016.....	7011
APPLICANT'S EXHIBIT #2, APPLICANT'S STANDARD INTERROGATORIES.	7035
APPLICANT'S EXHIBIT #3, APPLICANT'S REQUEST TO PRODUCE.	7038
APPLICANT'S EXHIBIT #4, SUBPOENA.....	7041
APPLICANT'S EXHIBIT #5, INCIDENT REPORT.....	7046
APPLICANT'S EXHIBIT #6, INCIDENT REPORT.....	7049
APPLICANT'S EXHIBIT #7, INCIDENT REPORT.....	7052
APPLICANT'S EXHIBIT #8, INCIDENT REPORT.....	7054
APPLICANT'S EXHIBIT #9, INCIDENT REPORT.....	7058
APPLICANT'S EXHIBIT #10, INCIDENT REPORT.....	7061
APPLICANT'S EXHIBIT #11, INCIDENT REPORT.....	7063

APPLICANT’S EXHIBIT #12, INCIDENT REPORT	7071
APPLICANT’S EXHIBIT #13, INCIDENT REPORT	7073
APPLICANT’S EXHIBIT #14, INCIDENT REPORT.	7078
APPLICANT’S EXHIBIT #15, INCIDENT REPORT.	7091
APPLICANT’S EXHIBIT #16, INCIDENT REPORT	7094
APPLICANT’S EXHIBIT #17, PROSECUTOR’S DESKBOOK, 2010 EDITION.	7095
APPLICANT’S EXHIBIT #18, MOTION TO DISMISS THE DEATH PENALTY DUE TO UNCONSTITUTIONALITY OF STATE PROPORTIONALITY REVIEW.	7119
APPLICANT’S EXHIBIT #19, MOTION TO BAR THE DEATH PENALTY BASED UPON RACE.	7131
RESPONDENT’S EXHIBIT #1, DOCUMENTS.	7145
RESPONDENT’S EXHIBIT #2, CJIS SECURITY POLICY.	7165
RESPONDENT’S EXHIBIT #3, EMAIL CHAIN.	7165
RESPONDENT’S EXHIBIT #4, BOOKING REPORT.	7187
COURT’S EXHIBIT #1, TABLE, MSU REPORT.	7190
MAY 27,2016 HEARING.	7194
DR. WILLIAM NORTON	
Direct Examination by Ms. Scrantom.	7204
Cross Examination by Mr. Grose.	7225
Redirect Examination by Ms. Scrantom.	7248
Examination by the Court.	7255
MOTIONS.	7260
<u>EXHIBITS</u>	
STATE’S #1, CV OF DR. NORTON.	7280
STATE’S #2, EMAILED OPINION.	7287

STATE’S #3, FORMAL REPORT.	7285
MARCH 16, 2017 HEARING.....	7288
OCTOBER 23,2017 HEARING.	7315
BARBARA O’BRIEN	
Direct Examination by Ms. Franklin-Best.	7323
Cross Examination by Ms. Scrantom.....	7338

EXHIBITS

APPLICANT’S EXHIBIT #1 DR. O’BRIEN’S REPORT.	7362
APPLICANT’S EXHIBIT #2 FLASH-DRIVE LOCATED AT CHARLESTON COUNTY COURTHOUSE	
<i>STATE V. COLIN BROUGHTON</i> JURY SELECTION, 06-GS-08, 2164 B.....	7386
POST-TRIAL BRIEFING ON BEHALF OF PETITIONER.	9237
POST-TRIAL BRIEFING ON BEHALF OF RESPONDENT (SEALED).	
ORDER OF DISMISSAL.	9314
59(E) MOTION.	9394
ORDER DENYING 59(E) MOTION.	9488
<i>STATE V. JALAL BEYAH</i> , 2001-GS-10-1736.....	9605

43N 006 14346 P/T 1
ICKERSON WILLIAM 0
AT 930295560 SUR
P/M
X

DATE

5/18/96

ME: RECORD CHANGES IN PATIENT'S STATUS

EVALUATION OF PATIENT PROBLEMS/STANDARDS

Problem resolved - P/W to clinic
Rx given for prevention of infection & pain
Controlled in

Signature/Title/Shift

Int.

Signature/Title/Shift

Int.

00091434b

INPATIENT

P/T

MUSC MEDICAL CENTER
 ADULT DATA BASE AND
 INTERDISCIPLINARY PLAN OF CARE



INPATIENT
 HYN 00091434b
 DICKERSON
 PAT 94029550
 P/T
 16

PAGE 1: PATIENT PROBLEM LIST AND PLAN OF CARE

Refer to this list for initials used throughout the Data Base

Signature	Init.	Signature	Init.	Signature	Init.
Miss Currie M	RC				

Date/Init.

5/17/96	PROBLEM: ALTERATION IN SKIN INTEGRITY R/T G.S.L	
RC	EXPECTED OUTCOME: PT. WILL DEMONSTRATE PROGRESSIVE HEALING OF WOUND.	
	Intervention/Frequency	Evaluation/Resolution
	Implement standards of care.	

Date/Init.

5/17/96	PROBLEM: ALTERATION IN COMFORT R/T PAIN.	
RL	EXPECTED OUTCOME: PT WILL VERBALIZE COMPLETE OR PARTIAL PAIN RELIEF DURING HOSPITALIZATION.	
	Intervention/Frequency	Evaluation/Resolution
	Implement standards of care.	

Date/Init.

5/17/96	PROBLEM: Knowledge deficit R/t Hospital	
H.C	EXPECTED OUTCOME: Pt will verbally express an understanding of all test & procedures during hospitalization	
	Intervention/Frequency	Evaluation/Resolution
	Implement standards of care	

PAGE 2 - CONTINUING CARE ASSESSMENT

(This page optional for Short Stay patients)

DIET (II. restrictions/supplement/substitute) No pork

Changes in Eating Pattern/Appetite/Thirst

Changes in Wt (amt./time)

Dental Problems

Chewing/Swallowing Problems

Bowel Elimination Pattern/Appliances, Aids

Urinary Elimination Pattern/Appliances, Aids

Sufficient Energy for Desired Activities ☒ YES ☐ NO

Exercise Pattern WALKING

Occupation Unemployed

Recreational Activity Basketball

Sleep/Rest Patterns, Problems Nights

Activity Level ☒ No Restriction ☐ Chair only ☐ Bed only ☐ Other:

Activities of Daily Living (I=Independent, A=with Assistance, D=Dependent)

☒ Independent in all ☐ Feeding ☐ Bathing ☐ Dressing ☐ Toileting
☐ Grooming ☐ Home Maintenance ☐ Ambulation ☐ Stairs

Assistive Devices ☐ WC ☐ Walker ☐ Cane ☐ BS Commode ☐ Other: 0

Educational Level: G.E.D.

Ability to Read: YES

Changes in Memory ☐ YES ☒ NO

Duration/Problem:

Will your illness affect your ability to cope/how?

Do you have any religious or spiritual beliefs that will effect your care or treatment?

Living Arrangements (Note if patient from SNF, ICF, Boarding Home, # in household, etc.) LIVE w FAMILY

Are you responsible for care of others?

Who will provide transportation home?

☐ YES ☒ NO Who:

Who prepares meals at home? MOTHER

Any Financial Concerns regarding hospitalization/health care? ☐ YES ☒ NO

Support Systems (Family, Community, Church, Other) FAMILY

Use of Community Resources in Past (i.e., Home Health, WIC, Food Stamps)

What will interfere with prescribed health regimens (diet, activity, meds, follow up, transportation)?

SOURCE OF INFORMATION ☒ Patient ☐ Family ☐ Other:

Section Completed By: Kris Lumbae R

DATE/TIME: 5/17/96 22:00

Preliminary Assessment of Risk for Post-Hospitalization Needs

Name of Case Manager

☐ LOW RISK ☐ HIGH RISK

Name of Social Worker

RN SIGNATURE: Kris Lumbae R

DATE/TIME: 5/17/96 22:00

WV 000 14345 P77 1
DICKERSON WILLIAM 0
PAT 9 1730

PAGE 3
CONTINUING PATIENT CARE DISCHARGE FORM

1. Date Admitted: 3/17 Admitting Diagnosis: CSW hand (L) shoulder
2. Date of Discharge: 5/18 Discharge Diagnosis: CSW (L) shoulder + face
Discharged to (person/place): Police
Address: 1017
Mode of Transportation (e.g., car, bus, taxi): Police
How was patient discharged (e.g., wheelchair, walking): Police
3. Caregiver: see above Phone Number: 677-7434

4. Indicate below major diagnostic tests/procedures performed while patient in hospital:

DATE	TEST/PROCEDURE	DATE	TEST/PROCEDURE

5. Diet Instructions:

6. Allergies:

7. Activity: No heavy lifting given
hand 5/18

8. Medications: None []

9. Prescriptions Given? YES NO

10. How will medications be paid for?

Name of Drug	Amount	Route	Time of Day	Next Dose Due	Special Instructions
<u>keflex 500mg</u>	<u>1 tablet</u>	<u>by mouth</u>	<u>every 6 hours</u>	<u>for 5 days</u>	<u> </u>
<u>Vicodin 5/5</u>	<u>1 to 2 tablet</u>	<u>every 4-6</u>	<u>as needed</u>	<u>for pain by mouth</u>	<u> </u>

11. Return Appointments made:

12. How will patient get to Appointment?

Physician/Clinic	Date	Time	Phone	Appt. made by
<u>Plastic Surgery</u>	<u>on Monday 5/20/96</u>	<u>@ 8:00 AM</u>	<u> </u>	<u>Please call</u>
<u>McClure Bros</u>	<u> </u>	<u> </u>	<u> </u>	<u>to confirm</u>
<u>Trauma Clinic</u>	<u>Tuesday 5/21/96</u>	<u>@ 2 PM</u>	<u> </u>	<u>Appointment</u>
<u>McClure Bros</u>	<u> </u>	<u> </u>	<u> </u>	<u>#772-807</u>

Photo copy to patient and physician/case manager/clinic/community service

PAGE 4

Patient Name: _____

13. Community Services: None ☒

Name of Agency	Contact Person	Phone #	Services Provided	Frequency	Referral Date

14. Equipment Ordered: None ☒

Name of Agency	Contact Person	Phone #	Equipment Provided	Referred By	Referral Date

15. Discharge Resources:

Name	Phone #	Name	Phone #
Physician/Service <i>Maxwell</i>	<i>782-9737</i>		
Case Manager <i>R. Strimmon</i>	<i>782-2123</i>	<i>Beep # 1349</i>	
Social Worker <i>B. Schuman</i>	<i>782-2123</i>	<i>Beep # 2317</i>	
OTHER:			

16. Education Received/Special Instructions (Write in type of education and check patient/caregiver response to education and/or special instructions) (e.g., respiratory needs, wound care, & bowel & bladder)

Type of Education/Special Instructions / Education Tools Provided Patient	Verbalized Steps/Regime	Return Demonstrated
<i>Wt to dry dressing change twice a day to shoulder. Leave right gas dressing on until 5/20</i>		

17. Continuing Patient Care Form Sent to physician/clinic/community agency:

Physician/Clinic	Fax # / Other Mode of Delivery	Physician/Clinic	Fax # / Other Mode of Delivery

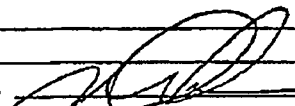
18. Primary Insurance _____

Policy # _____

Secondary Insurance _____

Policy # _____

Nurse Discharging Patient: _____

RN Reviewing Form: 

I have reviewed this form with the nurse, understand the information, and have received a complete copy:

 (Patient or Caregiver)

Photo copy to patient and physician/case manager/clinic/community services

=Patient/Family will articulate instructions relative to managing care as evidenced by:

1. Discusses follow-up health care plans including return appointment(s).
2. States purpose, schedule, and side effects of medications.
3. Articulates instructions relative to care of wound/stoma.
4. Describes activities allowed.
5. Articulates instructions relative to health problems.

In addition to the above criteria, the patient has the following needs:

[illegible]

PAGE 6 ADMISSION ROUTINE

date: 5/17/96 Time: 21:15 AM/PM

Mode: ☐ amb, ☐ stretcher ☐ wc
Via: ☐ Admitting ☐ ACCESS Center ☐ other

Temp: 98.2 ^{°F} Pulse: 65 Resp: 20 B/P: 145/72

Height: 6' Weight: 220 lbs FHT:

DOCTOR notified of admission AM/PM by

Admitting MD/Service: Family MD/Clinic

Most Recent Adm. (hosp/date/reason): 1994 / Appendectomy / C.M.H.

Age: 27, 19 Diagnosis: GSW (L) Shoulder & (L) EAR

Patient's Statement of Present Complaint: HEADACHE

Valuables (list):

Disposition: ☐ hospital sale ☐ patient retained ☐ Given to:

Prosthetic Aids: ☐ glasses ☐ contacts ☐ dentures ☐ bridge/partial ☐ hearing aid
☐ WC ☐ Artificial limb ☐ other: Disposition: ☐ sent home ☐ retained

Oriented to: ☒ room ☐ bed ☐ phone ☐ call light ☐ TV ☐ visiting hours ☐ safety/smoking policy

Primary Language: ☒ English ☐ Other:

Notify in Emergency: SANDRA JENKINS relation: Mother phone:

Do you have

Advanced Directives/LIVING Will? ☐ YES ☒ NO Do you carry an Organ Donation Card? ☐ YES ☒ NO

PATIENT HISTORY

ALLERGIES (food/drugs/dyes/latex/other): ~~None~~ Medication worn ☐ YES ☒ NO

Medication & Strength	freq.	last dose	Medication & Strength	freq.	last dose
1.			6.		
2.			7.		
3.			8.		
4.			9.		
5.			10.		

Disposition of Meds: ☐ did not bring ☐ patient retained ☐ given to ☐ unit retained

Use of Tobacco ☒ NO ☐ YES Type: Daily Amount:

Use of Alcohol ☒ NO ☐ YES Type: Daily Amount:

Use of Caffeine ☒ NO ☐ YES Type: Daily Amount:

Use Recreational Drugs ☐ NO ☒ YES Type: MARIJUANA Amount: EVERY DAY

Patient History (major-illnesses/operations/major injuries/problems/past pregnancies/disabilities)

1. 1994 / Appendicitis / County hosp.	7.
2.	8.
3.	9.
4.	10.
5.	11.
6.	12.

ONLY: G P A # Living ☐ SIDS EDC: ☐ No Prenatal Care
Anesthesia preferred: Last Meal: ☐ Baby for adoption

Admitting Nurse: Rina Lumley A

RN Signature:

Date/Time: 5/17/96 22:00

Date/Time:

William O. Dickerson, Jr. v. State

Bloomington Police Department TRAUMA RESUSCITATION FLOWSHEET		EMERGENCY																																																																																																																									
Date: <u>5/24/96</u> Name: <u>William Dickerson</u> DOB: <u>31</u> Sex: <u>M</u> Race: <u>Black</u> Time Call Received: <u>15:43</u> Trauma Alert Called: <u>(Y) N</u> Time: <u>15:45</u> Arrival Time: <u>15:52</u> EMS Run Report: <u>Y</u> <u>N</u> ALLERGIES: <u>NKDA</u> Source: <u>AT</u> PM Hx: _____ Current MEDS: <u>None</u> Meds PTA: <u>None</u> Last Tetanus: _____																																																																																																																											
TRAUMA TEAM Attending Trauma: <u>Norcross</u> Chief Trauma: <u>Pitts</u> Res. Trauma: <u>Porter</u> Neurosurg.: _____ Consult: _____ Respiratory: _____ X-ray: _____ Anesthesia: _____ Other: _____ RN Recorder: <u>J. Jones, RN</u> RN Primary: <u>Stephanie Hearn</u> RN Secondary: <u>SE Dickerson</u>		Transfer Mode: ☐ Air ☐ Auto ☐ Police ☐ Walkin ☒ Ambulance Other: _____ Injury Location: ☐ Work ☒ Street ☐ School ☐ Farm ☐ Residence Other: <u>SPRING ST</u> LOC: <u>(Y) N</u> Length: _____ VS PTA: BP _____ P _____ R _____																																																																																																																									
TRAUMA REGISTRY Safety Equipment: ☐ Restraints ☐ None ☐ Airbag ☐ Unknown ☐ Helmet In place on arrival: ☒ Cervical collar ☐ Backboard ☐ Limb Restraints ☐ Mast ☒ Splint ☐ O2 ☐ ETT ☐ IVx _____ ☐ Monitor ☐ Foley ☐ NG Tube		Mechanism of Injury: ☐ Auto ☐ Passenger ☐ Driver ☐ Fall Ft. ☐ GSW ☐ Stabbing ☐ Bicycle ☐ Crush ☐ Amputation ☐ Motorcycle ☐ Pedestrian ☐ Burn ☐ Assault Other: _____																																																																																																																									
ASSESSMENT ON ARRIVAL: AIRWAY: ☒ self maintained ☐ obstructed ☐ oral/nasal airway ☐ intubated ☐ other: _____ BREATHING ☐ absent ☐ assisted/bagged ☒ present ☐ RR rate/pattern: Chest Excursion: ☒ symmetrical ☐ asymmetrical Breath Sounds: <u>(D, A, C)</u> PERC: <u>LUL</u> <u>LLL</u> <u>RUL</u> <u>RL</u> Oxygen: <u>100%</u> <u>100%</u> <u>100%</u> CIRCULATION: Pulse: ☒ present ☐ absent ☐ CPR rate: <u>117</u> rhythm: <u>P. Tach</u> Radial: R <u>+</u> L <u>+</u> Pedal: R <u>+</u> L <u>+</u> cap. refill: _____ other: _____ HEAD: Pupils size (mm) reaction: left: <u>3</u> <u>+</u> right: <u>3</u> <u>+</u> Ears: Clear/Blood/CSF: <u>None</u> <u>None</u> other: <u>Bleed + bruise @ mandible</u> CHEST: <u>Clear, symmetrical</u> ABDOMEN: ☒ soft ☐ distended ☐ firm/hard ☐ nontender ☐ tender ☐ hyper ☐ hypo ☐ other: _____ EXTREMITIES: movement: ☒ normal ☐ abnormal <u>6 INCHES RNT intense Pnt without</u> sensation: ☒ normal ☐ abnormal other: _____ POSTERIOR: _____ OTHER: _____		GLASGOW COMA SCORE <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th colspan="3">PEDIATRIC</th> <th colspan="3">ADULT</th> </tr> <tr> <th>EYE OPENS TO</th> <th>TIME</th> <th>SCORE</th> <th>EYE OPENS TO</th> <th>TIME</th> <th>SCORE</th> </tr> </thead> <tbody> <tr> <td>Spontaneous</td> <td>4</td> <td>4</td> <td>Spontaneous</td> <td>4</td> <td>4</td> </tr> <tr> <td>Speech</td> <td>3</td> <td>3</td> <td>Speech</td> <td>3</td> <td>3</td> </tr> <tr> <td>Pain</td> <td>2</td> <td>2</td> <td>Pain</td> <td>2</td> <td>2</td> </tr> <tr> <td>Remain closed</td> <td>1</td> <td>1</td> <td>Remain closed</td> <td>1</td> <td>1</td> </tr> <tr> <td>BEST VERBAL</td> <td></td> <td></td> <td>VERBAL</td> <td></td> <td></td> </tr> <tr> <td>Coos/Babbles</td> <td>5</td> <td>5</td> <td>Orients</td> <td>5</td> <td>5</td> </tr> <tr> <td>Understands</td> <td>3</td> <td>3</td> <td>Understands</td> <td>3</td> <td>3</td> </tr> <tr> <td>Cries to pain</td> <td>2</td> <td>2</td> <td>Words</td> <td>2</td> <td>2</td> </tr> <tr> <td>Moans to pain</td> <td>1</td> <td>1</td> <td>Sound</td> <td>1</td> <td>1</td> </tr> <tr> <td>No response</td> <td>1</td> <td>1</td> <td>No response</td> <td>1</td> <td>1</td> </tr> <tr> <td>BEST MOTOR</td> <td></td> <td></td> <td>MOTOR</td> <td></td> <td></td> </tr> <tr> <td>Spontaneous movements</td> <td>6</td> <td>6</td> <td>Obeys commands</td> <td>6</td> <td>6</td> </tr> <tr> <td>Withdraws to touch</td> <td>5</td> <td>5</td> <td>Localizes pain</td> <td>5</td> <td>5</td> </tr> <tr> <td>Withdraws to pain</td> <td>4</td> <td>4</td> <td>Withdraws</td> <td>4</td> <td>4</td> </tr> <tr> <td>Abnormal flexion</td> <td>3</td> <td>3</td> <td>Abnormal flexor</td> <td>3</td> <td>3</td> </tr> <tr> <td>Abnormal extension</td> <td>2</td> <td>2</td> <td>Extension</td> <td>2</td> <td>2</td> </tr> <tr> <td>No response</td> <td>1</td> <td>1</td> <td>No response</td> <td>1</td> <td>1</td> </tr> <tr> <td>TOTAL</td> <td></td> <td></td> <td>TOTAL</td> <td></td> <td></td> </tr> </tbody> </table>		PEDIATRIC			ADULT			EYE OPENS TO	TIME	SCORE	EYE OPENS TO	TIME	SCORE	Spontaneous	4	4	Spontaneous	4	4	Speech	3	3	Speech	3	3	Pain	2	2	Pain	2	2	Remain closed	1	1	Remain closed	1	1	BEST VERBAL			VERBAL			Coos/Babbles	5	5	Orients	5	5	Understands	3	3	Understands	3	3	Cries to pain	2	2	Words	2	2	Moans to pain	1	1	Sound	1	1	No response	1	1	No response	1	1	BEST MOTOR			MOTOR			Spontaneous movements	6	6	Obeys commands	6	6	Withdraws to touch	5	5	Localizes pain	5	5	Withdraws to pain	4	4	Withdraws	4	4	Abnormal flexion	3	3	Abnormal flexor	3	3	Abnormal extension	2	2	Extension	2	2	No response	1	1	No response	1	1	TOTAL			TOTAL		
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TOTAL			TOTAL																																																																																																																								
TRAUMA SCORE <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Category</th> <th>+2</th> <th>+1</th> <th>-1</th> <th>Total</th> </tr> </thead> <tbody> <tr> <td>Component size</td> <td>>20kg</td> <td>10-20kg</td> <td><10kg</td> <td></td> </tr> <tr> <td>Airway</td> <td>Normal</td> <td>Maintainable</td> <td>Unmaintainable</td> <td></td> </tr> <tr> <td>Systolic BP</td> <td>>90 mm Hg</td> <td>50-90 mm Hg</td> <td><50 mm Hg</td> <td></td> </tr> <tr> <td>CNS</td> <td>Awake</td> <td>Obtunded/LOC</td> <td>Coma/Unconscious</td> <td></td> </tr> <tr> <td>Skeletal</td> <td>None</td> <td>Closed fracture</td> <td>Open/multiple fractures</td> <td></td> </tr> <tr> <td>Cutaneous</td> <td>None</td> <td>Minor</td> <td>Major/penetrating</td> <td></td> </tr> </tbody> </table>		Category	+2	+1	-1	Total	Component size	>20kg	10-20kg	<10kg		Airway	Normal	Maintainable	Unmaintainable		Systolic BP	>90 mm Hg	50-90 mm Hg	<50 mm Hg		CNS	Awake	Obtunded/LOC	Coma/Unconscious		Skeletal	None	Closed fracture	Open/multiple fractures		Cutaneous	None	Minor	Major/penetrating		ADULTS RTS <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Component</th> <th>TIME</th> <th>SCORE</th> </tr> </thead> <tbody> <tr> <td>RESP RATE</td> <td>10-20 Min</td> <td>3</td> </tr> <tr> <td></td> <td>>20 Min</td> <td>2</td> </tr> <tr> <td></td> <td>3-5 Min</td> <td>1</td> </tr> <tr> <td></td> <td>1-3 Min</td> <td>0</td> </tr> <tr> <td></td> <td>None</td> <td>0</td> </tr> <tr> <td>Sys BP</td> <td>>88 mmHg</td> <td>3</td> </tr> <tr> <td></td> <td>76-89 mmHg</td> <td>2</td> </tr> <tr> <td></td> <td>60-75 mmHg</td> <td>1</td> </tr> <tr> <td></td> <td>1-49 mmHg</td> <td>0</td> </tr> <tr> <td></td> <td>NO PULSE</td> <td>0</td> </tr> </tbody> </table>		Component	TIME	SCORE	RESP RATE	10-20 Min	3		>20 Min	2		3-5 Min	1		1-3 Min	0		None	0	Sys BP	>88 mmHg	3		76-89 mmHg	2		60-75 mmHg	1		1-49 mmHg	0		NO PULSE	0																																																				
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RESP RATE	10-20 Min	3																																																																																																																									
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	1-49 mmHg	0																																																																																																																									
	NO PULSE	0																																																																																																																									
KEY: Breath sounds: C-clear D-diminished A-absent W-wheezes R-ralles Respiratory Pattern: R-regular I-irregular Pupils: B-brisk N-normal S-sluggish F-fixed PTA-Prior to Arrival Pulses: 0-absent 1-weak 2-normal 3-strong 4-bounding		GLASGOW COMA SCALE <table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>SCORE</th> <th>13-15</th> <th>9-12</th> <th>8-7</th> <th>4-5</th> <th>1-3</th> </tr> </thead> <tbody> <tr> <td>13-15</td> <td>3</td> <td>3</td> <td>3</td> <td>3</td> <td>3</td> </tr> <tr> <td>9-12</td> <td>2</td> <td>2</td> <td>2</td> <td>2</td> <td>2</td> </tr> <tr> <td>8-7</td> <td>1</td> <td>1</td> <td>1</td> <td>1</td> <td>1</td> </tr> <tr> <td>4-5</td> <td>0</td> <td>0</td> <td>0</td> <td>0</td> <td>0</td> </tr> <tr> <td>1-3</td> <td>0</td> <td>0</td> <td>0</td> <td>0</td> <td>0</td> </tr> <tr> <td>TOTAL</td> <td></td> <td></td> <td></td> <td></td> <td></td> </tr> </tbody> </table>		SCORE	13-15	9-12	8-7	4-5	1-3	13-15	3	3	3	3	3	9-12	2	2	2	2	2	8-7	1	1	1	1	1	4-5	0	0	0	0	0	1-3	0	0	0	0	0	TOTAL																																																																																			
SCORE	13-15	9-12	8-7	4-5	1-3																																																																																																																						
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9-12	2	2	2	2	2																																																																																																																						
8-7	1	1	1	1	1																																																																																																																						
4-5	0	0	0	0	0																																																																																																																						
1-3	0	0	0	0	0																																																																																																																						
TOTAL																																																																																																																											

ARRIVAL DATA

UP NO. 501415 Rev. 11/93

SECRET
P. 17 5

LAB RESULTS:

-TIME-

(%O-2)	()	()	(%O-2)	()	()
Ph.	_____	_____	Ph.	_____	_____
PCO-2	_____	_____	PCO-2	_____	_____
PO-2	_____	_____	PO-2	_____	_____
O2 SAT	_____	_____	O2 SAT	_____	_____
BE	_____	_____	BE	_____	_____
T.CO-2	_____	_____	T.CO-2	_____	_____
Hgb.	_____	_____	Hgb.	_____	_____
Bicarb	_____	_____		_____	_____

HEMATOLOGY:

CHEMISTRY:

TIME	1600
WBC	13.1
RBC	5.57
HGB	14.9
HCT	45.4
PLT	379.0

TIME 11:00
BUN 9
NA 142
K 3.7
CL 102
CO2 16

PTT 23.1

BS (mg)	124
AMYL	
CA	16.0
CREAT	1.3

OTHER:

Antibody - Neg

TIME:

URINE COLOR _____ CLARITY _____ PH _____ SP GR _____
 PROT _____ GLUC _____ KEY _____ BILE _____
 BLOOD _____ RBC _____ WBC _____
 URINE DRUG SCREEN NEG POS

PERITONEAL FLUID: GRAH STAIN

AMYLASE _____ BILIRUBIN _____
CELL COUNT _____

LEGAL BLOOD ALCOHOL BY:

SPÉ

PREP

LEGAL URINE DRUG BY:

6171

EMERGENCY
P/T E

Y 9000914345

WILLIAM PICKINSON

NURSING NOTES:

1552 Arrived trauma team present
1600 Patient - pronounced GCS PIV
1605 GAC PIV. Ritalin given 1-1

1615 4 mg Ativan IV
1620 P. L. CT Dr. Pitner qd.
1640 - Pitner from CT (PIV)
Mottus present (PIV).
Patient's name Present
Attendant Wilson Present
RTS - Low unresponsive per
Patrolman Wilson -
Patrolman Wilson (PCA)
1800 Report received - rare assault on
Wilson & Nguyen. Keno to remain in area
messy. M. Awake & alert. IV x 7 to
DHA infusing 5 difficulty. NO. 2033
basal head & neck completed per
Nly. Wilson B. shoulder wounds
cleared T USS & cleared T
bulky dis. 4x5 per d. all
2W-Chia? Distal pul us 3t = cal
Ref 10 & dec. 10 2000 H. required
transported to hospital. RTS=15,
RTS=12. JPL.

☐ Additional notes on back

DISPOSITION: DATE 17 May 98 TIME _____ PLACE 785
☐ Wheelchair ☒ Stretcher ☐ Ambulatory

ADMITTING SERVICE: Trauma

ORGAN DONATION PURSUED ☐ Y ☒ N With Whom _____

EXPIRED: DATE _____ TIME _____

PRONOUNCED BY _____
TO MORGUE (TIME) _____

FAMILY NOTIFIED @ _____ Phone: _____
Name Morice Relationship Present

LD, Band X Side Rails UP x2 X
Valuations: _____

☐ to pt ☐ to family ☐ to police ☐ to sale
☐ to whom _____ Receipt on chart X
☐ other _____

sg_id = William O. Dickerson, Jr. v. State
0001-0092-0000
Bloom File, Box 8, Page 2188

Message From: PATHNET/CERNER
Mail Addr: PATHNET
Message To : PRINTER FOR TRAU
Mail Addr: TRAU.P
Time Posted : Fri May 17 17:02:03 1996
Message Type: Stat Mail
Subject : DICKERSON, WILLIAM O #000000000914346 PG01

PATIENT: DICKERSON, WILLIAM O DATE: 05/17/96
NUMBER: (0000)-000914346 LOCN: TRAU TIME: 1713 PAGE: 1

BLOOD BANK TESTS

COLLECTION DATE 05/17/96
COLLECTION TIME 1631
DAY/DAY OF STAY FRI 001

TEST	REF RANGE	UNITS
ANTIBODY SCRIN	NEG	

Patient:

```

)ssage From: PATHNET/CERNER
) Mail Addr: PATHNET
) sge To : PRINTER FOR TRAU
) il Addr: TRAU.P
)mc Posted : Fri May 17 16:47:09 1996
)ssage Type: Stat Mail
)bject : DICKERSON, WILLIAM O

```

#0000000000914346 PG01

DATE: 05/17/96

~~NUMBER:~~ 100 ~~SUBJECT:~~ TRAU ~~TIME:~~ 1658 ~~PAGE:~~ 1

COLLECTION DATE	05/17/96
COLLECTION TIME	1600
DAY/DAY OF STAY	FRI 001

TEST	REF RANGE	UNITS
SODIUM	142	(137-145) MMOL/L
POTASSIUM	3.7	(3.6-5.0) MMOL/L
CHLORIDE	102	(98-107) MMOL/L
CO2 CONTENT	16 L	(22-31) MMOL/L
GLUCOSE	126 H	(75-110) MG/DL
UREA NITROGEN	7 L	(9-20) MG/DL
CREATININE	1.3	(0.8-1.5) MG/DL
CALCIUM	10.0	(8.4-10.2) MG/DL

WOLFOLES

L = Low, H = High

7atient:

William O. Dickerson, Jr. v. State
sg_id = 8000000000914346 2190

Message From: PATHNET/CERNER
Mail Addr: PATHNET
Age To : PRINTER FOR TRAU
il Addr: TRAU.P
Time Posted : Fri May 17 16:23:14 1996
Message Type: Stat Mail
Subject : DICKERSON, WILLIAM O #0000000000914346 PG01

PATIENT: DICKERSON, WILLIAM O DATE: 05/17/96
NUMBER: (0000) 000914346 LOCN: TRAU TIME: 1634 PAGE: 1

HEMATOLOGY

COLLECTION DATE 05/17/96
COLLECTION TIME 1600
DAY/DAY OF STAY FRI 001

TEST	REF RANGE	UNITS
--- HEMATOLOGY PROFILE ---		
WBC 13.100 H	(4.800-10.800)	K/CUMM
RBC 5.57	(4.70-6.10)	M/CUMM
HGB 14.90	(14.00-18.00)	GM/DL
HCT 45.4	(42.0-52.0)	%
MCV 81.5	(80.0-94.0)	FL
MCH 26.8 L	(27.0-31.0)	UGM
MCHC 33.0	(32.0-36.0)	GM/DL

Footnotes
L = Low, H = High

Patient:

William O. Dickerson, Jr. v. State
Bloom File Box 8, Page 2191
msg_id = 0000000000000000

Message From: PATHNET/CERNER
Mail Addr: PATHNET
Age To : PRINTER FOR TRAU
Mail Addr: TRAU.P
Time Posted : Fri May 17 16:23:06 1996
Message Type: Stat Mail
Subject : DICKERSON, WILLIAM O . #0000000000914346 PG01

PATIENT: DICKERSON, WILLIAM O DATE: 05/17/96
NUMBER: (0000)000914346 LOCN: TRAU TIME: 1634 PAGE: 1

HEMATOLOGY

COLLECTION DATE 05/17/96
COLLECTION TIME 1600
DAY/DAY OF STAY FRI 001

TEST		REF RANGE	UNITS
--- HEMATOLOGY PROFILE ---			
PLATELET	379.0	(140.0-440.0)	K/CUMM
MPV	9.71	(7.40-10.40)	FL

Patient:

lsj id = Bloom File 09x8, Page 2192

Message From: PATHNET/CERNER

Mail Addr: PATHNET

Page To : PRINTER FOR TRAU

Mail Addr: TRAU.P

Time Posted : Fri May 17 16:37:40 1996

Message Type: Stat Mail

Subject : DICKERSON, WILLIAM O #000000000914346 PG01

DATE: 05-17-96

NUMBER: (0000)-00-0914346

-LOCN:-TRAU-

TIME: 1649

~~PAGE: 1~~

COAGULATION

COLLECTION DATE 05/17/96

COLLECTION TIME 1600

DAY/DAY OF STAY	FRI 001

TEST

REF	RANGE	UNITS
1	0-100	PERCENT
2	0-100	PERCENT
3	0-100	PERCENT
4	0-100	PERCENT
5	0-100	PERCENT
6	0-100	PERCENT
7	0-100	PERCENT
8	0-100	PERCENT
9	0-100	PERCENT
10	0-100	PERCENT
11	0-100	PERCENT
12	0-100	PERCENT
13	0-100	PERCENT
14	0-100	PERCENT
15	0-100	PERCENT
16	0-100	PERCENT
17	0-100	PERCENT
18	0-100	PERCENT
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20	0-100	PERCENT
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22	0-100	PERCENT
23	0-100	PERCENT
24	0-100	PERCENT
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28	0-100	PERCENT
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32	0-100	PERCENT
33	0-100	PERCENT
34	0-100	PERCENT
35	0-100	PERCENT
36	0-100	PERCENT
37	0-100	PERCENT
38	0-100	PERCENT
39	0-100	PERCENT
40	0-100	PERCENT
41	0-100	PERCENT
42	0-100	PERCENT
43	0-100	PERCENT
44	0-100	PERCENT
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47	0-100	PERCENT
48	0-100	PERCENT
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55	0-100	PERCENT
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60	0-100	PERCENT
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62	0-100	PERCENT
63	0-100	PERCENT
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87	0-100	PERCENT
88	0-100	PERCENT
89	0-100	PERCENT
90	0-100	PERCENT
91	0-100	PERCENT
92	0-100	PERCENT
93	0-100	PERCENT
94	0-100	PERCENT
95	0-100	PERCENT
96	0-100	PERCENT
97	0-100	PERCENT
98	0-100	PERCENT
99	0-100	PERCENT
100	0-100	PERCENT

1--- ROUTINE COAGULATION

APTT 23.1 L

(23.2-31.4) SEC

Footnotes

Low

'Patient:

) William O. Dickerson, Jr. v. State
)
) g_id = 000116015-0000 2193
)
) ssage From: PATHNET/CERNER
) Mail Addr: PATHNET
) ge To : PRINTER FOR TRAU
) .l Addr: TRAU.P
) me Posted : Fri May 17 16:37:34 1996
) ssage Type: Stat Mail
) pject : DICKERSON, WILLIAM O #000000000914346 PG01

PATIENT: DICKERSON, WILLIAM O DATE: 05/17/96
NUMBER: (0000)-000914346 LOCN: TRAU TIME: 1649 PAGE: 1

COAGULATION

COLLECTION DATE 05/17/96
COLLECTION TIME 1600
DAY/DAY OF STAY FRI 001

TEST	REF RANGE	UNITS
ROUTINE COAGULATION		
PT	11.7	(10.2-12.7) SEC
INR	1.05	

atient:

04EC 1050 8/85

William O. Dickerson, Jr. v. State
Bloom File, Box B, Page 2195

Medical University of South Carolina
Patient Progress Record

NRN 00091.546
TRAUMA VICTIM GH
PAT 000000000

EMERGENCY

P.A.

TRA

DATE

5/17/96

Patient Stamp Plate

TIME	RELEASE OF EVIDENCE
16:18	OFFICER B. BROWN, CHO CITY POLICE
16:18	EVIDENCE RELEASED TO: OFFICER B. BROWN
16:18	BY: JUDY JONES, R.N.
	CLOTHING: 1 pair of black pants, cut, black minkes shirt
	1 pair of boxer's white socks
	CHUX X 2
	PHOTOGRAPHS:
	FINGERNAIL SCRAPINGS (R & L)
	PUBIC HAIR COMBINGS
	PUBIC HAIR PLUCKINGS
	FOREIGN MATERIAL:
	VAGINAL WASHING WITHOUT FIXATIVE
	VAGINAL SWAB BOX 300
	+ WOODS LAMP SWAB
	FILTER PAPER WITH SALIVA
	OTHER EVIDENCE:
	1 - yellow-colored chain necklace & gold nugget charm
	1 - keeper
	1 - 3 keys
	47.00 dollars 0.35 cents
	1 - lighter
	3 - condoms
	1 - brown braided belt

5/96 CT

Radiology Report

Patient: DICKERSON, WILLIAM
procedure: CT POST FOSSA W/O CONTRAST

MRN: 000289733
Date of Service: 5/17/96
Last Update: 5/20/96

HEAD CT, 5/17/96

COMPARISON: None

HISTORY: Gunshot wound to the head

FINDINGS: Noncontrasted axial computed tomography of the head demonstrates significant right temporal and parietal soft tissue swelling and soft tissue irregularity about the right ear. There are no metallic fragments within soft tissues. Bone windows demonstrate evidence of fracture. There is no evidence of intracranial hemorrhage, mass effect, infarct or missile fragments. Paranasal sinuses and orbits are unremarkable.

IMPRESSION:

Right temporal soft tissue swelling compatible with gunshot injury without evidence of residual missile fragments or acute intracranial process.

Summary:
DX:

Radiologist 1: HORTON, JOSEPH

Date: 5/20/96

Radiologist 2:

Radiologist 3:

HEAD CT, 5/17/96

COMPARISON: None

HISTORY: Gunshot wound to the head

FINDINGS: Noncontrasted axial computed tomography of the head demonstrates significant right temporal and parietal soft tissue swelling and soft tissue irregularity about the right ear. There are no metallic fragments within soft tissues. Bone windows demonstrate evidence of fracture. There is no evidence of intracranial hemorrhage, mass effect, infarct or missile fragments. Paranasal sinuses and orbits are unremarkable.

IMPRESSION:

Right temporal soft tissue swelling compatible with gunshot injury without evidence of residual missile fragments or acute intracranial process.

Summary:
DX:

Radiologist 1: HORTON, JOSEPH

Date: 5/20/96

Radiologist 2:

Radiologist 3:



William O. Dickerson, Jr. v. State
Bloom File, Box 8, Page 2198
Dept. of Pathology/Laboratory Medicine
MUSC Medical Center
171 Ashley Avenue
Charleston, SC 29425-0701
Telephone: (803)792-4231

Patient: DICKERSON, WILLIAM O Date: 05/21/9
MRN: (0000)000289733 1926
Age:
Pat Type: PATIENT Location: 7W D785
Attending Dr: NORCROSS, E D
Ordering Dr: PITRE Page: 1

CANCELLED TESTS

ALYSIS 05/17/96 1600 NO SPECIMEN RECEIVED WITH REQUEST-SLIP

BLOOD BANK TESTS

COLLECTION DATE 05/17/96
COLLECTION TIME 1631
AY/DAY OF STAY FRI 001
TEST
ABO RH INT O POS
ANTIBODY SCRIN NEG

REF RANGE UNITS

ROUTINE CHEMISTRY

COLLECTION DATE 05/17/96
COLLECTION TIME 1600
AY/DAY OF STAY FRI 001

REF RANGE UNITS

ONE CHEMISTRY

Ob. ALITY SER 293

(280-300) MOEM/K

CHEMISTRY 8 PROFILE

COLLECTION DATE 05/17/96
COLLECTION TIME 1600
AY/DAY OF STAY FRI 001

TEST
SODIUM 142
POTASSIUM 3.7
CHLORIDE 102
CO2 CONTENT 16 L
GLUCOSE 125 H
UREA NITROGEN 7 L
CREATININE 1.3
CALCIUM 10.0

REF RANGE UNITS
(137-145) MMOL/L
(3.6-5.0) MMOL/L
(98-107) MMOL/L
(22-31) MMOL/L
(75-110) MG/DL
(9-20) MG/DL
(0.8-1.5) MG/DL
(8.4-10.2) MG/DL

Notes

- Low, H = High

Continued

*** DISCHARGED: MEDICAL RECORDS COPY ***

atient: DICKERSON, WILLIAM O
MRN: (0000)000289733
atcom: 980296560

A. J. Garvin, MD, PHD
Chairman
John C. Cate IV, MD
Director



William O. Dickerson, Jr. v. State
Blood Bank and Laboratory Medicine
MUSC Medical Center
171 Ashley Avenue
Charleston, SC 29425-0701
Telephone: (803)792-4231

Patient: DICKERSON, WILLIAM O Date: 05/21/9
MRN: (0000)000289733 1926
Age: 1926
Pat Type: IN-PATIENT Location: 7W D785
Attending Dr: NORCROSS, E D
Ordering Dr: PITRE Page: 2

HEMATOLOGY

COLLECTION DATE 05/17/96

COLLECTION TIME 1600

Y/DAY-OF-STAY FRI-001

TEST

HEMATOLOGY PROFILE

		REF RANGE	UNITS
WBC	13.100 H	(4.800-10.800)	K/CUMM
RBC	5.57	(4.70-6.10)	M/CUMM
HGB	14.90	(14.00-18.00)	GM/DL
HCT	45.4	(42.0-52.0)	%
MCV	81.5	(80.0-94.0)	FL
MCH	26.8 L	(27.0-31.0)	UGM
MCHC	13.0	(32.0-36.0)	GM/DL
RDW	14.6 H	(11.5-14.5)	%
PLATELET	379.0	(140.0-440.0)	K/CUMM
MPV	9.71	(7.40-10.40)	FL

COAGULATION

COLLECTION DATE 05/17/96

COLLECTION TIME 1600

Y/DAY-OF-STAY FRI-001

ROUTINE COAGULATION

		REF RANGE	UNITS
PT	11.7	(10.2-12.7)	SEC
INR	1.05		
APTT	23.1 L	(23.2-31.4)	SEC

Notes

Low, H = High

*** DISCHARGED: MEDICAL RECORDS COPY ***

Dr. DICKERSON, WILLIAM O
MRN: (0000)000289733
Ext: 980296560

A. J. Garvin, MD, PHD
Chairman
John C. Cate IV, MD
Director

TRAUMA CARD

(CIRCLE ONE)

AMP PLATE

051276

COLOR CODE :

RED

GREEN

ENERGIZCY

YELLOW

BLUE

PHENINDOLE

gite of Birth:

8124176 SS#

Sex

Race

Diagnosis:

Address:

none #:

West Signature:

White-Admitting Office

Canary-West Trauma

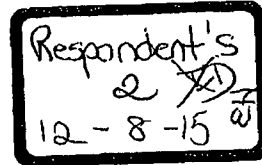
Pink-Pathology

Goldenrod-Medical Records

OTCNO. 800701 Rev. 4/92

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
DIVISION OF SUBSTANCE ABUSE SERVICES**

INMATE CORRESPONDENCE



TO: William Dickerson SCDC #211972
Ridgeland Correctional Institution

FROM: Jennifer Campbell
Program Coordinator

REF: ADMISSION TO ATU

DATE: June 12, 2002

Inmate Dickerson, I have received your second request in which you expressed your desired to be admitted to the Horizon Addiction Treatment Unit (ATU) program located at Lee Correctional Institution.

We know you are eager to be in the program and you appear to be sincere about getting help, but the process in getting an individual into the program is not determined by this office. Once a request has been sent to the Division of State Classification for ATU placement there is a matter of bed-space availability. I would like to encourage you to continue to be patient and your persistence is not going unnoticed.

Meanwhile, please continue to improve your current status and involve yourself in positive activities, so that upon your release from SC Department of Corrections, you will become the productive citizen you so desire. If can be of further assistance, please contact me via "Request to Staff Member".

S/ Jennifer Campbell
Jennifer Campbell, Program Coordinator

File

KLP/cf

INDEX

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER

RECEIVED
JUN 12 2002

A.T.U.

TO: NAME: <i>Jennifer Campbell (A.T.U.)</i>	TITLE: <i>(Program Coordinator)</i>	DATE: <i>6-5-02</i>
INMATE'S NAME: <i>William Dickerson</i>		SCDC #: <i>211912</i>
INSTITUTION: <i>Ridgeland</i>		LIVING QUARTERS: <i>Georgetown-B-#64</i>
DISPOSITION BY STAFF MEMBER: <i>Inmate Dickerson,</i> <i>Please see attached response.</i> <i>Thank you,</i>		
DATE: <i>6-12-02</i>	SIGNATURE: <i>Jennifer Campbell</i>	

SCDC FORM 19-11 (REV.FEB 2001)

Dear Mrs. Jennifer Campbell

This is William Dickerson, yes I'm writing to you again about the A.T.U. program. Mrs. Campbell in the request form that you had sent back, you said the patient during the process. Yes, I'm being patient, but it's real hard dealing with the situation at hand. It seems like I'm reaching out for help and it's taking entirely too long. But as soon as I make a mistake the punishment comes real fast and harsh. I'm trying to make self a better person, all I need is little help. Mrs. Campbell, this is the year of 2003, the last time I saw the free world was of May 76. I wish I can go back into time and change the past, but we are dealing with reality, and I can only correct my future. I'm trying to cope with alot of inner demons, and by being alone, the only friend I got is drugs to help me out. I'm not making a excuse, but it's so hard. If you can just help me a little bit, I will really appreciate it from the bottom of my heart.

Thank you
William Dickerson

MOVING
IN/EX

William O. Dickerson, Jr. v. State
Bloom File, Box 6, Page 606
SOUTH

NC DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER

ANNEX
RECEIVED

TO: NAME: <i>Kristen L. Perry (ATU Program Coordinator)</i>	TITLE:	DATE: <i>4-10-02</i> APR 15 2002
INMATE'S NAME: <i>William Dickerson</i>	SCDC #: <i>211972</i>	SUBSTANCE ABUSE SERVICES
INSTITUTION: <i>Ridgeland</i>	LIVING QUARTERS: <i>Longbottom B-64 #</i>	
DISPOSITION BY STAFF MEMBER: Inmate Dickerson, Your request for admission to the ATU has been received and reviewed. I have taken the liberty of forwarding your request to the State Classification for review and ATU placement. Please be patient during this processing. Thank you,.		
DATE: <i>4-25-02</i>	SIGNATURE: <i>Jennifer Campbell</i>	

SCDC FORM 19-11 (REV. FEB 2001)

William Dickerson # 1-10-02
P.O. Box 2039 G-B-#64
Ridgeland S.C. 29936

Keisha Perry
Director of Substance Abuse
Manning Annex

I'm writing you to ask for help with my drug problem. I have been tested positive three times for drugs. I have ask for help here at Ridgeland, but know one seems to care. So I said to myself, I can stop on my own, but I end up doing it again. Mrs. Perry, my father William Dickerson die at Loma Prison on Oct-22-01, I don't want to end up like that. I want to enter back into society drug-free and be a productive person. Here at Ridgeland, its seems any where I turn, I'm coming in contact with drugs. I'm twenty five years old, I have been using drugs since I was fourteen years old. I have been lock-up since I was nineteen years old, I think a person is a product of there environment. If I can just get around some positive people who are striving for the same goals, I believe it will help me cope with my problems. Mrs. Perry, it was hard for me to write this letter, because I never consider myself a drug addict, but I come to realize and be an man about the situation, I need your help Mrs. Perry. Thank You William Dickerson

753 F.3d 1171
United States Court of Appeals,
Eleventh Circuit.

Brandon Astor JONES, Petitioner–Appellant,
v.
GDCP WARDEN, Respondent–Appellee.

No. 11–14774. | March 20,
2014. | As Amended April 24, 2014.

Synopsis

Background: Following affirmance of his capital murder conviction, state inmate filed petition for writ of habeas corpus. The United States District Court for the Northern District of Georgia, No. 1:88–cv–328–CAM, 706 F.Supp. 1534, granted petition in part and ordered new sentencing proceeding. Denial of plea in bar was affirmed, 260 Ga. 794, 401 S.E.2d 1, and most pretrial rulings were affirmed, 263 Ga. 904, 440 S.E.2d 161. On resentencing, the state court sentenced petitioner to death, and he appealed. Following affirmance of his death sentence, 273 Ga. 231, 539 S.E.2d 154, petitioner again sought federal habeas relief. The United States District Court for the Northern District of Georgia, No. 1:09–cv–01228–CAP, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

[1] fact that state habeas court's order was adopted verbatim from state's proposed order did not affect deference accorded it;

[2] determination that petitioner was not denied effective assistance during penalty phase determination that petitioner was not denied effective assistance of counsel during penalty phase due to counsel's failure to investigate mitigating evidence was reasonable; and

[3] determination that prosecutor did not violate petitioner's right against self-incrimination was reasonable.

Affirmed.

West Headnotes (6)

[1] Habeas Corpus

⇌ Review de novo

Court of Appeals reviews de novo district court's denial of habeas relief. 28 U.S.C.A. § 2254.

2 Cases that cite this headnote

[2] Habeas Corpus

⇌ Existence and adequacy of record or findings

Where state court's decision is unaccompanied by explanation, habeas petitioner's burden still must be met by showing there was no reasonable basis for state court to deny relief. 28 U.S.C.A. § 2254.

11 Cases that cite this headnote

[3] Habeas Corpus

⇌ Existence and adequacy of record or findings

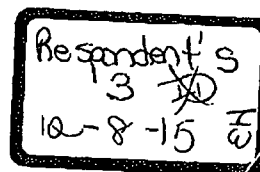
Fact that state habeas court's order was adopted verbatim from state's proposed order did not affect deference that federal habeas court was required to accord that order pursuant to Antiterrorism and Effective Death Penalty Act (AEDPA), where petitioner received full and fair hearing on all of his habeas claims. 28 U.S.C.A. § 2254(d).

7 Cases that cite this headnote

[4] Habeas Corpus

⇌ Post-trial proceedings; sentencing, appeal, etc

State court's determination that petitioner was not denied effective assistance of counsel during penalty phase of his capital murder trial due to counsel's failure to investigate mitigating evidence was not contrary to, or unreasonable application of, clearly established federal law in *Strickland v. Washington*, and thus did not warrant federal habeas relief, even if court lacked reasonable basis for finding that counsel



performed adequately in preparing for and presenting mitigating evidence, and some of petitioner's proffered mitigating evidence about his childhood and his mental health could have been helpful to his arguments at sentencing, where introduction of proffered evidence would have opened door to vast array of aggravating evidence that likely would have overwhelmed balance of mitigating evidence, and mitigating mental health evidence was subject to serious attack and meaningful contradiction. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

17 Cases that cite this headnote

[5] **Habeas Corpus**

⇨ Prosecutorial and police misconduct; argument

State court's determination that prosecutor's question to jury during closing argument as to whether they had "seen any remorse in this case?" did not violate petitioner's right against self-incrimination was not contrary to, or unreasonable application of, clearly established federal law in *Griffin v. California*, and thus did not warrant federal habeas relief; statement did not directly criticize petitioner's refusal to testify to his remorse, but rather was reference to petitioner's failure to express remorse to his pen pals and to victim's family. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 2254.

18 Cases that cite this headnote

[6] **Criminal Law**

⇨ Comments on Failure of Accused to Testify

Prosecutor's statement violates defendant's right to remain silent if statement was manifestly intended to be comment on defendant's failure to testify, or statement was of such character that jury would naturally and necessarily take it to be comment on his failure to testify. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

*1172 Before MARCUS, WILSON and PRYOR, Circuit Judges.

Opinion

MARCUS, Circuit Judge:

In 1979, Petitioner Brandon Astor Jones was convicted of malice murder in Georgia state court. Jones and his co-defendant, Van Roosevelt Solomon, killed Roger Tackett, the manager of a Tenneco convenience store, in the course of an armed robbery and burglary. Jones was sentenced to death, but the United States District Court for the Northern District of Georgia later granted Jones's petition for a writ of habeas corpus in part and vacated his sentence only. This appeal concerns two errors that, Jones claims, infected his *second* penalty-phase trial, which also resulted in a sentence of death. The Georgia state courts, both on direct appeal and during collateral habeas proceedings, rejected all of Jones's attacks on his sentence, and the federal district court denied Jones's second petition for a writ of habeas corpus in its entirety.

After thorough review, we affirm. We conclude that the Georgia Supreme *1173 Court's rejection of Jones's ineffective-assistance claims was not an unreasonable application of clearly established Supreme Court law. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Georgia's high court had reasonable grounds for concluding that Jones suffered no prejudice from his counsel's failure to discover mitigating background and mental health evidence, especially in light of the substantial aggravating circumstances that would also have been revealed in the investigation and presentation of this "new" mitigating evidence. Jones raises a Fifth Amendment claim regarding the prosecutor's comments during his closing argument too, but that claim is also unavailing. Therefore, we affirm the district court's denial of habeas relief.

I.

A.

The Georgia Supreme Court's denial of Jones's direct appeal, which followed his second penalty-phase trial, summarized the essential facts of this case:

[T]he evidence showed that the victim, Roger Tackett, was the manager of a Tenneco convenience store. On June

16, 1979, he arrived at the store at 11:20 p.m. to close it for the night. After the other employees left, Tackett remained at the store to complete some paperwork. At approximately 1:45 a.m., Officer Kendall of the Cobb County police department drove a stranded motorist to the Tenneco parking lot so she could use a pay phone. Officer Kendall observed a car (Tackett's) parked in front of the store with the driver's-side door open; the lights were also still on inside the store. Since the Tenneco store was in his regular patrol area, Officer Kendall knew that it usually closed at midnight. Suspicious, he walked to the store and saw through the front window Brandon Jones stick his head out of the storeroom door at the back of the store, look around (apparently without seeing the officer), and then close the storeroom door. Officer Kendall entered through the unlocked front door and heard three shots, a pause, and then a fourth shot. He drew his weapon and after shouting "police, come on out" without a response, approached the storeroom door and opened it. Jones and his co-defendant, Van Roosevelt Solomon, were standing just inside the door. Officer Kendall ordered them into the main store area, where he searched them and handcuffed Jones. He placed Solomon in his patrol car since he only had one set of handcuffs, and called for assistance on the radio. He also informed both defendants of their rights under *Miranda v. Arizona*.

A private security officer, Alex Woolyard, heard Officer Kendall's request for assistance on a police scanner and arrived first. He loaned Officer Kendall a set of handcuffs to restrain Solomon and watched the defendants while Officer Kendall investigated a van parked nearby. During this time, Woolyard spoke with Jones and determined that the car parked in front of the store did not belong to them; they had arrived in the van. Upon continued questioning by Woolyard, Jones stated that they had come to burglarize the store and found a man who was "bad hurt" in the back of the store. After handcuffing Jones to a metal pole, Woolyard and Officer Kendall entered the store and discovered that the storeroom door had locked when it shut as the defendants exited. They used a crowbar to break open the door and they found Tackett's body lying face-down at one end of the narrow storeroom (Officer Kendall had not seen the victim when he first encountered the *1174 defendants in the storeroom since he did not enter the storeroom at that time). Tackett had been shot five times from behind, once in the jaw, once behind the left ear, once in the thumb, and twice in the right hip. The medical examiner determined that the fatal shot was the "loose contact" shot behind the left ear since that bullet penetrated

the brain; this shot was probably the final shot and was fired while the victim was lying on the ground. Two .38 caliber revolvers were found in an open box next to where Officer Kendall had first encountered the defendants. A large Smith and Wesson contained two spent shells; a smaller Colt contained four spent shells. Four .38 caliber bullets were recovered at the scene or in the victim's body; the ballistics expert determined that all were probably fired by the Colt. Crime scene photographs also show a possible bullet hole in a shelf on the wall, indicating a fifth shot may have been fired in the storeroom. An atomic absorption test conducted on swabs of the defendants' hands indicated that both men had recently fired a gun or handled a recently fired gun. The store's cash drawer was found moved from its original place inside the store and wrapped in a plastic bag. Inside the van, which belonged to Solomon, the police discovered burglary tools, holsters that fit the revolvers and .38 caliber bullets.

Jones v. State (Jones II), 273 Ga.231, 539 S.E.2d 154, 157–58 (2000).

B.

In 1979, both Jones and his co-defendant Solomon were indicted for malice murder, convicted in separate jury trials, and sentenced to death. The Georgia Supreme Court affirmed Jones's conviction and death sentence in 1982. *Jones v. State (Jones I)*, 249 Ga.605, 293 S.E.2d 708 (1982). Jones filed a state habeas corpus petition, which the Superior Court of Butts County denied in 1982; the Georgia Supreme Court affirmed that denial in 1984. The United States Supreme Court denied Jones's petition for a writ of certiorari. *Jones v. Francis*, 469 U.S. 873, 105 S.Ct. 228, 83 L.Ed.2d 157 (1984). Jones then petitioned for habeas relief in federal court. The United States District Court for the Northern District of Georgia granted the petition in part and ordered a new sentencing proceeding, on the ground that the state trial court had improperly allowed the jury to bring a Bible into the deliberation room. *See Jones v. Kemp*, 706 F.Supp. 1534, 1560 (N.D.Ga.1989).

Jones's second penalty-phase trial took place in the Superior Court of Cobb County in September 1997. During closing argument, the prosecutor commented:

The thing that bothers me most about this case, and I hope it bothers you, is the complete lack of remorse. Have

you seen any remorse in this case? I hope I'm wrong about it. I hope you saw some, because I didn't. None of the defense witnesses who testified told you anything about Jones being remorseful. Again, I hope I'm wrong. No one has claimed through Jones's lawyers or his writings that he has apologized to the Tackett family or sought their forgiveness. No one has claimed through Jones's web site on the Internet that he's apologized to the Tackett family or sought their forgiveness. Now, who has the power of forgiveness on this earth? Well, that belongs to Mr. Tackett, and in his absence, to Mrs. Tackett and her daughter, and there's no evidence that they have been asked. I find that ... unusual for eighteen years he's had that opportunity. He's got all kinds of pen pals who apparently would do anything for him. I'm sure if asked, they would have been dispatched to Florida. But *1175 there's no indication or evidence that they were asked. So where is the remorse?

Is not that the kind of conduct that deserves the death penalty? The defense objected and requested a mistrial, arguing that the prosecutor's closing statement impermissibly commented on the defendant's refusal to testify. The state trial court denied the motion.

During deliberations, the jury informed the trial court that it had reached an "impasse," apparently because one juror was "opposed to the death penalty under any circumstances." See *Jones II*, 539 S.E.2d at 160. The judge then chose to give a so-called *Romine* charge.¹ A *Romine* charge is the Georgia state-law equivalent of a federal *Allen* charge, see *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896); *Romine v. State*, 256 Ga. 521, 350 S.E.2d 446, 450–52 (1986), where a trial judge urges a hung jury to continue deliberating and to attempt to reach a verdict. Three hours later, the jury returned a verdict: it found two statutory aggravating circumstances—that Jones committed the murder while engaged in the commission of armed robbery and burglary, see Ga Code Ann. § 17–10–30(b)(2), and that the murder was "outrageously or wantonly

vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," see *id.* § 17–10–30(b)(7)—and sentenced Jones to death. See *Jones II*, 539 S.E.2d at 157.

Jones appealed to the Georgia Supreme Court. Among other points of error, Jones raised his Fifth Amendment challenge to the State's closing argument. The Georgia Supreme Court rejected this argument because "it is not improper to argue the defendant's lack of remorse in the penalty phase, nor do such comments amount to an improper reference to a defendant's failure to testify." *Id.* at 159. According to the state's high court, the prosecutor was not pointing at Jones's failure to testify but rather the fact that "[s]everal of Jones's mitigation witnesses testified about his numerous articles ... and their frequent correspondence with *1176 him, but ... none had mentioned any expression of remorse by Jones." *Id.*

C.

Jones then collaterally attacked his death sentence by filing a habeas petition in the Superior Court for Butts County in 2003. In 2004, the state habeas court held an extensive evidentiary hearing on Jones's claims of ineffective assistance of trial counsel, and developed an elaborate record of what Jones's trial counsel had and had not done in preparation for the penalty phase.

Through this record, we learned that Jones's trial counsel, Clive Stafford Smith, had hired an investigator, Bart Stapert, who started compiling evidence of Jones's childhood and background for potential use at sentencing. Stapert made two trips to Chicago in 1993 and found witnesses who could testify about Jones; in the same year, however, Smith relocated and ended his representation of Jones, which also ended Stapert's involvement in the case.

The case did not move forward for several years, until the state court appointed two new lawyers, Ray Gary, Jr., and J. Michael Treadaway, to represent Jones in March 1996. A third lawyer, Tony Axiom, joined the team shortly before the penalty phase retrial and was the one who actually conducted the retrial.

After Gary and Treadaway first met Jones, Jones sent his new attorneys a letter, along with twenty-seven attachments (mostly Jones's own publications or writings). These writings described how an older female cousin had sexually abused

Jones when he was five years old, and how Jones had suffered "extremely violent beatings" from his uncle. The writings also detailed that when Jones fled home, he became a member of a gang, which led to his incarceration at Sheridan, a juvenile detention center where he was beaten. Both defense counsel Gary and Treadaway testified that they had read Jones's letter and remembered parts of the personal history contained in the attached articles. They also testified, however, that when they asked Jones about the writings, Jones said something to the effect that, "I tell them what I think they want to hear." Gary took this to mean that the writings were "fiction" and "[not] true," and Treadaway took it to mean that the writings were "not to be relied upon." In addition, both attorneys testified that they would have inquired about abuse when asking general background questions, but they could not remember Jones telling them, in person, that he had ever been abused as a child.²

In December 1996, the defense team received a letter from Stapert, the investigator hired by Jones's previous attorney. Stapert's letter said that he had "spent a *1177 lot of time with [Jones] and developed a close relationship with him," and had "built good contacts with several of [Jones's] friends and family members in the Chicago area." Stapert claimed to have "created a fairly detailed picture of what evidence could and should be presented at trial," and offered "to assist you in your efforts or, at the least, share any insights and information I might have." However, it appears that none of Jones's three lawyers contacted Stapert during their investigation in preparation for Jones's retrial.

Instead, Gary and Treadaway testified that they reviewed the boxes containing Jones's previous attorneys' files, though Axam, who officially joined the team shortly before the retrial, did not have time to review all of the material. Included in the records was a 1963 report by U.S. Army psychiatrist Dr. Levon D. Tashjian, which recommended, and ultimately led to, Jones's discharge from the army for psychological reasons. Dr. Tashjian observed that Jones "was markedly depressed," and he initially placed Jones on anti-depressant medications. Tashjian concluded that there was no evidence "of a major thinking disorder such as specific psychosis or psychoneurosis," but that Jones suffered from "a severe character disorder, characterized by extreme emotional instability and liability, by immaturity in handling the demands of his environment, ... and by his passive way of running away from the stresses of his environment." Tashjian believed that Jones's poor adjustment to the military was the consequence of his character disorder and merely "a

repetition of a demonstrable life-long pattern of defective adjustment." The doctor ultimately concluded that attempts at rehabilitation would have been unavailing. He did note, however, that Jones "was and is mentally responsible, both to distinguish right from wrong and to adhere to the right."

While defense counsel Treadaway did not remember Tashjian's report, Gary testified that the report contained "90 percent aggravation and 10 percent mitigation" and was "certainly not anything [he] would want to bring in front of a Cobb County jury." Gary admitted that the defense team never followed up or investigated the report.

Treadaway also testified that he subpoenaed Jones's prison records but that he did not recall whether any mental health evaluations were included. In fact, Jones's prison medical records contained three mental health evaluations by prison psychiatrists. The first, dated July 13, 1982, concluded that "this patient has no evidence of psychiatric illness." The second, dated February 16, 1987, by psychiatrist Dr. Marcelo de la Serna, likewise concluded that Jones "was not suffering from any severe clinical symptomatology," but also opined that Jones "presented a picture of a deeply ingrained and pervasive personality disorder." Dr. de la Serna thus determined that while Jones was not suffering from an Axis I clinical disorder (such as bipolar disorder or PTSD), he did suffer from an Axis II personality disorder—to wit, mixed personality disorder with "prominent histrionic, paranoid, and passive-aggressive features."³ The final report, dated December 1, 1987, concerned Jones's reports of difficulty sleeping. The report stated that Jones was given Benadryl and would continue to be monitored.

*1178 Both Gary and Treadaway testified that they could have secured the funds for an investigator or a mental health expert from the state court. They did not petition the court for such funds, however, because they believed that hiring a mental health expert potentially would have hurt the defense. According to Gary, the law at the time of Jones's retrial would have permitted the State to interview the mental health expert and even to call that expert as a State's witness. Nor did they hire an investigator to look into Jones's childhood.

Instead, Gary and Treadaway focused on three other avenues of mitigation, which they investigated and which Axam eventually presented to the jury. First, counsel believed that the evidence of the crime itself left open the possibility that Solomon, Jones's co-defendant, had killed the victim, and that Jones was not the shooter. The attorneys hired a

forensic expert, Dr. Norton, to examine the facts and testify at the retrial that based on the angles of the bullet holes, Jones could not have been the shooter. Second, Gary and Treadaway attempted to blunt the State's introduction of the petitioner's prior Illinois assault conviction as an aggravating circumstance. To that end, they hired an investigator to go to Chicago and find a witness who would testify that the assault victim was actually the aggressor, and the witness testified at trial. Finally, Gary and Treadaway sought to demonstrate that Jones had forged valuable relationships with pen pals while he was in prison, and that Jones's death would hurt his family. Thus, they interviewed several family members and Jones's pen pals, some of whom eventually testified on Jones's behalf.

At some point during the second trial, either Jones himself or his supporters apparently told Axam about the abuse and neglect that Jones suffered as a child. Axam therefore prepared a proposed jury instruction that listed three specific mitigating factors that the jury could find about Jones's difficult childhood. Axam had no witnesses or evidence to attest to these mitigating circumstances, however, so the trial court declined to give the proposed instruction.

Beyond this account by Jones's trial attorneys of the circumstances surrounding the sentencing retrial, the record from the state habeas hearing contains three other broad categories of relevant evidence: (1) additional background mitigation evidence regarding Jones's childhood; (2) background aggravating evidence regarding Jones's mistreatment of his family and other misconduct; and (3) mental health mitigation evidence. In particular, Jones offered eight affidavits from friends and family members who knew Jones while he was growing up, as well as affidavits and depositions from four mental health experts. For its part, the State offered the contents of the file compiled by the investigator, Bart Stapert, for Jones's prior counsel, Clive Stafford Smith (the "Stapert file"). The State also introduced Jones's prison record, military record, and arrest record.

Together, the evidence presented to the state habeas court reveals an unhappy and abusive childhood. Jones's mother, Jessie Carter, evinced signs of mental instability, his father played no role in his upbringing, and his family was poor. Jones gave Carter "fits" because he was "not a quiet baby," and when Jones was a toddler, Carter gave him to her aunt and uncle, Lois and Reverend James McGee, who then raised him. McGee, Jones's uncle, regularly beat Jones and his cousin, Lois Crenshaw. A neighbor and friend of Jones, Odell

Duncan, recalled that Jones's "arms and face were always covered in bruises."

*1179 Jones repeatedly ran away from the McGees' farm until, at the age of twelve, he moved back in with his mother and her new husband, Julius Lewis, in Chicago. Carter was ill-equipped to raise a child, and her marriage was a violent one. During this time, Jones developed an extensive juvenile record "for stealing cars and the like" and began using aliases. At around thirteen years old, he was placed—under the name "Estes Lewis"—in the State Industrial School for Boys in St. Charles for robbing a milkman. As a fifteen year old, Jones was sent to Sheridan, a state juvenile institution that resembled a prison, for eighteen months. Jones told the investigator, Stapert, that he went to Sheridan for "an incident related to the murder of a youth at a gang party"; Jones's father, however, claimed that Jones had raped a girl who lived down the street from his grandmother. While Jones was at Sheridan, the guards and administration were abusive to the children in their custody and were, in the words of one affiant, "vicious racists." In 1960, the year after Jones was released, the Illinois legislature investigated allegations of brutality at Sheridan. In 1973, following a consent judgment entered in a lawsuit by Sheridan residents, the facility ceased operating as a juvenile institution entirely.

His life as an adult did not improve much. Jones entered the army at nineteen, but he was discharged for "unsuitability" a little more than a year later. Jones's military records included a statement from his company commander, Charles Pardee, which criticized Jones's army performance. Specifically, it provided that Jones had "contributed nothing" to the army, that he had "absented himself" from the army on numerous occasions, and that he had "no regard for the military or its regulations," "cannot accept responsibility," and "in general is very bad for the morale of this unit."

The sworn affidavit of Ruby McDougale, Jones's first wife, explains that Jones was "not a good husband" and was "too unstable." His daughters, Lisa and Veronica, told Stapert that Jones had physically abused their mother, Ruby, while they were growing up, and that he was not around very much. His second wife, Yvonne Crosswell, revealed to Stapert that Jones had beaten her at least once a week, even when she was pregnant. She said that he once kidnapped their children, and she eventually left him because he beat the children.

Several relatives and friends also reported, in affidavits and conversations with investigators, that Jones had often been

in jail. Yvonne said that whenever Jones was arrested, he would bail out and avoid recapture by relying on different aliases. In fact, Jones told Stapeit's investigators that his aliases included Willie Hooper, Astor Jones, Brandon Jones, Estes Lewis, Lambert Lewis, Wilbur May, Jimmy McGee, Estes McGee and James McKay, and that his priors could "appear in Chicago area; Denver; Jefferson County, Mo.; Los Angeles; Washington, DC; and Gary, Indiana." Jones confirmed to those investigators that he "sometimes would get charged with something, make bond, change his name and never show up again." Besides his strong arm robbery conviction discussed at sentencing, Jones was also convicted of contributing to the delinquency of a minor. His prison records also describe over two dozen infractions for which Jones was disciplined while incarcerated: among other infractions, Jones fashioned weapons by melting razor blades onto ink pens, threw hot water and baby oil at a guard, and broke a prison window by repeatedly hurling a typewriter at the glass.

Further, Yvonne, friend Orteal Tyler, and daughter Lisa revealed to investigators *1180 that Jones made a living "hustling" as a pimp. Jones himself admitted to those investigators that he ran "tourist houses" in Washington, D.C., and Chicago, which were actually fronts for brothels where drugs and prostitution were intertwined. Orteal didn't remember Jones ever holding down a steady job; instead, he made his money by pimping.

As for his mental health evidence, Jones presented to the state habeas court affidavits or deposition testimony from four psychiatric experts. Jones's experts diagnosed him with PTSD, bipolar disorder, and decreased brain functioning.

Dr. Marlyne Israelian, a clinical psychologist specializing in psychotherapy and neuropsychological evaluation, performed a series of neuropsychological tests on Jones. Dr. Israelian opined, based on the test results and affidavits from his friends and family, that Jones exhibited a lifelong pattern of behavior consistent with childhood-onset bipolar disorder. Israelian also stated that Jones's results were consistent with a diagnosis of PTSD, and that Jones's history of physical, sexual, and emotional trauma and exposure to the chemical perchloroethylene contributed to deficient brain functioning. Unlike Dr. de la Serna, who had examined Jones in prison in 1987 and considered him alert and intelligent, Israelian found that Jones suffered from cognitive deficits. She opined that these deficits—particularly his poor judgment, lack of

impulse control, and inability to process new information—contributed to his participation in the murder.

Dr. Elaine Walker, a clinical psychologist specializing in mental disorders, reviewed the same materials as Israelian. She canvassed the environmental risk factors in Jones's history—particularly the abuse he suffered as a child, and his exposure to chemicals such as perchloroethylene through his work as a dry cleaner—and concluded that Jones met the clinical criteria for a life-time diagnosis of bipolar disorder and PTSD. Dr. Pablo Stewart, a psychiatrist, conducted a clinical interview with Jones and reviewed the documentary evidence, along with the reports submitted by Walker and Israelian. Dr. Stewart too diagnosed Jones with PTSD, Bipolar I Disorder, and related cognitive impairments. Furthermore, Stewart concluded that Jones's mental impairments significantly contributed to the offense for which he was convicted. Finally, Dr. Tashjian, the army psychiatrist who evaluated Jones in 1963, explained that his 1963 findings were consistent with the contemporary diagnoses of PTSD and bipolar disorder.

D.

In 2006, the state habeas court denied all of Jones's claims for relief in an order adopted verbatim from the State's proposed order. Citing to *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, the state court determined both that Jones's attorneys performed effectively in their investigation of mitigating evidence, and that the failure to uncover evidence of Jones's childhood abuse and mental health problems caused Jones no prejudice.

As for performance, the state court credited Gary and Treadaway's testimony that they specifically had asked Jones about abuse. The court also found that, when Gary and Treadaway asked Jones about his autobiographical articles containing allegations of physical and sexual abuse, Jones replied that he was simply telling the readers what they wanted to hear. Concerning Dr. Tashjian's 1963 report, the state court credited Gary and Treadaway's testimony that they believed the report's diagnosis would be more aggravating than mitigating.

*1181 As for the prejudice prong of *Strickland*, the state court discounted Jones's autobiographical allegations of sexual and physical abuse. The state court also found that the mental health experts' diagnoses of Jones were "the product of unsupported evidence and errant analysis." The

state court noted that Dr. Stewart "completely disregarded" the diagnoses of the psychiatrists who had evaluated Jones in prison, and that the facts upon which Dr. Stewart relied were "fraught with speculation, error, clear bias, and do not present an accurate report of Petitioner's life."

The state court also observed that Dr. Israelian had concluded that Jones's exposure to perchloroethylene had contributed to his mental deficiencies—even though the record provided little basis for one to discern the extent of his exposure or even how long Jones had worked as a dry cleaner. The state court further determined that Jones's statement, given to police on the night of the crime, strongly suggested that Jones was not an inactive or unwitting participant in the murder—which directly contradicted Dr. Israelian's opinion that Jones's disorders made him vulnerable to manipulation by co-defendant Solomon.

Finally, the state court determined that Dr. Tashjian's findings, based only on his evaluation in 1963 and not on any new information about Jones, were the product of "blatant speculation" and that Dr. Tashjian was "reaching to find any corollary between his 1963 report and Petitioner's current diagnosis." The court did not address Dr. Walker's affidavit separately, but it nevertheless reached the overarching conclusion that Jones had not been prejudiced because "the foundation upon which Petitioner's alleged mental health experts rely is patently biased and incorrect." The state habeas court therefore denied Jones's *Strickland* claim.

E.

In September 2008, the Georgia Supreme Court denied Jones's application for a certificate of probable cause to appeal. In 2009, Jones filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. On August 10, 2011, the United States District Court for the Northern District of Georgia denied the petition in its entirety. The district court rejected Jones's ineffectiveness claim, concluding that the state court had reasonably applied *Strickland* when it held that Jones had not been prejudiced by counsel's failure to investigate or offer the additional mitigating evidence. The district court also rejected Jones's Fifth Amendment claim because it read the prosecutor's comments not as an impermissible allusion to Jones's failure to testify but rather as a permissible "observation that despite the numerous mitigation witnesses the petitioner presented to speak to his good character, none provided any testimony that the

petitioner expressed remorse." The district court granted Jones a COA on those two claims: (1) whether counsel provided ineffective assistance during Jones's sentencing retrial; and (2) whether the State's closing argument violated Jones's Fifth Amendment privilege against self-incrimination. We denied Jones's motion to expand his COA.

II.

[1] We review *de novo* the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254. *Wellons v. Warden*, 695 F.3d 1202, 1206 (11th Cir.2012). The district court's legal conclusions, and its resolution of mixed questions of law and fact, also receive *de novo* review. *Id.*

Since Jones's habeas petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *1182 Pub.L. No. 104–132, 110 Stat. 1214, these provisions govern his challenge:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under § 2254(d)(1)'s "contrary to" clause, we grant relief only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under § 2254(d)(1)'s "unreasonable application" clause, we grant relief only "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* We may overturn factual findings by the state habeas court only when a petitioner

produces "clear and convincing evidence" that those findings are erroneous. 28 U.S.C. § 2254(e)(1). The Supreme Court has stressed that "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786–87, 178 L.Ed.2d 624 (2011).

[2] The Georgia Supreme Court's denial of the application for a certificate of probable cause to appeal was the final state-court determination of Jones's *Strickland* claim. "[T]he highest state court decision reaching the merits of a habeas petitioner's claim is the relevant state court decision." *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir.2008). Like in *Newland*, here "the rejection of petitioner's application for a certificate of probable cause to appeal was, implicitly, a determination that none of petitioner's claims had arguable merit." *Id.* Though the Georgia Supreme Court did not give reasons for its decision, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington*, 131 S.Ct. at 784.

[3] Jones argues that we should not apply AEDPA deference because the state habeas court's order was adopted verbatim from the State's proposed order. We are unpersuaded. To begin with, we look to the Georgia Supreme Court's action as the final state merits determination. Moreover, even if the state superior court decision had been the final merits determination, AEDPA mandates deferential review of any claim that a state court "adjudicated on the merits," 28 U.S.C. § 2254(d), and does not impose any specific requirements on how a state court should announce its decision. Jones does not and cannot deny that his claims were adjudicated on the merits; the state court's order undeniably rejected Jones's *Strickland* claim on the merits, not on any procedural ground. Indeed, *1183 the superior court's order extensively analyzed his *Strickland* claim over the course of ninety pages. Considering that a summary disposition of a *Strickland* claim qualifies as an adjudication on the merits, see *Ferrell v. Hall*, 640 F.3d 1199, 1224 (11th Cir.2011); *Wright v. Sec'y, Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir.2002), we can discern no basis for saying that a state court's fuller explanation of its reasons—albeit reasons drafted for the court by the State—would not be entitled to AEDPA deference.

We have considered and rejected similar arguments in the past. In *Rhode v. Hall*, for example, a habeas petitioner challenging his death sentence argued that the state court's habeas decision was not entitled to deference. See 582 F.3d 1273, 1281 (11th Cir.2009). Like Jones, Rhode "complain[ed] that the state habeas court adopted verbatim the State's proposed order," and that the order "uncritically incorporate[d]" the State's evidence and "mischaracterizations of the evidentiary record." *Id.* Thus, by Rhode's lights, the order was not "a fair and impartial assessment of the facts and law," and its findings should have been rejected as unreasonable determinations of fact pursuant to § 2254(d)(2) and (e)(1). *Id.* A panel of this Court in *Rhode* rejected that claim, noting that "the record clearly reflects that both Rhode and the State had the opportunity to present the state habeas court with their version of the facts," and concluding that, "[d]espite the fact that the state habeas court adopted the State's facts verbatim, these findings of fact are still entitled to deference from this court." *Id.* at 1282.

Jones cites as primary support for his position *Jefferson v. Upton*, 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010). In *Jefferson*, the Supreme Court applied the pre-AEDPA version of § 2254 and held that a state court had denied a death-penalty petitioner a full, fair, and adequate hearing, where: (1) the state court had adopted factual findings drafted exclusively by the State's attorneys pursuant to an *ex parte* request from the state-court judge; (2) the state court had failed to notify the petitioner of the request made to opposing counsel, and (3) the proposed findings recounted evidence from a nonexistent witness. See 560 U.S. at 292, 130 S.Ct. 2217. *Jefferson* offers no guidance here, however, because it is both legally and factually distinguishable.

First, *Jefferson* never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference. *Jefferson* addressed a claim arising under the pre-AEDPA version of § 2254; the *Jefferson* Court was therefore operating under a different statute than the one controlling this case. Moreover, even absent that legal distinction, the facts of this case are critically different from *Jefferson*. There, the state court adopted a proposed order that it had obtained *ex parte* from the State, without notice to Jefferson. Here, notably, the state court requested that both Jones and the State prepare proposed orders. The court conducted an evidentiary hearing in August and September 2004, at which Jones was represented ably by his habeas counsel, who presented several witnesses and 125 exhibits spanning about 5,000 pages. The

state court then took a year and a half to consider the party's submissions and only issued its order denying habeas relief in March 2006. In stark contrast to *Jefferson*, the circumstances here demonstrate that Jones received a full and fair hearing on all of his habeas claims.

III.

Jones argues that the Georgia state courts unreasonably applied *Strickland* when they concluded that his trial counsel's *1184 investigation of mitigating evidence was not deficient and, second, that there was no reasonable probability that the additional mitigating evidence discovered by Jones's habeas counsel would have altered the outcome of his trial. To prevail under *Strickland* and AEDPA, Jones first has to demonstrate that every fairminded jurist would conclude that counsel's performance was so deficient that it "fell below an objective standard of reasonableness," 466 U.S. at 688, 104 S.Ct. 2052. The *Strickland* inquiry is "highly deferential" and evaluates "all the circumstances from counsel's perspective at the time." *Id.* at 688–89, 104 S.Ct. 2052.

Then, to meet his burden on *Strickland*'s second prong under AEDPA, Jones also has to show that every fair-minded jurist would conclude "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Jones need not show that counsel's conduct more likely than not altered the outcome of his penalty proceeding; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; see *Brownlee v. Haley*, 306 F.3d 1043, 1069 (11th Cir.2002); *Mincey v. Head*, 206 F.3d 1106, 1143 (11th Cir.2000). When, as here, the claim concerns the failure to present mitigating evidence, "we reweigh the evidence in aggravation against the totality of available mitigating evidence" to determine whether the petitioner suffered prejudice. *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "[W]hat matters is not merely the number of aggravating or mitigating factors, but their weight." *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1240–41 (11th Cir.2010). In addition, since this case arises in Georgia, where the death penalty requires a unanimous jury verdict, prejudice exists where every fairminded jurist would perceive "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527. Notably, a court "may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice

prong cannot be satisfied." *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir.1995) (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

A.

[4] As an initial matter, we assume without deciding, for purposes of this appeal, that the Georgia Supreme Court lacked a reasonable basis for finding that Jones's counsel performed adequately in preparing for and presenting mitigating evidence at the penalty phase of trial. We ground this assumption on the fact that counsel became aware of several avenues of potential mitigating evidence to pursue—through, for example, the defendant's own personal essays, a letter from previous counsel's investigator, and a mental health evaluation found in the defendant's military records—yet counsel failed to follow up on any of these red flags. On the other hand, however, evidence in the state record shows that Jones told his attorneys that some of the stories in his writings were fabricated, and that Jones never told his attorneys about his childhood abuse, even though they had questioned him about it. On this mixed record, we need not resolve the question of whether the performance of Jones's counsel was deficient, let alone whether the Georgia's high court had a reasonable basis for deciding otherwise. As we determine below, the Georgia Supreme Court had a reasonable basis for concluding Jones did not suffer prejudice. See *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1248 (11th Cir.2009) ("We need not determine whether counsel's limited investigation into Windom's *1185 background and mental health constituted deficient performance under the first prong of *Strickland* because we conclude that, even assuming counsel performed deficiently, Windom was not prejudiced thereby."); *Hall v. Head*, 310 F.3d 683, 699 (11th Cir.2002) ("[A]lthough there is evidence in the record to support the district court's finding of deficient performance, we need not and do not 'reach the performance prong of the ineffective assistance test [because we are] convinced that the prejudice prong cannot be satisfied.'" (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052)).

B.

We turn then to prejudice and weigh the totality of the aggravating evidence against the totality of the mitigating evidence, both what was presented at Jones's trial and what

was discovered for his state habeas proceeding. *Boltoson v. Moore*, 234 F.3d 526, 534 (11th Cir.2000). On the totality of this evidence, we conclude that the Georgia Supreme Court's determination that Jones did not raise a reasonable probability of a different result is neither contrary to nor an unreasonable application of federal law clearly established by the Supreme Court.

To begin with, we do not dispute that some of Jones's proffered mitigating evidence, both about his childhood and his mental health, could have been helpful to his arguments at sentencing. Indeed, evidence of Jones's psychiatric problems may have bolstered the argument that Solomon, not Jones, was the driving force behind the decision to rob the store. Further, the details regarding Jones's childhood with his abusive uncle and sexually abusive cousin and at a deplorable juvenile detention center may have supported the argument that Jones was not fully culpable for his actions, and may have cast him in a more sympathetic light.

However, Jones's reliance on this "new" mitigating evidence suffers from several substantial flaws. First, by introducing this evidence, Jones's counsel would have opened the door to a vast array of aggravating evidence that likely would have overwhelmed the balance of mitigating evidence in this case. See *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (concluding that petitioner could not show prejudice since the proposed mitigating evidence would have opened the door to strong aggravating evidence); *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir.2013) (en banc) (same); *Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255, 1289 (11th Cir.2013) (same); *Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1275 (11th Cir.2012) (same); *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1246 (11th Cir.2010) (same); *Windom*, 578 F.3d at 1251 (same); *Wood v. Allen*, 542 F.3d 1281, 1311–12 (11th Cir.2008) (same); *Gaskin v. Sec'y, Dep't of Corr.*, 494 F.3d 997, 1004 (11th Cir.2007) (same); *Robinson v. Moore*, 300 F.3d 1320, 1350 (11th Cir.2002) (same). Second, the mitigating mental health evidence was subject to serious attack and meaningful contradiction.

Some of the most damaging evidence in the full habeas record came from Jones's family and friends. His daughters, Lisa and Veronica, revealed that Jones had beaten their mother, Ruby, who admitted that Jones was "not a good husband," and "too unstable." His second wife, Yvonne, went even further in describing him as violent: she said Jones once beat a man with a hammer because he commented on Yvonne's outfit;

Jones beat Yvonne at least once a week, even when she was pregnant, once with a 2x4 board until she passed out in the bath tub; Jones beat her *1186 children; Jones would make the children stand in the corner for hours and beat them if they moved; and Jones had the children watch while he beat her.

His military record likewise failed to cast him in a positive light. He was discharged from the army after about a year, and his company commander expressly said that Jones had "contributed nothing" to the army, that he had "absented himself" from the army on numerous occasions, and that he had "no regard for the military or its regulations," "cannot accept responsibility," and "in general is very bad for the morale of this unit." Plainly, this evidence would have undercut any plea for mercy that Jones would have sought to make on a fuller habeas record.

Nor would the portrait of Jones as being submissive to Solomon have been left untouched. Aside from the details about the physical abuse he unleashed on his family, much of the testimony would have painted Jones as a seasoned criminal who knew how to work the system. Yvonne, friend Orteal, and daughter Lisa disclosed Jones's career as a pimp, and Jones himself admitted that he ran "tourist houses" in D.C. and Chicago where "drugs and prostitution were intertwined." Yvonne also explained that whenever Jones was arrested, he would bail out and disappear under one of the nine different aliases found in the habeas record.

The habeas record also includes damning evidence of the numerous and serious prison infractions Jones has committed since he has been on death row. One report detailed that Jones had hurled a typewriter repeatedly at a window until both the window and the typewriter had been broken. Another said that Jones had injured a prison guard by throwing hot water and baby oil on the guard's face and shoulder. In yet another, a guard found Jones in possession of two ink pens with razor blades melted onto them as weapons. There are also many reports detailing other instances of insubordination, including times he cursed at or threatened the guards or spat in their faces, as well as times he failed to follow instructions or possessed contraband.

The image of Jones found in the habeas record stands in stark contrast to the one counsel actually portrayed at sentencing. There, counsel relied on residual doubt, by using the evidence of the crime itself to suggest that Jones had not been the shooter and calling a witness from Jones's prior assault conviction to testify that the victim, and not Jones, had

actually been the aggressor. Defense counsel also introduced the testimony of family and pen pals to demonstrate that Jones's death would devastate his family and that Jones had reached out and touched the lives of others while incarcerated. Put simply, they sought to humanize him—an effort that would have collided with a largely unforgiving record.

To the extent Jones now argues that the State *could not* have introduced any of the “new” aggravating evidence because it *did not* do so, we are unpersuaded. As Jones acknowledges, his counsel did not delve into his background, character, or mental health in the sentencing retrial. Presenting this kind of evidence would have sharply changed the landscape of the case, for both Jones and the State. The Supreme Court has clearly said that “the reviewing court must consider *all* the evidence—the good and the bad—when evaluating prejudice.” *Wong*, 558 U.S. at 26, 130 S.Ct. 383 (emphasis added). And the permissible scope of the State's aggravating evidence depends in part on the kinds of mitigation the defense introduces. *See Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527 (noting that had Wiggins's counsel introduced the “powerful mitigating narrative” developed in the *1187 habeas proceeding, “Wiggins does not have a record of violent conduct that *could have been* introduced by the State to offset” it) (emphasis added); *see also Puiatti*, 732 F.3d at 1290 (recognizing that the *Strickland* calculus includes “the aggravating circumstances actually found, or that *would be found on remand*” (emphasis added)).

Here, had Jones's counsel attempted to offer a more detailed presentation about his childhood and life history, it seems to us that there is “not just a reasonable probability, but a virtual certainty that [Jones's] ‘good’ mitigation evidence would have led to the introduction of ‘bad’ evidence,” too. *Reed*, 593 F.3d at 1246. Indeed, some of the very witnesses he proffered at the state habeas proceeding are also the source of some of the aggravating material we've described—including his daughter Veronica, his friend Taylor, and his first wife, Ruby, all of whom the State could have used to paint Jones as a violent, manipulative criminal. What's more, further probing into Jones's background and mental health could have opened the door to a strong rebuttal by the State based not only on additional character witnesses, but also on Jones's extensive and damning record from prison and the military. *See Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1368–69 (11th Cir.2009); *see also Wong*, 558 U.S. at 25, 130 S.Ct. 383 (recognizing that “heavyhanded,” “more-evidence-is-better” attempt to portray defendant in positive light can invite strong negative evidence in rebuttal). Titus,

the likelihood that the presentation of additional mitigating evidence would have dredged up substantial, additional aggravating evidence that would not have tipped the scales in Jones's favor gave the Georgia Supreme Court a reasonable basis for denying relief.

We are also unpersuaded by Jones's argument that his trial counsel's failure to investigate and present mental health mitigation evidence undermined confidence in the outcome of the trial. Jones's habeas mental health experts claim that Jones suffers from PTSD, bipolar disorder, and brain dysfunction, and that these disorders affected his behavior on the night of the murder. But doubts about testimony drawn from Jones's four mental health experts—Dr. Israelian, Dr. Stewart, Dr. Tashjian, and Dr. Walker—also amounted to a reasonable basis for rejecting Jones's claim.

The reasons offered by the state superior court for disbelieving much of the experts' testimony illuminate some of the problems associated with the petitioner's mental health evidence. For starters, the state court gave two reasons for discounting Dr. Israelian's diagnosis that Jones suffered from PTSD, bipolar disorder, and decreased right-hemispheric brain functioning. First, the state court found that there was insufficient evidence to support her opinion that Jones's work as a dry cleaner, and his exposure to the neurotoxic chemical perchloroethylene, contributed to his neuropsychological maladies. It thus found that “Dr. Israelian has proclaimed a professional opinion well outside her area of expertise and based on unsupported factual findings, rendering her entire opinion questionable.” Specifically, Israelian's report provided that “[i]t appears that the deficits associated with Mr. Jones's Bipolar disorder, which manifested very early, were exacerbated by years of psychological, physical and sexual abuse, in addition to exposure to neurotoxic dry cleaning agents.” However, Israelian admitted that she did not have *any* information about the length or intensity of his exposure while employed at a dry cleaners. Indeed, the record is barren on these points.

*1188 The state court was also unpersuaded by Israelian's explanation of the connection between Jones's mental health issues and his participation in the crime, since Jones's own statements, taken directly after the crime by law enforcement officers, undermined her view of him as an unwitting participant in the homicide or merely a tool of co-defendant Solomon. On this issue, the state court found that “Dr. Israelian's diagnoses and conclusions regarding Petitioner's culpability of the crime are lacking in credibility.” As his

statement to the police revealed, Jones knew that he and Solomon were entering the convenience store with the intent to commit burglary or armed robbery; he was armed with a crowbar; he admitted that he and Solomon had cased the store for a period of time; and he instructed Solomon where to hide the vehicle during the commission of the crime.⁴ Israelian was questioned at her deposition about whether Jones had admitted in his postarrest statement that he told Solomon where to park, and she said, "Based on what I just read, it would appear that way; but based on the entire transcript and his entire interview, there is a great deal of disorder and chaos." She *1189 also steadfastly maintained that Jones's plan on the night of the murder was to buy marijuana.

Relying largely on these two matters—which went to the etiology of Israelian's diagnosis, and her account of the crime—the state court found incredible Israelian's testimony. It also discounted the opinions of Jones's remaining three habeas experts, who reached opinions consistent with Dr. Israelian's. It is relatively easy, under Georgia law, for a factfinder to disregard an expert's opinion. See *Reynolds Const. Co. v. Reynolds*, 218 Ga.App. 23, 459 S.E.2d 612, 614 (1995) ("[Expert] testimony is not conclusive or controlling and is submitted for whatever the [factfinder] considers it to be worth." (alterations in original)) (quoting *Wilson v. Prof'l Ins. Corp.*, 151 Ga.App. 712, 261 S.E.2d 450, 451 (1979)); *Wilson*, 261 S.E.2d at 451 ("The opinion of an expert witness is not conclusive upon the [factfinder]. Such testimony is intended to aid them in coming to a correct conclusion upon the subject; but the [factfinder] is not bound by such opinion, and can disregard it. The [factfinder] may deal with such testimony as [it] see[s] fit, giving credence to it or not, and [it] may do so without rhyme or reason." (internal quotation marks and citations omitted)). What's more, we've accepted a state court's findings that an expert is not credible when that expert fails to seek out and consider "all possible evidence." *Callahan v. Campbell*, 427 F.3d 897, 936 n. 27 (11th Cir.2005)). At all events, the record supports a conclusion that the experts' opinions appear to ignore—at least on their face—the admissions contained in Jones's police statement, and even more significantly, are strongly undercut by other evidence in the habeas record.

Thus, for example, Israelian opined that Jones's deficits had "a direct bearing on his involvement in, and culpability for, the murder of Mr. Tackett" and caused the events to "spiral[] out of control on the night of Mr. Tackett's murder." She said that Jones's "poor judgment and lack of impulse control involved him in a criminal excursion with a man he had only

just met," and that with the "new feedback" of Solomon's ill intentions and "the presence of an employee at a business he believed would be empty ..., Mr. Jones had substantial difficulty quickly processing the new information, shifting his cognitive set accordingly, redirecting his focus and devising a new strategy." She emphasized at the deposition that Jones has "deficits in goal-directed behavior, ... doesn't perceive new information, doesn't process new information, doesn't incorporate, doesn't change plan according to new information."

However, the Georgia Supreme Court had reasonable grounds for doubting the notion that Jones was unable to process new information. As we've discussed, Jones's post-arrest statement alone suggests that on the night of the murder, Jones was able to direct Solomon to park the car in a place that would make it easier and quicker to abscond with the stolen goods. Further, the habeas record contains other evidence that squarely contradicts Israelian's account of Jones's cognitive deficiencies. In 1987, for example, a prison psychologist expressly noted that Jones appeared alert and intelligent. The habeas record also establishes Jones's tendency to use aliases whenever he was arrested, to skip out on bail, and to regularly change locations and jobs. He also became a prolific writer while in prison, and developed a group of pen pals who testified on his behalf at trial.

The state Supreme Court also had a reasonable basis for doubting the opinion that Jones lacked the ability to control his *1190 impulses. As the post-arrest statement indicates, he and Solomon had the presence of mind to wait for the store to empty out before they went in, and, again, he came prepared with a crowbar. The habeas record further reveals that Jones had the control and wherewithal to own and operate brothels, fronting as "tourist houses" that provided prostitution and drugs in two different cities. In addition, his prison record detailed that he had carried out a plan to make weapons by melting down razor blades.

The state record also contains reports of the prison psychologists that highlight concerns about the diagnoses of Jones's habeas experts. In 1982, Jones saw psychiatrist Dr. Mark Hutto because Jones felt he was being treated poorly by the prison guards. Dr. Hutto gathered a social history from Jones and concluded, "[a]side from the patient being a rather obnoxious and demanding personality who has no feeling for the inaccuracy and inefficiencies in a bureaucratic system, this patient has no evidence of psychiatric illness ... [;] there is no evidence that this patient's demands are motivated by

psychotic processes and he is not at this time in need of psychiatric treatment.” Jones was evaluated again in 1987, by psychologist Dr. Marcelo de la Serna, because Jones wanted to establish a “therapeutic” relationship. After speaking with Jones, Dr. de la Serna found that Jones “was alert, highly verbal, [and] intelligent,” “was not satisfied with any of the answers provided by the examiner, and in a highly skillful manner ... would phrase questions so as to elicit excessive attention to his present concerns.” Dr. de la Serna also noted that Jones “seems to possess an irascible temperament, an edgy irritability, and a fractious and retaliatory disposition.” Dr. de la Serna opined, however, that Jones “was not suffering from any severe clinical symptomology,” such as a mood or anxiety disorder, but rather “presented a picture of a deeply ingrained and pervasive ... [m]ixed personality disorder, with prominent histrionic, paranoid, and passive-aggressive features.” Later in 1987, Jones met with psychiatrist Dr. Cassandra Newkirk about sleeping problems. Dr. Newkirk reiterated that previous evaluators had deemed Jones “very manipulative” and to have a mixed personality disorder. She did not otherwise diagnose him.

None of the prison doctors diagnosed Jones with any of the disorders found by Jones’s habeas experts. While we recognize that the evaluations from the prison doctors did not appear to be based on neuropsychological testing or a full record of Jones’s life history, we cannot deny that they were performed closer in time to the murder, long before Jones had developed the habeas record. Nor can we engage in a battle of the experts at this stage of the case. We can conclude, however, that based on the full habeas record, including the reports filed by the prison psychologists, that the Georgia Supreme Court reasonably could have discounted, at least in some measure, the strength of Jones’s mental health experts.⁵ Nevertheless, Jones advances several reasons why some of the aggravating evidence developed in the habeas proceeding would not be admissible at a new sentencing trial. We remain unpersuaded.

*1191 At the outset, we observe that the state superior court considered all of the aggravating evidence in its *Strickland* analysis, implicitly finding that this evidence would be admissible under Georgia law. In addition, it expressly found that “Petitioner’s misconduct in prison ... and his many prior criminal acts would be sufficiently reliable sources of information ... for the State to rely upon in questioning Petitioner’s character witnesses.” Because state courts are the ultimate expositors of state law, we are bound by state-court determinations on state-law questions. See *Estelle v.*

McGuire, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”); *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (observing that federal courts are bound by state-court constructions of state law “except in extreme circumstances” (citation omitted)); *Cargill v. Turpin*, 120 F.3d 1366, 1381 (11th Cir.1997) (“We are not at liberty to challenge [a] state court determination of state law.”). Put another way, “[a] state’s interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved.” *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir.1992).

Thus, to the extent that Jones raises attorney work-product privilege or other state-law challenges to the introduction of this evidence, we need not address these claims further. But even if we did, “a habeas petitioner alleging that his counsel made unreasonable strategic decisions waives any claim of privilege over the contents of communications with counsel relevant to assessing the reasonableness of those decisions in the circumstances.” *Johnson v. Alabama*, 256 F.3d 1156, 1179 (11th Cir.2001). This principle applies in Georgia, where a party may waive work-product protection by providing documents to an adversary. See *McKesson Corp. v. Green*, 279 Ga. 95, 610 S.E.2d 54, 56 (2005) (“[A corporation] waived work-product protection when it provided the audit documents to the SEC.”); see also *Wellstar Health Sys., Inc. v. Jordan*, 293 Ga. 12, 743 S.E.2d 375, 380 (2013) (“A party may waive work product protection.”). Applying the federal work-product rule, the Supreme Court has concluded that a defendant,

by electing to present the [defense] investigator as a witness, waived the privilege with respect to matters covered in his testimony. Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.

United States v. Nobles, 422 U.S. 225, 239–40, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (footnote omitted). Here, by bringing this habeas action first in state court, and then again

in federal district court, Jones has waived any current or future privilege or work-product protection over the Stapert file. We do not see how the petitioner could use the contents of the Stapert file offensively to establish a *Strickland* violation and then turn around and block the contents of the very same file to the extent it contained—as it did—many aggravating circumstances too.

As for any federal constitutional hearsay claim Jones raises, we've recently rejected a similar argument in a death penalty habeas case. In *Muhammad v. Sec'y, Fla. Dep't of Corr.*, 733 F.3d 1065, 1073 (11th Cir.2013), we relied on *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), to hold that “hearsay is admissible *1192 at capital sentencing hearings.” We noted that while “a defendant does not have a right to confront hearsay declarants at a capital sentencing hearing, ... he does have a right to rebut information relevant to his character and record that is admitted against him at the sentencing hearing.” *Id.* at 1074. We explained that “[a]lthough the law of capital sentencing has changed in some respects since *Williams*, the Supreme Court of the United States has never questioned [its] precise holding.” *Id.* at 1074 (internal quotation marks and citation omitted). Because a state habeas court's interpretation of the federal Constitution is constrained only by clearly established *Supreme Court* law (i.e., *Williams*), we cannot find unreasonable the state court's determination that the contents of the Stapert file was admissible hearsay.⁶ This is especially true since Jones has given us no reason to believe that he was denied access to the witness interviews, prison disciplinary and mental health reports, or military records in the Stapert file; that he would not have the opportunity to cross-examine Stapert or even family and friends who were interviewed by Stapert (many of whom Jones himself relies on in this proceeding); or that he could not call his own witnesses.

Jones also says that the aggravating information found in the Stapert file and other records is not sufficiently reliable to be admissible. We've said that in considering whether to admit prior bad act evidence at capital sentencing, “the relevant inquiry for information at sentencing is whether it is reliable.” *Tucker v. Kemp*, 762 F.2d 1480, 1487 (11th Cir.1985) (en banc), *vacated*, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985), *reinstated*, 802 F.2d 1293 (11th Cir.1986), *cert. denied*, 480 U.S. 911, 107 S.Ct. 1359, 94 L.Ed.2d 529 (1987). Although we haven't defined “reliable” in this context, we know that prior convictions are admissible. See *Zant v. Stephens*, 462 U.S. 862, 873, 103 S.Ct. 2733,

77 L.Ed.2d 235 (1983); *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1, 2–4 (1982). We've also found that a defendant's commission of a prior, unadjudicated crime of forcible rape (unlike statutory rape) would be admissible during capital sentencing based on a rape victim's testimony. *Devier v. Zant*, 3 F.3d 1445, 1464–65 (11th Cir.1993). Thus, we have no basis to find unreasonable the conclusion that Jones's prior convictions for strong arm robbery and contributing to the delinquency of a minor, his repeated physical abuse of his family (through testimony from these very people), and his prior criminal conduct and use of aliases (again also drawn from the testimony of family members and friends) would be sufficiently reliable sources of information for the state to rely upon in rebutting Jones's character evidence.

*1193 Nor can we find unreasonable a determination that his military records, which document at length his misconduct while in the army, and his prison records, which document his serious misconduct while on death row, would also be admissible. See *Pooler*, 702 F.3d at 1276 (considering in aggravation military records showing that “Pooler was frequently disciplined for offenses, mostly absences without leave, and was found guilty in a court-martial for using disrespectful language to a superior officer and for refusing to obey orders and suffered a reduction in rank”); *Cummings*, 588 F.3d at 1369 (considering as aggravation “the evidence from Cummings's North Carolina prison file of Cummings's repeated involvement in violent incidents while in prison”).

But even if we could say it was unreasonable for a state court to conclude that this evidence was admissible substantively—and on this record we cannot—it is undeniable that a party may impeach an expert witness with materials the expert relied upon in reaching his opinion, or with materials that draw his very opinion into question. See *Orkin Exterminating Co. v. McIntosh*, 215 Ga.App. 587, 452 S.E.2d 159, 165 (1994) (“[W]hether [an expert's opinion] is based upon hearsay goes to the weight and credibility of the testimony, not its admissibility.”); Ga.Code Ann. § 17–16–4(b)(2) (“The defendant shall ... permit the prosecuting attorney ... to inspect and copy or photograph a report of any physical or mental examinations and of scientific tests or experiments, including a summary of the basis for the expert opinion rendered in the report, or copies thereof, if the defendant intends to introduce in evidence in the defense's case-in-chief or rebuttal the results of the physical or mental examination or scientific test or experiment.”); *id.* § 24–7–705 (eff. Jan. 1, 2013) (“An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts

or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination.”).

Jones's habeas experts reviewed and referenced, among other things, his military record, his prison psychiatric reports, and his family's statements, and the experts opined at length about the consequences of Jones's childhood. Thus, during sentencing, the state would have been entitled to confront and cross-examine the petitioner's mental health experts as to the military and prison documents, both because those documents formed a basis of the experts' reports and because they cast real doubt on the experts' diagnoses. The state would also have been able to use the prior bad act evidence to impeach Jones's experts about his inability to plan, process information, and control his impulses: Jones was sufficiently competent to run houses of prostitution, to fashion makeshift weapons in prison, to use numerous aliases, and to change his name whenever he was arrested to avoid apprehension. In fact, Jones has failed to point us to any particular aggravating circumstances that could *not* have been used for impeachment purposes. Nor has Jones cast any real doubt on the reliability of the prison records, the accounting given by his daughter, his second wife or his friend Oteal, or his own admissions to investigators about his prior bad acts.

In short, we are left with a state habeas record that contains some mitigating background evidence from the retrial, new mitigating background evidence accompanied by a host of new and quite substantial aggravating evidence, and new mental health evidence that carried little weight for the state habeas court. Having thoroughly considered the totality of this evidence, the new and the old, the good and *1194 the bad, we cannot say that the Georgia Supreme Court lacked a reasonable basis for finding no *Strickland* prejudice.

IV.

[5] Jones also says that the prosecutor's closing argument violated his Fifth Amendment privilege against self-incrimination. See *Griffin v. California*, 380 U.S. 609, 85

S.Ct. 1229, 14 L.Ed.2d 106 (1965). We reject this argument because the Georgia Supreme Court had a reasonable basis for concluding that the prosecutor's closing argument was not a commentary on Jones's failure to testify at trial.

[6] A prosecutor's statement violates the defendant's right to remain silent if “the statement was *manifestly intended* to be a comment on the defendant's failure to testify” or “the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.” *United States v. Knowles*, 66 F.3d 1146, 1162–63 (11th Cir.1995) (internal quotation marks omitted). In this case, neither was the prosecutor's closing argument manifestly intended to comment on Jones's failure to testify, nor would the jury necessarily and naturally have taken his remarks to be a comment on Jones's failure to testify. The prosecutor asked the jury, “Have you seen any remorse in this case?” That statement did not directly criticize Jones's refusal to testify to his remorse. At most, the prosecutor drew the jury's attention to the lack of remorse that Jones had expressed to his pen pals and confidants. Indeed, the prosecutor expressly pointed out, “None of the defense witnesses who testified told you anything about Jones being remorseful.” Thus, the most natural reading of the prosecutor's rhetorical question—“Is not that the kind of conduct that deserves the death penalty?”—is that the “conduct” in question was Jones's failure to express remorse to his pen pals and to the victim's family. Cf. *Isaacs v. Head*, 300 F.3d 1232, 1267–72 (11th Cir.2002). Quite simply, Jones has not shown that the Georgia Supreme Court unreasonably applied *Griffin* or any other Supreme Court precedent in concluding that the prosecutor's argument did not violate Jones's Fifth Amendment privilege against self-incrimination.

Accordingly, we affirm the district court's denial of Jones's § 2254 petition.

AFFIRMED.

All Citations
753 F.3d 1171

Footnotes

¹ This was the charge:

You have now been deliberating upon this case for a considerable period of time. The Court deems it proper to advise you further in regards to the desirability of agreement, if possible.

The case has been exhaustively and carefully tried by both sides and has been submitted to you for your decision and verdict, if possible.

While the verdict must be the conclusion of each juror and not a mere acquiescence of the jurors in order to reach an agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard and deference to the opinions of each other. A proper regard for the judgments of others will greatly aid us in forming our own judgment.

Each juror should listen to the arguments of other jurors. If the members of the jury differ in their view of the evidence or the mitigating or the aggravating circumstances, such differences of opinion should cause them or cause you all to scrutinize the evidence more closely and to reexamine the grounds of your opinion. It is your duty to decide the issues which have been submitted to you if you can conscientiously do so.

Do not hesitate to change an opinion if convinced it is wrong. However, you should never surrender honest convictions or opinions in order to be congenial or to reach a verdict solely because of the opinion of others.

The aim ever to be kept in view is the truth as it appears from the evidence, examined in the light of the instructions of the Court.

Now, in just a moment I'm going to send you back to the jury room so that you may again continue your deliberations for a reasonable period of time and examine your differences in a spirit of fairness and candor and try to arrive at a verdict in this case.

2 Specifically, Gary testified this way:

[The State]: What kind of questions did you ask Petitioner about his childhood?

[Gary]: We asked him, you know, like where he went to school, if he had been trouble. We asked him about his medical history and school history and discipline history, about his parents and how he was raised, whether or not there was any abuse.

Q: Do you recall what he said to you about that?

A: I don't remember him saying that there was any.

Q: You don't recall him saying there was any abuse by his parents?

A: No.

Q: Do you recall him saying there was any abuse from anyone else who reared him?

A: No, but that is what we were looking for, obviously.

Q: So you were asking about specific questions about that topic?

A: Yes. That's what we were there for. That was the main thing we would be looking for is any mitigation for the penalty phase.

3 The Diagnostic and Statistical Manual of Mental Disorders ("DSM") organizes psychiatric diagnoses into several dimensions or axes: Axis I pertains to all psychological diagnostic categories except mental retardation and personality disorders, and Axis II pertains to mental retardation and personality disorders. *See, e.g., Am. Psychiatric Ass'n, DSM (3d ed.1980).*

4 Relevant portions of Jones's statement to the police include these:

D [Police officer questioning Jones directly after the murder]: Alright, tell me what were you doing inside that store?

M [Jones]: I wasn't, we wasn't gonna have to burglarize. We were thinking about burglarizing it until we got in there and saw the place was empty.

M: When I saw the place was open like it was when he [Solomon] come back see, I just told him, I said park the truck. I was talking about if he parked the truck in front of the place. If we saw, we saw a police officer go by, probably shoot if he was going the other way. I thought about you know, if the truck was parked in front of the place, never be able to explain this here. So, first we was gonna park over by some bulldozers over there. And then that was too far away and we had to start across the street then somebody went by. And anyway, I looked up in there and there was a little driveway right up into that little forest there. And that way we would be able to you know, load up with the beer and everything and take it straight out to the side of the place there, you know, come out the front that way without having to go out to the street.

D: What did you think about the door being open and the car being parked in front?

M: Tell you the truth, I thought about [g]oing, is I got a little scared and what I was wanting to do, I was just gonna punch the cash register, stash the money and run ...

M: ... We had been looking at the place quite a while you see.

D: ... I'm saying why did you decide that was the store to go into rather than the store down the road? Why that store?

M: It was the only one. Some people had just come out of there. They didn't, wait a minute. I didn't see the people go in there. When we come by there the people were coming out of there. Coming out of there. The gal had kinda blonde, not blonde but real real light hair.

D: Alright. What did they do?

M: They was coming out. That time we was passed the place. And coming back the second time that's when I jumped with the crowbar. I figured that the you know, the store, I figured they had closed the place up or something. That's when I jumped out with the crowbar. You know when I saw the place was open it scared me a little bit.

[D]: Did you think they had forgot to open, close and lock the doors?

M: Yea. I run back you know, over there by the bulldozers. As I was going by the bulldozer I saw the little cubby hole up in there and I told him he could park up in there and we wouldn't have to go across the street[.]

D: You told Van driving? Was he driving or were you driving?

M: He was driving. I think I better shut up. I see I'm in a first class mess here.

5 This is not a case like *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), where the state postconviction trial court utterly disregarded Porter's mental health evidence in its discussion of nonstatutory mitigating evidence. *Id.* at 43 n. 7, 130 S.Ct. 447. Here, the state habeas court clearly considered Jones's mental health evidence, identified real problems with this evidence, and concluded that it would not have changed the outcome of Jones's trial.

6 As the Supreme Court has said, the phrase "clearly established Federal law" ... refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412, 120 S.Ct. 1495. As a result, any relevant case law we've developed—including, *e.g.*, our decision in *Proffitt v. Wainwright*, 685 F.2d 1227, 1254 (11th Cir.1982), that a capital defendant "ha[s] a constitutional right to cross-examine" a mental health expert at sentencing "before the doctor's report c[an] be used in determining sentence"—does not apply to the state court decision here. Indeed, "[a] circuit court may ... look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent. However, circuit precedent may not be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced." *Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 256–57 (11th Cir.2013) (alteration in original) (internal quotation marks and citation omitted)

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United States District Court,
N.D. Georgia,
Atlanta Division.

K.C., individually and as Next Friends of
their son, and A.C., a minor, et al., Plaintiffs,
v.

FULTON COUNTY SCHOOL
DISTRICT, et al., Defendants.

Civil Action File No. 1:03-
CV-3501-TWT. | June 30, 2006.

Attorneys and Law Firms

Chris E. Vance, Office of Chris E. Vance, Atlanta, GA, for
Plaintiffs.

Neeru Gupta, Sylvia Germaine Eaves, Brock Clay Calhoun
Wilson & Rogers, Marietta, GA, for Defendant.

ORDER

THOMAS W. THRASH, JR., District Judge.

*1 This is an action under the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act ("ADA"), and the Vocational Rehabilitation Act. It is before the Court on Defendant Fulton County School District's Motion for Summary Judgment [Doc. 57] and the Plaintiffs A.C. and his parents' Motion for Partial Summary Judgment [Doc. 58]. For the reasons set forth below, the Defendant's motion is GRANTED and the Plaintiffs' motion is DENIED.

I. PROCEDURAL HISTORY

On July 24, 2003, A.C. and his parents filed a due process hearing request against the Fulton County School District seeking public reimbursement and other compensatory payments for violations of their rights under the IDEA, 20 U.S.C. § 1400, *et seq.*¹ The limitations period for an IDEA claim is the two year statute of limitations that applies to personal injury actions. *Mandy S. ex rel. Sandy F. v. Fulton County Sch. Dist.*, 205 F.Supp.2d 1358, 1366 (N.D.Ga.2000), *aff'd*, 273 F.3d 1114 (11th Cir.2001). Thus, the Court will

consider only claims accruing within two years prior to their due process request, which includes events occurring after July 24, 2001. The relevant period begins with the 2001-02 academic year, when A.C. was in the fourth grade, and extends through the end of his fifth grade year.

In response to this due process request, a State of Georgia Administrative Law Judge ("ALJ") heard testimony and arguments from both parties and made findings of fact and conclusions of law based on this record. The ALJ ultimately determined that the Defendant had not violated the Plaintiffs' procedural rights and that A.C. had been provided with a free appropriate public education. The Plaintiffs seek to have that decision set aside by this Court. They seek to recover: (1) reimbursement for services provided to A.C. by Sylvan Learning Centers totaling \$10,611.00 over the course of two years; (2) the \$100.00 cost of reading assistive technology purchased by A.C.'s father; and (3) the compensatory cost of education in the Lindamood-Bell program in the amount of \$18,630.00. For actions brought pursuant to the appeals procedure in the IDEA, the district court: "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

II. SUMMARY JUDGMENT STANDARD

A district court may decide an IDEA case by summary judgment even where facts are in dispute, based on the preponderance of the evidence. *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir.2003). Thus, the usual summary judgment rules under Rule 56 of the Federal Rules of Civil Procedure do not apply. *Id.* In reviewing an ALJ's decision, "due weight" should be given to the determinations made during the administrative hearing. *Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206 (1982). The court must consider the administrative findings of fact, but has the discretion to accept or reject them. *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 657 n. 3 (11th Cir.1990); *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d 853, 857 (11th Cir.1988). When exercising this discretion, the Eleventh Circuit has further noted that a district court is required to respect an ALJ's findings when they are "thoroughly and carefully made." *Cory D. ex rel. Diane D. v. Burke County Sch. Dist.*, 285 F.3d 1294, 1298 (11th

Cir.2002). To prove by a preponderance of the evidence "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *U.S. v. Trainor*, 376 F.3d 1325, 1331 (11th Cir.2004) (citing *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 622 (1993)).

III. FINDINGS OF FACT

*2 Having reviewed the administrative record under the foregoing standard, this Court credits the ALJ's findings of fact and holds that they are supported by a preponderance of the evidence. Although the only period relevant to this claim involves A.C.'s fourth and fifth grade years, the Court discusses his second and third grade record to provide background for the services he was receiving during the relevant period.

A.C. was a resident of Fulton County between 1999 and 2003.² He has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). In the fall of 1999, prior to his second grade year, A.C. moved with his family from Illinois to Georgia, and enrolled in Fulton County's New Prospect Elementary School.

A. Second Grade (1999-2000 School Year)

Upon A.C.'s enrollment, the Defendant, Fulton County School District ("FCSD"), initially used the Individualized Education Program ("IEP") developed for him in Illinois. After sufficient time had passed to allow for the development of a new IEP, the Defendant scheduled a meeting to create its own temporary diagnostic IEP. They notified his mother, who indicated that she would attend. At this meeting, A.C.'s mother received notice of her parental rights and waived oral review of those rights.

The Defendant determined that A.C. was eligible for special education services under the eligibility categories of Learning Disabled and Speech Impaired. It was specifically recommended that he receive two hours per day of special education services to address his learning disabilities in the areas of reading and language arts, and ninety minutes per week of speech language therapy to address his articulation needs. This IEP also contained accommodations for A.C. both in the general education classroom and related to standardized, state-mandated and system wide testing. A.C. was to take the Iowa Test of Basic Skills ("ITBS") in a

small group and receive extended time, but required no accommodation to have the test read to him. This IEP was in effect from August 30, 1999, to November 16, 1999. A.C.'s mother signed both this IEP and the consent for his initial placement.

The Defendant subsequently evaluated whether A.C. was eligible to receive special education services and, on November 3, 1999, completed a Special Education Eligibility Report. Based on this report, the Defendant determined that A.C. was eligible to receive these services under the primary eligibility category of Specific Learning Disabilities. His learning disability affected his reading and language arts skills. A.C.'s mother attended a meeting to discuss this report and signed documentation concurring with this determination. At the same time, the Defendant also completed a Speech Language Eligibility Report that found A.C.'s expressive and receptive language skills to be within normal limits. However, the report did identify articulation errors and determined that he was eligible to receive speech language services under the secondary eligibility category of Speech-Language Impaired. A.C.'s father signed documentation showing that he concurred with this determination.

*3 At this same time, the Defendant held an IEP committee meeting, attended by A.C.'s parents, to develop his IEP. At the meeting his parents received another copy of their parental rights, which were reviewed orally with them. The committee reviewed A.C.'s eligibility reports and his current level of functioning, noting his strength in math and weaknesses in reading and language arts. His fine and gross motor skills were determined to be age appropriate. The 1999 IEP goals targeted these areas of disability: reading, language arts and articulation skills. The IEP provided that he would receive two hours of instruction per day in an interrelated resource classroom for his specific learning disability related to reading and ninety minutes per week of speech language therapy for articulation. This resource classroom served only students needing special education services for reading and language arts skills. Furthermore, he would continue to take the ITBS in a small group and receive extended time, but without having the test read to him. This IEP was in effect from November 3, 1999, to June 2, 2000. In March 2000, A.C. took the ITBS, which compared his performance to that of every other child in the nation who takes the test. He scored at the 2.0 grade level for reading and the 3.8 grade level in math.

B. Third Grade (2000-01 School Year)

On May 12, 2000, the Defendant convened its annual IEP meeting, with A.C.'s parents in attendance, to review his second grade year and develop an IEP for his upcoming third grade year. At the meeting, his parents received a copy of their parental rights, which were reviewed with them. The committee reviewed his current levels of functioning and determined that his oral expression and fine and gross motor skills were age appropriate. The committee also reviewed his results on the Brigance Comprehensive Inventory of Basic Skills ("Brigance"), administered in the spring of 2000. A.C. scored in the second grade level in word reception, spelling and computation skills, and at the third grade level in reading comprehension and word problems. The committee reviewed A.C.'s progress in goals and objectives from the previous year's IEP. All of his goals were determined to be "met," although some went from "in progress" to "met." (Joint Ex. 10, at 15-18.) The committee also developed new goals and objectives that raised A.C.'s expected competency and instruction levels from the previous year. These goals and objectives were designed to address and improve his auditory processing skills, specifically addressing phonetic decoding, word attack skills, and providing oral answers to reading comprehension questions. Speech goals were also developed to continue his progress regarding articulation.

The committee determined that the 2001-02 educational placement would include two hours per day in the resource classroom to address his reading disability and ninety minutes per week of speech therapy. A.C. would continue to take standardized tests in a small group, receive extended time, have directions repeated, and be given a limited amount of answer choices on tests as necessary. He required no accommodation to have any of the tests read to him. A.C.'s mother signed this IEP, which was in effect from August 21, 2000, to June 1, 2001.

*4 On December 5, 2000, the Defendant convened a meeting at A.C.'s parents' request. His parents wanted to reduce his speech therapy services to one hour per week. A.C.'s mother indicated that she would not attend but would receive a copy of the recommendations. It was agreed that his speech therapy services would be reduced as requested and that his IEP for that school year would be amended.

In March 2001, A.C. took the Stanford-9 Achievement Test, a standardized, norm-referenced test. He scored below average in several areas related to reading and language arts. That same month, he also took the Georgia Writing Assessment, a test that is graded outside of the school by an independent

state reviewer. The reviewer determined that A.C. was a Stage 2 Developing Writer.

C. Fourth Grade (2001-02 School Year)

On May 9, 2001, the Defendant convened its annual IEP meeting, attended by A.C.'s mother, to review his third grade year and develop an IEP for his upcoming fourth grade year. His parents received a copy of their parental rights and waived oral review. The committee reviewed his third grade scores on Brigance, which revealed that he tested at grade level in every category except spelling and word problems, in which he tested at the second grade level. The committee also reviewed his fine and gross motor skills. They found his gross motor skills to be age appropriate, but determined that his fine motor skills needed work on correct size, formation and spacing in his handwriting. According to the Defendant's middle school coordinator, Ms. Dottie Pettes, this was a typical concern for most children as they move into cursive handwriting. (Test., at 413, 419.) The committee reviewed A.C.'s goals and objectives and determined that he had mastered them. Given this progress, they concluded that he did not require extended school year ("ESY") summer services.

The committee developed new goals and objectives for A.C. in the areas of reading and language arts and increased the expected competency and instructional levels from the previous year's IEP. These goals and objectives were again designed to improve his auditory processing skills, specifically his phonetic decoding, word attack, and his ability to orally answer reading comprehension questions. The committee also developed new speech goals to continue his progress regarding articulation.

The committee determined that A.C.'s educational placement for the 2001-02 school year would continue to include two hours per day in the resource classroom to address his reading disability and one hour per week of speech language therapy to address his articulation needs. He was again given accommodations for standardized testing that allowed him to take the tests in a small group with extended time and have the directions repeated if necessary. He would also receive help from the instructor regarding reading of tests and assignments, have math word problems read to him by the instructor, receive study guides before tests, if appropriate, and receive a set of books for his mother to use at home. A.C.'s mother signed this 2002 IEP, which was in effect from August 13, 2001, to May 24, 2002.

*5 On September 14, 2001, the Defendant convened a meeting to amend his IEP. In the opinion of his speech language pathologist, he had consistently demonstrated mastery of his speech language goals and no longer needed that service. After A.C.'s mother expressed reservations, it was agreed that he would be monitored for thirty minutes per week for approximately one month to ensure that he maintained his speech language skills. A.C.'s parents were sent the paperwork for their approval along with a copy of their rights. On December 6, 2001, the Defendant sent A.C.'s parents the Parent Notice of Reevaluation form indicating that A.C. was no longer eligible to receive speech language services due to consistent mastery of his speech language goals and present educational performance. His mother signed her agreement with the recommendation. On December 11, 2001, the committee reconvened and agreed to dismiss A.C. from speech language therapy. A.C.'s parents, while not in attendance, indicated their agreement with the committee's action.

In the spring of 2002, A.C. took the Georgia Criterion Referenced Competency Test ("CRCT"), a state mandated test that is used to measure whether students are meeting state standards and making adequate yearly progress pursuant to the No Child Left Behind Act. The CRCT test questions were not read to him, although as provided in his IEP, he did take the test in a small group with extended time and with the directions read to him as necessary. A.C. met the competency requirements in all three content areas tested: reading, English/language arts and mathematics. On his fourth grade report card, A.C. received B's in language arts during each and every reporting period. He used a modified curriculum, but materials were on grade level.

D. Fifth Grade (2002-03 School Year)

On April 17, 2002, the Defendant convened its annual IEP meeting, attended by A.C.'s mother, to review his fourth grade year and develop his IEP for the upcoming 2002-03 school year. His mother received a copy of the parental rights and waived oral review. In reviewing his level of performance, the committee noted that he was more likely to continue to achieve success and progress in reading in the structured resource setting. The committee determined that A.C.'s speech and language skills and his fine and gross motor skills were age appropriate. The quality of his cursive handwriting was acceptable.

The committee also reviewed his performance on the Brigance administered that spring. His grade level

functioning had increased at least one full grade level in every area. In the areas of Word Problems and Reading Comprehension, he had increased by two grade levels. His reading, however, was only on a third grade level. It was further noted that his test scores were lower than his average daily performance on classroom, quizzes and unit tests. The committee reviewed his progress in goals and objectives and determined that he had mastered every goal and objective except for one, on which he was three percentage points short of mastery. Given his progress, the committee determined that he did not require ESY summer services.

*6 The IEP committee developed new goals and objectives for A.C. to continue his progress in the areas of reading and language arts and increase the expected competency and instructional levels from the previous year's IEP. As in past years, they established certain auditory processing goals specifically designed to address his phonetic decoding, word attack and ability to orally answer reading comprehension questions. His educational placement would continue to provide two hours in the resource classroom for language arts and reading. In addition to his continued standardized test accommodations, the IEP committee also determined that he should receive certain accommodations in the general education classroom. Included among these were the use of a notebook to record assignments, receiving a study guide for science and social studies as needed, receiving note taking accommodations and a set of science and social studies books to use at home. A.C.'s mother signed this IEP, which was in effect from August 12, 2002, to May 23, 2003.

During this committee meeting, it was also determined that A.C. needed to undergo a comprehensive reevaluation and have his continued eligibility for special education services determined by November 3, 2002. Parental consent was given for this reevaluation. A.C.'s teachers thus prepared a Skills Inventory checklist. This checklist showed that his motor coordination, oral expression, listening comprehension and mathematics skills were all age appropriate. He had weaknesses in the areas of reading and written expression, where his mastery of basic reading and reading comprehension was below the fifth grade level.

A certified school psychologist, Ms. Wendy Barker, completed a comprehensive reevaluation for A.C. in October 2002 to assist in determining his eligibility for special education services. His fine motor skills were tested to be within the 65th percentile and his phonological processing was within the average range for his age despite it being a

personal weakness for him. She noted a continued relative weakness, however, in his reading and language due to his disability. Specifically, he showed weakness in the areas of written expression, reading and reading comprehension. There was a significant difference between his verbal and performance scales indicating that his nonverbal reasoning skills were more highly developed than his verbal reasoning skills. She administered the Wechsler Intelligence Scale for Children-Third Edition ("WISC-III"), a battery of tests that evaluate a child's intellectual abilities. This test is usually a good predictor of future learning and academic success. A.C. tested as having a Full Scale Intelligence Quotient in the 84th percentile, comprised of a Verbal Quotient in the 50th percentile and a Performance Quotient in the 98th percentile. She estimated him as having an I.Q. of 130, which is in the 98th percentile for his age group. She identified him as having a significant discrepancy between his ability and achievement scores in the areas of basic reading, reading comprehension, and written expression. This discrepancy, according to Ms. Barker, indicated how he was actually functioning in the classroom. She concluded, however, that he "continue[d] to possess many of the characteristics and criteria consistent with other individuals who have Learning Disabilities." (Joint Ex. 21, at 11.)

*7 On November 8, 2002, the Defendant determined that A.C. continued to meet the criteria for special education services. The eligibility team reviewed his educational history and prior interventions. It was noted that he had been receiving special education services for reading and language arts under the eligibility category of Specific Learning Disabilities continuously since November 1999 and that these services had resulted in "steady progress." (Joint Ex. 23.) Both parents attended this meeting and signed the eligibility report indicating their agreement.

In March 2003, during the spring of his fifth grade year, A.C. took the ITBS standardized test. He scored at the 4.6 grade reading level in reading, which was a 2.6 grade improvement since he had previously taken the test in the spring of 2000. By comparison, his math total was now at a 7.2 grade level, an improvement of 3.4 grades. As provided in his IEP, he did not require that the questions be read to him. Also that spring, A.C. took the Georgia Writing Assessment. He received no assistance on this test and the Defendant had no involvement in its scoring. The Georgia Department of Education determined him to be a Stage 5 Engaging Writer. A.C.'s fifth grade report card shows that he earned B's in language arts during each reporting period with a modified

curriculum. He used the fifth grade reading and language arts materials throughout his fifth grade year.

Throughout his fourth and fifth grade years, he was also given the Basic Literacy Test to assess his reading abilities and measure his educational progress through the academic curriculum. His test scores steadily improved throughout this time. He received a score of 100 out of 100 at the January 2003 administration of the test. In March 2003, A.C.'s parents requested that he receive the Fast ForWord program. Ms. Michelle Norton, the instructional support teacher at New Prospect Elementary School, asked a speech language pathologist to review A.C.'s psychological report and make a recommendation concerning this request. Following that review, Ms. Norton decided there was no need to explore eligibility or speech language therapy for him.

E. Plan for Sixth Grade Year

Due to the scheduling needs of the participants, A.C.'s 2002 IEP was extended through the end of his fifth grade year. The 2003 IEP committee meeting was subsequently held on May 15, 2003, to review his progress and develop a draft IEP for his sixth grade year. Among those in attendance were A.C.'s parents and their attorney, Ms. Chris Vance. During this meeting, Ms. Vance asked for copies of A.C.'s reading and assessment records.

At this time, A.C.'s parents also presented the Defendant with a speech language evaluation and central auditory evaluation privately conducted by Children's Healthcare of Atlanta in March 2003. This evaluation of his speech language and auditory processing diagnosed him as having a language disorder with a host of specific disabilities. Also at this May 2003 meeting, his parents informed the Defendant for the first time that they had obtained private tutoring for their son at Sylvan Learning Centers.

*8 The committee then reviewed A.C.'s progress on goals and objectives for the fifth grade year and determined that he had mastered all except for one, which was two percentage points short of mastery. His parents requested that, for the summer of 2003, he receive ESY services specifically for the Fast ForWord program and one-to-one reading instruction. The IEP committee agreed to this request even though they had determined that he did not meet the eligibility criteria to receive ESY services.

His parents also requested and received a private psychological evaluation performed by Dr. Marlyne Israelian

at the Defendant's expense. She performed this evaluation on June 28 and 29, 2003, following a referral from the Defendant. A.C. was instructed not to take his prescribed medications for ADHD during the evaluation, which consisted of ten hours of testing over two days. Dr. Israelian evaluated him in three main areas: academic achievement, intellectual abilities and cognitive functioning. She reviewed records of A.C.'s history, the Defendant's most recent evaluations of him in 2002, the speech language evaluation of him through Children's Healthcare, and auditory testing. She found A.C.'s intellectual abilities to be in the high average range and that his reading and spelling scores were not commensurate with this. Based upon her administration of the WISC-III, Dr. Israelian found A.C.'s full-scale I.Q. to be 105. She found his verbal I.Q. to be 93, placing him in the 25th percentile when compared to his same age peers, and his performance I.Q. to be 117, which placed him at the 87th percentile. She believed his true I.Q. score fell between the range of 107 and 123 and would place him at 117, a high average range of intellect.

She also prepared a chart using A.C.'s achievement scores at the age tested and contrasted his achievement levels from the end of first grade in Illinois with the end of fifth grade as she tested in June 2003. Based upon the chart and her analysis of it, Dr. Israelian opined that A.C. had improved only three to four months each year over four years. She further determined that, despite the fact that he was at the end of his fifth grade year: (1) his word attack skills were at a 2.7 grade level; (2) his letter word identification abilities were at a 3.4 grade level; (3) his phonemic decoding was at the 3.2 grade level; (4) his basic reading was at a 3.2 grade level; and (5) his passage comprehension was at a 3.1 grade level. Based on this evidence, she told A.C.'s father that she found no measurable change in his performance during his time in FCSD. She recommended him as a good candidate for the Lindamood-Bell program, which would provide him with a variety of aids to assist with his ADHD.

That summer, A.C. also received 18 hours of instruction from Ms. Lisa Gray, a certified special education teacher. During their sessions, he did not take his ADHD medication and Ms. Gray noted him as having a high degree of activity and that he was easily distracted. She also found, however, that he could easily read fourth grade level materials and estimated his reading ability to be at the beginning of fifth grade. In working with him, she also noted a strong knowledge base in vocabulary, an ability to recall the meanings of unfamiliar words at 90% accuracy, and strong ability to decode words. She also found his comprehension skills to be very strong at

the fifth grade level. He further exhibited a high degree of mastery of oral reading fluency, reading at a rate of more than 130 words per minute. In assessing A.C.'s writing ability, Ms. Gray found that he was able to develop a topic, write fairly freely, use strong editing skills, and could write in cursive as a final copy.

*9 Finally, in preparation for his use of the computer Fast ForWord program, the Defendant administered a pretest in order to gauge his progress over the course of the program. He met 90% criteria for mastery for 28 out of the 33 testing objectives. Because A.C. left the school district, however, no post test was ever conducted.

IV. DISCUSSION

A. IDEA Claims

The IDEA's stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). To accomplish this purpose, state and local educational authorities are required to identify and evaluate children with disabilities and develop IEP's for each disabled child. *See* 20 U.S.C. § 1411; *Mandy S.*, 205 F.Supp.2d at 1366. If the parents of the disabled child are dissatisfied with that IEP, the educational agency is required to give them an impartial due process hearing. 20 U.S.C. § 1415(f).

The Supreme Court has identified the following two part inquiry for determining whether the School District has met the IDEA's requirements for a free appropriate public education: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07; *see also M.M. ex rel. C.M. v. School Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085, 1097 (11th Cir.2006). The Plaintiffs challenge the Defendant's actions under both the procedural and substantive prongs of this test. Because A.C.'s parents are attacking a program to which they previously consented on each and every one of his IEP's, they bear the burden of showing why it is inappropriate. *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir.2001); *see also Schaffer ex rel. Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005) ("The burden of proof in an administrative hearing

challenging an IEP is properly placed upon the party seeking relief").

1. Procedural Rights

The Plaintiffs make several allegations regarding the Defendant's failure to comply with the IDEA's procedural requirements. To succeed in this procedural challenge, the Plaintiffs must show that the Defendant either failed to provide educational benefit or restricted A.C.'s parents' ability to participate fully in their child's education. *Gwinnett County Sch. Dist. v. J.B. ex rel. D.B.*, 398 F.Supp.2d 1245, 1249 (N.D.Ga.2005)(citing *Collier County Sch. Bd. v. K.C.*, 285 F.3d 977, 982 (11th Cir.2002)). The Plaintiffs attempt the latter, alleging that they have been denied the opportunity to participate fully in A.C.'s education because the Defendant: (1) prohibited them from examining all records related to A.C.; (2) withheld information regarding A.C.'s training in his school's resource classroom; (3) failed to identify and report A.C.'s fine motor, receptive and expressive language, and auditory disabilities; (4) never told them about the related services and assistive technology that would have helped with A.C.'s reading and writing issues; and (5) misinformed them about A.C.'s lack of progress on his IEP goals. However, "[i]n evaluating whether a procedural defect has deprived a student of a FAPE, the Court must consider the impact of the procedural defect, and not merely the defect per se." *Weiss v. School Bd. of Hillsborough County*, 141 F.3d 990, 994 (11th Cir.1998). No single violation of the IDEA's procedures can be a per se violation of the Act. *Id.* at 996. Using these guidelines, the Court will assess each of these allegations in turn.

a. Access to Student Records

*10 The Plaintiffs first claim that the Defendant has denied them rightful access to certain documents in A.C.'s educational record. The procedural safeguards established under the IDEA require that parents have the opportunity to examine all records relating to their child. 20 U.S.C. § 1415. For the purposes of the IDEA, "education records" means the types of records covered under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g; 34 C.F.R. § 300.560(b). FERPA grants parents the right "to inspect and review the education records maintained by the State educational agency." 20 U.S.C. § 1232g (B). Here, the Plaintiffs claim that they have been wrongfully denied access to: (1) 700 pages of A.C.'s records held by the Defendant; (2) data, writing samples and other records held by A.C.'s summer reading instructor, Ms. Lisa Gray; and (3) a pre-test

administered to A.C. in the summer of 2003. Upon further examination, the Court finds these arguments unpersuasive.

i. Records of A.C.'s Writing Samples, Evaluations, Written Assignments, and Worksheets

The Plaintiffs allege that prior to the due process hearing, the Defendant failed to provide them with 700 pages of A.C.'s records including writing samples, evaluations, written assignments and worksheets to which they had rightful access. The crux of this dispute hinges on what documents constitute "education records" under FERPA. The Supreme Court's discussion of this term in *Owasso Indep. Sch. Dist. No. 1-011 v. Falvo*, 534 U.S. 426 (2002), is instructive on this issue. There, a parent challenged an Oklahoma school district's practice of allowing students to grade each other's work and report the scores to the class, claiming that this was a violation of the student's privacy rights under FERPA. The Court explained, "[i]t is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes." *Id.* at 435. The Court went on to state that any construction of the term "education records" that included "student homework or classroom work would impose substantial burdens on teachers across the country." *Id.* Thus, while a teacher's grade book might be a part of the child's educational record, individual student papers certainly were not.

The Supreme Court has thus made clear that parental access to "education records" does not extend so far as to allow access to each individual piece of student work. The Plaintiffs were provided with the material when they subpoenaed it for the due process hearing. There was no IDEA violation by the school district in not providing the material earlier. The Court, therefore, concludes that the Defendant's denial of access to these records is not an IDEA procedural rights violation.

ii. Summer Reading Instructor's Records

The Plaintiffs also claim a right to access Ms. Lisa Gray's data, writing samples and other records collected during the summer term when she taught A.C. As discussed above, writing samples and other daily work are not within the definition of "education records." It appears that the Plaintiffs also seek to obtain her personal notes regarding A.C.'s IEP progress. (Pls.' Mot. for Summ. J., at 40-41.) Georgia Board of Education Rules state that parents have the right to "all information used in assessing the student or in evaluating the IEP, including all data as and reports or summaries

of such data."GA BOE Rule 160-4-7-.18(1)(g)(5). Again, this Court must determine whether such data falls within the scope of the term, "education records." FERPA excepts from its scope records of "instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." See 20 U.S.C. § 1232g (a)(4)(B)(i). Here, however, Ms. Gray testified that she allowed A.C.'s mother to review these notes at the end of every session with A.C. (Test., at 834.) The Court thus finds that because these notes constitute information used in assessing A.C. and were accessible to individuals other than a teacher or substitute, they do not constitute sole possession records and the Plaintiffs had a right of access to them.

*11 The Plaintiffs must also demonstrate, however, that this procedural violation restricted them from full participation in A.C.'s education. See *Weiss*, 141 F.3d at 994. They argue that these notes could have been used by their psychologist, Dr. Joan Teach, in assessing the appropriateness of Ms. Gray's data collection. (Admin. Rec., at 319-20.) The Plaintiffs submitted an affidavit from Dr. Teach as additional evidence after the close of evidence at the administrative hearing. They failed, however, to make a request to add this evidence to the record in this proceeding. See 20 U.S.C. § 1415(i)(2)(C) (ii) (allowing a district court to hear additional evidence at the request of a party). This evidence, therefore, will not be considered by the Court.

Furthermore, the Court does not find that this evidence, even if considered, would demonstrate that A.C.'s parents were restricted from fully participating in their son's education. In order to show a procedural violation, A.C.'s parents must demonstrate that their lack of access to this data "seriously infringed" upon their opportunity to participate in their son's IEP process. *Knable ex rel. Knable v. Bexley City School Dist.*, 238 F.3d 755, 765 (6th Cir.2001); see also *Independent Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 562 (8th Cir.1996) (requiring a showing that a procedural violation "seriously hampered the parents' opportunity to participate in the formulation process"). Here, Dr. Teach states only that if she had access to Ms. Gray's data collection, including A.C.'s writing samples, she would have "testified as to the appropriateness or lack thereof of her data, the reading level of the work she did with A.C. over the summer, and the writing level of A.C.'s samples, including providing detailed analysis and interpretation in this regard." (Admin. Rec., at 320.) This testimony does not demonstrate a serious infringement of

the Plaintiffs' rights for several reasons. First, part of what Dr. Teach required to make this determination were A.C.'s writing samples, information to which the Plaintiffs were not entitled. Furthermore, Ms. Gray's assessment of A.C.'s reading and writing levels as of the summer of 2003 is only one of many pieces of evidence demonstrating his academic progress. Dr. Teach's ability to confirm or refute that evidence did not significantly affect A.C.'s parents' ability to participate in this IEP challenge. Therefore, this procedural violation had no demonstrable impact on this proceeding and does not constitute a violation of the IDEA's requirements.

iii. *Fast ForWord Pre-test*

Finally, the Plaintiffs assert a right to the pre-test administered to A.C. as part of the Fast ForWord program. The Plaintiffs cite to a 1997 memorandum from the director of the Family Policy Compliance Office which states that "completed test instruments ... constitute 'education records' subject to the FERPA requirements."³ (Def.'s Mot. for Summ. J., Att. 2.) The Defendant correctly points out, however, that because this was only a pre-test, it was not a completed test instrument. Indeed, A.C. left the state before a post test could be conducted. They have no grounds for demanding this incomplete test protocol.

*12 Again, even if the Plaintiffs could demonstrate a procedural right of access to this pre-test, the Court finds that their lack of access to this data did not seriously infringe upon their ability to participate in A.C.'s IEP. The Plaintiffs offer this test as further evidence that A.C. ranked more than two standard deviations below normal on language testing even though his estimated I.Q. was two standard deviations above normal. They cite Dr. Teach's affidavit again to demonstrate how this information would have been used. (Pls.' Mot. for Summ. J., at 38.) As discussed above, Dr. Teach's affidavit was not offered into evidence and, even if considered, does not demonstrate a procedural violation.

b. *Composition of Classroom*

The Plaintiffs next assert that the Defendant violated State of Georgia standards regarding composition of the students in a resource classroom by having too many children in too many grade levels. Georgia Board of Education Rules explicitly provide that, for children with emotional and behavioral disorders, a resource classroom may have no more than seven children with one teacher, or ten children with a teacher and a paraprofessional. GA BOE Rules 160-4-7-.11, Appendix A. Special Education Segment Reports from A.C.'s resource

classroom indicate that on several days the classroom had eight students and no assistant. (Plaintiffs' Ex. 28.) However, Ms. Michelle Norton, an Instructional Support Teacher at New Prospect, testified that there would never have been more than seven students in the resource classroom with only one teacher. (Test., at 517-18, 558.) The ALJ, moreover, concluded that there were never more than seven students with one teacher. (Admin. Rec., at 81.) Although A.C.'s father testified that the classroom consisted of eight to twelve children, even the Special Education Segment Report does not support this assertion. (Test., at 207; Plaintiffs' Ex. 28.) Furthermore, neither he nor his wife ever requested a visit to their son's resource classroom. (Test., at 506-07.) This Court finds that the preponderance of the evidence supports the ALJ's conclusion that Georgia standards regarding resource classroom composition were not violated.

The Plaintiffs also claim that the Defendant violated Georgia law by having students on four different grade levels represented in the resource classroom. However, they have failed to identify any Georgia law to support their contention that this was illegal. The Court thus concludes that no procedural violation occurred.

c. Failure to Report Disabilities

The Plaintiffs also assert that the Defendant failed to identify and report A.C.'s fine motor, receptive and expressive language, and auditory disabilities. This assertion is simply not substantiated by the evidence. His receptive and expressive language disabilities were identified on his fourth grade IEP and addressed through ten hours a week of writing and ninety minutes a week of speech training with a certified special education teacher. (Joint Ex. 12.) The Defendant thus provided A.C. with speech language services throughout his enrollment and ceased those services only when the school and A.C.'s parents explicitly agreed that he no longer required them. (Joint Exs. 12; 13; 14; 15; and 16.) Indeed, it was the Plaintiffs who first requested a reduction in speech impaired services. (Joint Exs. 12; 45.) His auditory processing skills were similarly addressed throughout enrollment. (Joint Exs. 3; 8; 10; 12; 13; 14; 15; and 16.) His fourth and fifth grade IEP's contained specific goals to improve his phonetic decoding, word attack and oral answering of reading comprehension questions. (Joint Exs. 12; 18.) When the Plaintiffs later requested evaluations to review A.C.'s possible need for further speech language therapy and/or auditory processing services, the Defendant agreed to provide these but was unable to do so because the Plaintiffs had moved to New Jersey. (Joint Ex. 25.)

*13 Finally, although the Plaintiffs claim that the Defendant failed to identify and report A.C.'s fine motor disabilities, there is substantial evidence that the Defendant continually assessed his fine motor skills and identified shortcomings as they became apparent. Through the third grade, the Defendant found these skills to be age appropriate. (Joint Ex. 8; 10.) His fourth grade IEP notes that his fine motor skills "need work in correct size, formation, and spacing (handwriting)." (Joint Ex. 12, at 5.) Ms. Pettes testified that this is a typical concern for most children as they move into cursive handwriting. (Test., at 413, 419.) In fifth grade, these skills were again determined to be age appropriate. (Joint Ex. 18, at 3; 20.) In fact, Ms. Barker tested his fine motor skills to be within the 65th percentile. (Joint Ex. 21, at 8.) When the Plaintiffs requested further investigation of A.C.'s fine motor skills, the Defendant agreed to provide an evaluation but again was unable to do so solely because A.C. had moved to New Jersey and was unavailable. (Joint Ex. 25.) This claim is thus without merit.

d. Failure to Inform About Assistive Technology

The Plaintiffs allege that they were not informed about the related services of occupational therapy and assistive technology that would have helped A.C. This claim also proves unavailing. The Plaintiffs do not have the right to dictate educational methodology or particular programming options, and the use of a particular methodology to address a disabled student's educational needs is within the discretion of the educators who developed the IEP. *Rowley*, 428 U.S. at 208; *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir.1991). Moreover, the Plaintiffs have provided no evidence of any technology to which they were denied access. Therefore, they have failed to demonstrate any procedural violation of A.C.'s IEP sufficient to support a motion in their favor.

e. Failure to Inform About A.C.'s Lack of Progress

The Plaintiffs' final argument is that they were misinformed about A.C.'s lack of progress. They allege that the independent evaluation of A.C. shows that the Defendant falsely informed them that he was meeting his goals and "on track," when in fact he was achieving no academic progress. (Pls.' Mot. for Summ. J., at 44.) This is, in essence, an extension of their allegation that the Defendant failed to provide A.C. with a free appropriate public education. The Court thus discusses the merits of this substantive claim below.

2. Substantive Rights-Free Appropriate Public Education

A student's right to a free appropriate public education under the IDEA can be summarized as follows: "In order to satisfy its duty to provide a free appropriate public education to a disabled child, the state must provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Mandy S.*, 205 F.Supp.2d at 1366 (citing *Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 930 (11th Cir.1989)). As explicitly stated by the Supreme Court in *Rowley*, the Act does not require that the school maximize a student's potential, only that it provide a "basic floor of opportunity." *Rowley*, 458 U.S. at 201; see also *Loren F.* 349 F.3d at 1312 n. 1 ("The FAPE described in an IEP need not be the best possible one ... rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction"). Under the IDEA, a school district need not guarantee a particular outcome. *Rowley*, 458 U.S. at 192.

*14 If the educational benefits are adequate based on surrounding and supporting facts, [IDEA] requirements have been satisfied. While a trifle might not represent adequate benefits, maximum improvement is never required. Adequacy must be determined on a case-by-case basis in the light of the child's individual needs.

JSK, ex. rel. JK v. Hendry County School Bd., 941 F.2d 1563, 1573 (11th Cir.1991) (citations omitted). In determining whether a student has received adequate educational benefit, the Eleventh Circuit has further noted that courts should pay "great deference" to the educators who developed the IEP. *Id.* at 1573.

Here, the evidence demonstrates that the Defendant constructed an appropriate IEP that allowed A.C. to receive sufficient educational benefit. This educational benefit is apparent from his performance in the classroom-as demonstrated both by his IEP's and report cards-and by his results on state-mandated, system wide standardized tests. First, he consistently achieved mastery of the majority of the goals on his IEP evaluations. During the fourth grade, he mastered all of his goals except one, on which he was just three points below mastery. (Joint Exs. 12; 18.) During fifth grade, he again mastered all of his goals except one,

where he was just two points below mastery. (Joint Ex. 18; 25, at 27-28.) Furthermore, his report cards demonstrate consistently satisfactory achievement in the areas of focus on his IEP. In both his fourth and fifth grade years, he earned B's in language arts during every reporting period. (Joint Exs. 36; 37.) Additionally, on the Brigance Comprehensive Inventory of Basic Skills, A.C. advanced at least one grade level each year. (Joint Exs. 12; 18.) His scores on the Basic Literacy Test ("BLT") also steadily improved throughout his fourth and fifth grade years. (Test., at 399; Joint Ex. 24.)

The Plaintiffs, however, argue that these indicators do not matter because they are merely part of the Defendant's effort to show false progress and advance A.C. from grade to grade even though he was learning nothing in school. First, far from being irrelevant, the Supreme Court has emphasized that the success or failure of a student's IEP is measured in part by its ability to enable the student to receive passing grades in the regular classroom. *Rowley*, 458 U.S. at 204; see also *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 196 (2d Cir.2005) ("the attainment of passing grades and regular advancement from grade to grade will generally constitute evidence of satisfactory progress"); *Alex R., ex. rel. Beth R. v. Forrestville Valley Community Unit Sch. Dist.*, 375 F.3d 603, 615 (7th Cir.2004) (stating that factors such as passing grades and advancement "usually show satisfactory progress"). Here, although A.C. was using a modified curriculum in language arts, he used grade level books and achieved satisfactory marks.

Several standardized tests, which the Defendant did not grade, further demonstrate A.C.'s academic progress. On the CRCT, he met state-mandated requirements. Ms. Pettes testified that this test is particularly useful in measuring special education students and that she had never witnessed a child pass it who could not read proficiently. (Test., at 390-91.) On the ITBS, A.C. advanced from a level of 2.0 in reading in the second grade to a level of 4.6 in the fifth grade. (Joint Exs. 30; 31.) He showed similar progress in the writing assessment, progressing from a Stage 2 Developing Writer in the third grade to a Stage 5 Engaging Writer in the fifth grade. (Joint Exs. 32; 33.) This test was administered outside the school by an independent state reviewer.

*15 To refute this evidence, the Plaintiffs present several evaluations that allegedly show A.C.'s lack of educational benefit. First, they offer the results of a psychoeducational analysis performed by Ms. Barker after A.C. had begun fifth grade. On her exam, the Plaintiffs argue that even though

A.C. tested in the estimated 98th percentile for I.Q., he ranked in the 1st percentile in spelling and contextual language writing skills. (Joint Ex. 21, at 4.) However, they neglect to mention that he tested in the 50th percentile in reading comprehension and capitalization, the 63rd percentile in story comprehension, and the 84th percentile in punctuation. (Joint Ex. 21, at 4.) These were also focal areas on his IEP. (Joint Exs. 12; 18.) Moreover, declining percentile scores do not necessarily correlate with a lack of educational benefit. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir.2000) ("declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by his non-disabled peers"); *Nein v. Greater Clark County Sch. Corp.*, 95 F.Supp.2d 961, 975 (S.D.Ind.2000) (acknowledging that falling percentile scores do not always demonstrate the failure of the school's IEP because "some children will always be below the mean, and if some children's test scores are improving relative to others' in the same age group, then some children's scores will reflect drops in percentiles"). Thus, although Ms. Barker's analysis indicates that A.C. continued to struggle in basic reading and writing, it does not show that he had received no educational benefit.

The Plaintiffs also point to the independent examination of A.C. by Dr. Israelian, a clinical psychologist who concluded that as a 12 year old, A.C. was reading only at an 8 year 8 month level. (Test., at 299.) This Court, however, finds Dr. Israelian's analysis to be of suspect reliability as a measure of educational benefit. First, she did not measure or intend to measure A.C.'s academic progress, as this cannot be determined by psychological testing alone. (*Id.*, at 679; Plaintiffs' Ex. 3.) Furthermore, she opined that A.C. had not made any measurable progress based on the results she obtained from the Woodcock-Johnson Achievement test, which is not designed for nor capable of tracking academic achievement over time. (Test., at 544-546.) Evidence also showed that her testing deviated from standard testing protocol in that A.C. was instructed not to take his ADHD medication and one test, the WISC-III, was administered only eight months after its most recent prior administration. (*Id.*, at 590-91, 598.) According to undisputed testimony by the Defendant's Coordinator for Psychological Services, Jennifer Schau, the best practice for this test requires a waiting period of at least a year in between administrations. (*Id.*, at 590, 598.) Finally, the Defendant agreed to implement many of Dr. Israelian's suggestions even before her evaluation was performed. Her recommendation that A.C. receive a speech

language evaluation, an occupational therapy evaluation, one-to-one reading assistance, and possible enrollment in the Fast ForWord program had already been agreed to by the Defendant. (Joint Ex. 25, at 25.) The Court thus finds that this evaluation does not demonstrate a lack of educational benefit.

*16 The Plaintiffs' final evidence is the testimony of Ms. Lisa Gray, A.C.'s summer reading teacher. They rely upon her testimony that A.C. had trouble decoding words from third and fourth grade books. (Test., at 845.) She further testified, however, that he met mastery of all of his reading objectives during that summer and that she found him to be working on a 5.1 grade level, an improvement from his 4.6 grade level reading score from the ITBS he had taken earlier that year. Moreover, A.C.'s mother told Ms. Gray that her son was not taking his ADHD medication during the summer. (*Id.*, at 827, 850.)

The record conclusively demonstrates A.C.'s parents' staunch commitment to their son's academic achievement. It is also clear that this child remained behind his peers in certain areas of basic reading and written expression even after several years of focused attention by his IEP. (Joint Ex. 20.) The Defendant's own psychologist acknowledged that there was a significant discrepancy between A.C.'s ability and achievement rankings in basic reading, reading comprehension, and written expression. (Joint Ex. 21, at 10.) However, the potential reasons why a child's I.Q. ranking would not match up with his academic performance are too numerous for this Court to infer failure to provide a free appropriate public education. In determining whether a school district has fulfilled its responsibilities under the IDEA, the Eleventh Circuit requires only that the school district establish an IEP that provides the student with a "basis floor of opportunity" so that he can achieve some educational benefit from that instruction. *Rowley*, 458 U.S. at 201.⁴ The record conclusively demonstrates that the Defendant created an IEP specifically designed to meet A.C.'s educational needs. Over the course of his attendance in FCSD, moreover, his grades, IEP reports, and standardized test scores all indicate that he was making adequate academic progress. The Court thus concludes that he received a free appropriate public education as required by the IDEA.

Furthermore, in order for the Plaintiffs to receive reimbursement for A.C.'s private instructional expenses, the private education must be appropriate to fit his needs. 20 U.S.C. § 1412(a)(10)(C). The Supreme Court has made it clear that the chosen private placement must

be "reasonably calculated to enable the child to receive educational benefits." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993). This Court agrees with other courts holding that the student and his parents bear the burden of demonstrating that the private placement is appropriate. See *M.S. ex rel. S.S. v. Board of Educ. of the City Sch. Dist. of the City of Yonkers*, 231 F.3d 96, 104 (2d Cir.2000); *Linda W. v. Indiana Dept. of Educ.*, 200 F.3d 504, 506 (7th Cir.1999) (citing *School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359 (1985)); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3rd Cir.1995). Here, the Plaintiffs have provided no evidence to demonstrate the appropriateness of Sylvan Learning Centers or the Lindamood-Bell program.⁵ For all these reasons, summary judgment for the Defendant is appropriate.

B. Section 504 of the Vocational Rehabilitation Act and Title II of the ADA

*17 The Defendant also moves to dismiss the Plaintiffs' claims that FCSD, as a matter of policy and practice, discriminated against A.C. based on his disability in violation of section 504 of the Vocational Rehabilitation Act and Title II of the ADA. Under section 504:

No otherwise qualified handicapped individual in the United States ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

29 U.S.C. § 794(a); *Manecke v. School Bd. of Pinellas County, Fla.*, 762 F.2d 912, 921 (11th Cir.1985). Title II of the ADA similarly states: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §

12132. Because the ADA and section 504 are identical anti-discrimination statutes prohibiting federally funded bodies from denying disabled individuals access to benefits, the interpretations of one act apply to the other. *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1280 (11th Cir.2001). The Plaintiffs have failed to respond to the Defendant's motion on this claim, indicating that they do not oppose it. L.R. 7.1(B). The Court deems this failure to be an abandonment of the claim. See *City of Lawrenceville v. Ricoh Electronics, Inc.*, 370 F.Supp.2d 1328, 1333 (N.D.Ga.2005). Moreover, in the Eleventh Circuit, a disparate treatment claim for compensatory damages under section 504 must fail in the absence of intentional discrimination or bad faith. *Wood v. President and Trustees of Spring Hill College in City of Mobile*, 978 F.2d 1214, 1219 (11th Cir.1992). To make a claim under section 504 in the education context, something more than an IDEA violation for failure to provide a free appropriate public education in the least restrictive environment must be shown. *N.L. ex rel. Mrs. C. v. Knox County Schs.*, 315 F.3d 688, 695 (6th Cir.2003); *Sellers by Sellers v. School Bd. of City of Manassas, Va.*, 141 F.3d 524, 529 (4th Cir.1998); *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir.1982). Thus, for either statute, the Plaintiffs must show intentional discrimination or bad faith, which they have failed to do. Summary judgment for the Defendant is thus merited on this claim.

V. CONCLUSION

For the reasons set forth above, the Defendant Fulton County School District's Motion for Summary Judgment [Doc. 57] is GRANTED and the Plaintiffs A.C. and his parents' Motion for Partial Summary Judgment [Doc. 58] is DENIED.

SO ORDERED, this 28 day of June, 2006.

All Citations

Not Reported in F.Supp.2d, 2006 WL 1868348

Footnotes

- 1 The Plaintiffs also claimed violations under section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the ADA, 42 U.S.C. § 12132. However, because the ALJ lacked jurisdiction to hear these claims, the matter was preserved on the record. (Admin. Rec., at 59.)
- 2 The record indicates that A.C.'s family has now established residence in New Jersey, making him no longer eligible for Fulton County School District services. (Test., at 36, 242.)

- 3 Because Congress has not directly spoken on this issue, this opinion by the administrative agency in charge of enforcing FERPA is entitled to deference by this Court. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").
- 4 The Plaintiffs cite to *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir.1988), for the proposition that the IDEA requires "a great deal more than negligible benefit" for a student with considerable intellectual potential. (Pls.' Mot. for Summ. J., at 45.) The Court recognizes that both the Third and Sixth Circuits have adopted an interpretation of *Rowley* that expressly considers the student's academic potential in determining proper educational benefit. See, e.g., *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir.2004); *T.R. v. Kingwood Tp. Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir.2000) (Alito, J.) ("To fulfill this mandate a district court must 'analyze the type and amount of learning' of which the student is capable."). These courts emphasize that a satisfactory IEP must confer "meaningful" benefit, as gauged in relation to a child's potential. *Deal*, 392 F.3d at 862; *T.R.*, 205 F.3d at 578. The Court finds that this authority does not support the Plaintiffs' assertion that under the IDEA, A.C.'s level of success relative to his peers must somehow correlate with his I.Q. First, none of these cases from other circuit courts considered the child's I.Q. as a measure of his potential. Furthermore, even if these other courts support a comparison between the student's I.Q. and achievement rankings, the Eleventh Circuit does not subscribe to the Third and Sixth Circuit's definition of the term "meaningful." *Deal*, 392 F.3d at 863. In *JSK*, the Eleventh Circuit concluded that "meaningful" meant nothing more than "some" or "adequate" educational benefit. *JSK*, 941 F.2d at 1572. While the court acknowledged that adequacy was determined in light of the child's individual needs, it stressed that the IEP must provide only a "basic floor of opportunity" to a disabled child who, before the passage of the IDEA, "might otherwise have been excluded from any educational opportunity." *Id.* at 1572-73. This continues to be the standard in the Eleventh Circuit for determining whether a student's IEP complies with the requirements of the IDEA. See *Devine*, 249 F.2d at 1289 (reaffirming *JSK* and emphasizing that educational benefit need not be maximized and that FAPE requires nothing more than "measurable and adequate gains in the classroom"). Thus, despite the Plaintiffs' exhaustive referencing of A.C.'s high I.Q. ranking, (see Pls.' Mot. for Summ. J., at 2, 3, 13, 37, 45, 46), this Court must conclude from Eleventh Circuit precedent that a student's above average I.Q. does not mandate a higher measure of adequacy. See also *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 327 (4th Cir.2004) (recognizing that a school has not failed its duty under the IDEA simply because a student with an above average I.Q. is not fulfilling his potential in a general education setting).
- 5 A.C. also cannot receive compensation for future services from Lindamood-Bell because he is no longer a resident of FCSD.

MEDICAL UNIVERSITY OF SOUTH CAROLINA
Department of Psychiatry and
Behavioral Sciences
(803) 792-4037

Respondent's
5 ~~12~~
12-8-15



171 Ashley Avenue
Charleston, South Carolina 29425-0742

Psychiatric Evaluation

Name: William Dickerson

Date: 5/12/88

Identifying Information: William Dickerson is an 11-year-old, black boy who was brought directly to the MUSC Youth Division by his mother.

History of Present Illness: The patient was brought for psychiatric treatment because of repeated running away from home, uncontrollable behavior, and failing school performance. The mother recalls the onset of his oppositional behavior as starting at Christmas, 1987. William had hoped to receive a "Mike Tyson" doll; when he did not, it upset him greatly. Over the ensuing weeks, William was noted to be more withdrawn and pouty, and when confronted by mother would often not respond or not listen. At other times, they fought engage in verbally and sometimes physically.

William began running away from home, but always to his grandmother's house. Initially, this simply irritated Mrs. Dickerson, as she knew he was safe, but on later occasions he would stay longer (e.g. 2 days), and sometimes would go to others' houses. Due to physical aggressiveness and running away, Mrs. Dickerson tried to enlist the aid of several agencies, including the local MHC, ER, Continuum of Care, DYS, and ultimately the police. She has been frustrated with the help she has received, which she states is minimal.

Due to her financial status (she earns just enough to NOT qualify for Medicaid, but has no insurance), she is in a very poor situation as far as funding any inpatient help for William. She was therefore recommended to look into Tara Hall, which may be able to work around the funding problem. While this was in progress, and due to the urgency of the problem plus their need for a psychological evaluation, she presented William to the MUSC Youth Outpatient division.

William reports that he is very unhappy at home and sometimes feels he cannot tolerate his mother. He acknowledges sometimes not listening or defying her, but states that she "nags" a lot. He questions sometimes whether he is really loved. He admits to feeling sad much of the time with frequent crying. He states that his sleep is poor with much difficulty falling asleep and midnight awakening. His appetite is poor. Mother confirms all of these aspects of depression, but goes on to state that she suffers from all the above symptoms "even worse than William." William has only a few friends now, and plays much less than he used to. He has wondered whether there is any hope or whether life is worth living, but has not made a suicide attempt.

nuredini/dickerson,evl/1

"An equal opportunity and affirmative action employer"

William, or "Little Man" as mother calls him, is in the 6th grade at Rivers Middle School. He is currently failing all but one of his classes. He has missed several days as well. His decline in school parallels his decline in mood and behavioral problems, although he never was an excellent student.

Past Psychiatric History: No prior psychiatric problems known.

Past Medical History: William has been a healthy boy since birth with no major medical or surgical problems. Developmentally he reached normal milestones.

Family History: William's father was jailed for a felony when William was 4 months of age, and remains in jail. William has never met his father. Mrs. Dickerson has attempted to develop other relationships but feels that William tries to interfere. Other family psychiatric history is unknown. William has one younger brother.

Social History: William denies using alcohol, cigarettes or drugs. He alleges that he has seen his mother use marijuana, but she denies this. William likes sports and TV.

Mental Status Examination: William was a well-built, well-nourished black boy appearing at least his stated age. He was clearly sad with sloped shoulders and downcast gaze. With mother present he was nearly nonverbal and only answered a few yes/no questions. With her absent he became much more verbal, and demonstrated no abnormalities of thought process or content. He acknowledges suicidal thoughts but denied plan. His affect was clearly sad and mood nearly hopeless. Insight was minimal.

Assessment: William is suffering from depressive symptoms and meets criteria for Major Depression. His history of apparently very good premorbid functioning followed by a persistent 5 month period of full-spectrum depressive features suggests no other diagnosis. Some of his behavior may seem antisocial, but this appears directed almost exclusively towards mother and seems a function of the great tension and hostility present between them. Mother herself seems likewise suffering from Major Depression and has very little tolerance for any erratic behavior from William.

Provisional Diagnosis:

- Axis I: Major Depression, single episode, moderate
- Axis II: Deferred
- Axis III: None
- Axis IV: Severe
- Axis V: GAF now of 45

nuredini/dickerson.evl/2

William Dickerson: Evaluation

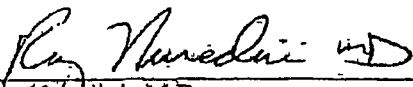
Page 3

Plan:

1. I am working with Mrs. Dickerson to arrange residential or inpatient treatment, at this point, as I feel the situation merits this. I will help her pursue applications to Tara Hall or possibly Carolina Youth Development Center.
2. In the meantime, I will treat both mother and son as outpatients. I will start them both on antidepressants (imipramine) and will continue outpatient psychotherapy.

Douglas Mossman, M.D.
Supervisor

RN:td


Ray Nuredini, M.D.
Resident in Psychiatry

nuredini/dickerson.ev1/3

William O. Dickerson, Jr. v State
Bloom File Box 1 Page 69
Application for Emergency Admission

PART I

(Complete in Triplicate)

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

IN THE MATTER OF:

William O. Dickerson, Jr.
(Person Alleged to be Mentally Ill)

Religion Baptist Marital Status Single

County

State

Zip

Phone Number

Length of Time Residing There

Sex M Age or Birth Date 5-21-52 Race BL

City

TO THE SUPERINTENDENT/DIRECTOR:

APPLICATION IS HEREBY MADE for the admission of the above-named person to a state mental health

facility or to Wm S. Hall psychiatric inst for the following reasons:
Name of Hospital or Facility

That the undersigned believes that the above-named person is mentally ill, and because of his condition is likely to cause serious harm to himself or others if not immediately hospitalized.

1. The specific type of serious harm thought probable is:

Harm to Self; frequent running away & angry outbursts.

2. That the applicant bases his belief on the following grounds:

1. He expressed thoughts of killing himself tonight and ran away for the tenth time in 5 months.

3. That the said individual has been examined by at least one licensed physician who has certified that in his opinion said person is mentally ill and because of this condition, is likely to cause serious harm if not immediately hospitalized, and his grounds are set forth in the certificate attached.

4. That next-of-kin of allegedly mental ill person is Sandra Dickerson

Relation Mother Whose address is 612-15-57

In case of next-of-kin cannot be contacted, notify

Relation

Address

City and State

Zip

Phone Number

WHEREFORE, the undersigned requests that the person named above be admitted to a state mental health facility for treatment as authorized by law.

SWORN to before me this

26 day of May, 1988

Mary Gladson

Notary Public for South Carolina NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: My Commission expires December 23, 1996

(See reverse side which must be completed)

Sandra Dickerson

Applicant's Signature

Sandra Dickerson

Name of Applicant (typed or printed)

Address of Applicant

Telephone

Relation to Patient or Title, if any

CERTIFICATE OF LICENSED PHYSICIANS

(Complete in triplicate)

I do hereby certify that I am a duly licensed physician under the laws of the State of South Carolina, and that on the 26 day of May, 19 88, I examined Wm. Dickerson and as a result of said examination, I am of the opinion that said person is mentally ill, and because of his condition is likely to cause harm to himself through neglect, inability to care for himself, personal injury or otherwise or to others if not immediately hospitalized in a state mental health facility or Wm S Hall Institute and the grounds of my opinion are:
(Please print or type)

The pt has 1140 hmc suicidal ideation to wife and
increasing Behavioral Problems @ home - He has been combative
and has run away from home 10 times in the last 5 mos,
He was very withdrawn on interview. Mother reports loss of
appetite lately.

APPROVAL (for hospital use only)		X <u>J. R. Batterson M.D.</u> M.D.	
Date:	<u>May 26, 1988</u>	(Signature)	
	<u>Alexander G. Donald M.D.</u>	<u>J. R. Batterson M.D.</u>	
	Superintendent	(Typed or Printed Name)	
By:	<u>Nancy Gulcher / K. Blou</u>	(Address)	
	(City)	(State)	(Zip) (Phone)

NOTE: This form to be completed in triplicate (3). Original and one copy will accompany the patient so that the original can be forwarded to Judge of Probate of the County in accordance with Section 44-17-410 (3) and one copy will be retained in the patient's record. One copy will be retained by the Applicant.

NOTE: If the patient is to be admitted to a state mental health facility, the certifying physician should notify, in advance, the admitting physician of that hospital.

NOTE: "Likelihood of serious harm" is defined in Section 43-23-10 (2), S. C. Code, 1976, as amended, to mean "because of mental illness there is (1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior and serious harm to them or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so altered that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community."

NOTE: No patient can be admitted to the hospital more than three (3) days after the date of the medical examination set out above. A licensed physician is defined by the Mental Health Act as follows: An individual licensed under the laws of this State to practice medicine or a Medical Officer of the Government of the United States while in this State in the performance of his official duties.

NOTE: TO POLICE AND OTHER OFFICERS OF THE PEACE:
The certificate of a licensed physician authorizes and requires taking the proposed patient into custody. Section 44-17-440, South Carolina Code of Laws, 1976, as amended: "The certificate required by item 2 of Section 44-17-410 shall authorize and require any officer of the peace, preferably in civilian clothes, to take the individual into custody and transport him to the hospital designated by the certification. No person shall be taken into custody after the expiration of three days from the date of the certification. Any friend or relative may transport the individual to the mental health facility designated in the application, provided such friend or relative has read and signed a statement on the certificate which clearly states that it is the responsibility as an officer of the peace to provide timely transportation for the patient and that the friend or relative freely chooses to assume such responsibility. A friend or relative who chooses to transport the patient shall not be entitled to reimbursement from the State for the cost of such transportation. Any officer acting in accordance with the provisions of this article shall be immune from civil liability."

NOTE: TO FRIENDS AND RELATIVES:
It is the responsibility of an officer of the peace to provide timely transportation of the person alleged to be mentally ill to the designated mental health facility. However, by freely signing this statement, you can choose to assume that responsibility. Transportation must begin immediately. This form must be hand delivered by you to the admissions office of the designated mental health facility at the time of admission.

Date

Sign of Friend or Relative Relationship

PART II. - PAGE 2 Referring Physician's Findings and Report

Name of Patient <u>Dickerson, William</u>	Sex	County of Residence <u>Charleston</u>	Date of Birth	Age <u>71</u>
Reason for psychiatric admission (specify symptomatology) <u>Depression, frequent running away</u>				

Medical condition of patient

good

Is patient medicated prior to transporting? If yes, give type, amount and when taken

Yes ☒ No

Medication - Maintenance Drugs

None

Are there criminal charges? If yes, give details (include county, type of charge)

Yes ☒ No

Are there prior admissions to SCDMH or other mental hospitals?

Yes ☒ No

Where?

When?

HEALTH OF PATIENT

Disease	Yes	No	Date(s)	Disease	Yes	No	Date(s)	Disease	Yes	No	Date(s)
Fever (Type?)				Meningitis or Encephalitis				Cancer			
Paralysis				Tremors				TB (Lung Trouble)			
Blindness or Eye Trouble				Severe Headache				Heart (High Blood)			
Deafness or Ear Trouble				Serious Head or Body Injury				Diabetes			
Homicidal or Suicidal Tendency				Allergies (please describe)				Epilepsy (Seizures)			
								Syphilis			
								Stroke			
								Alcoholism			
								Drug Addiction (types of drugs abused)			

Patient's Operations

None

Name of Approving SCDMH Physician

Castorelli

Facility Patient to be Admitted to

W-M 57 PT

Name of Referring Physician

J. Ballersee

Address

Phone Number

ON THE BASIS OF MY PERSONAL EXAMINATION OF THIS PATIENT, I BELIEVE THE CONDITION OF THIS PERSON IS SUCH AS TO REQUIRE EVALUATION, CARE AND TREATMENT IN A MENTAL HOSPITAL. FURTHERMORE, IN MY PROFESSIONAL OPINION, THE PERSON IS IN NO MEDICAL/SURGICAL DISTRESS THAT POSES AN IMMINENT LIFE THREAT AND PRESENTLY IS NOT IN NEED OF IMMEDIATE MEDICAL/SURGICAL HOSPITALIZATION.

SIGNATURE OF EXAMINING/REFERRING PHYSICIAN:

J. Ballersee

M.D.

S.C. LICENSE #

LL695

PLACE OF EXAMINATION:

Chas. Mann Hoag
Facility and City

Charleston Area Mental Health Center

Community Services Building

Date of Examination

Mental Health Center, authorizing Admission

20 Lockwood Drive

SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH APPLICATION FORM TO A STATE HOSPITAL PART II IS A REQUIREMENT FOR SCDMH ADMISSIONS		Specify type of admission sought: ☐ Emergency ☐ Judicial ☐ Voluntary	
GENERAL INFORMATION FOR ADMISSION TO SCDMH HOSPITALS			
FACILITY	AREAS SERVED	TYPE OF PATIENTS SERVED	
G. Werber Bryan Psychiatric Hospital 220 Faison Drive Columbia, S.C. 29203 For information and prior to all admissions call: 737-7143 - All Hours	Serves 28 county area and 11 Mental Health Centers of the Midlands, Pee Dee and Coastal areas. Also excludes Kershaw, Lee, Sumter and Clarendon counties.	Serves ages 16 through 64. Short-term, acute care. Excludes criminal court cases and medically distressed cases.	
South Carolina State Hospital 2100 Bull Street (PO Box 119) Columbia, S.C. 29202 For information and prior to all admissions call: 734-6560 - All Hours	Serves chronic care for all counties.	Serves adults through age 54.	
Crafts-Farrow State Hospital 7901 Farrow Road Columbia, S.C. 29203 For information and prior to all admissions call: 737-7922 - All Hours	Serves all counties.	Serves ages 65 and older for all counties and ages 65 through 64 counties NOT Served by Bryan Psychiatric Hospital.	
William S. Hall Psychiatric Institute 1800 Colonial Drive (PO Box 202) Columbia, S.C. 29202 For information and prior to all admissions call: 734-7075 Psychiatric - All Hours 734-7126 Neurology - 8:00 am - 5:00 pm 253-6381 Child & Adolescent (ages 4-17) - 8:00 am - 5:00 pm 734-7195 Adolescent (Open Unit/Research) - 8:00 am - 5:00 pm 734-7075 All Hours for Kershaw, Lee, Sumter and Clarendon counties	Psychiatric, Neurology & Adolescent serves all counties by referral only. Child & Adolescent serves all counties except 14 Piedmont Counties of Harris Hospital. Special Project serves Kershaw, Lee, Clarendon and Sumter Counties.	Serves as Research and Teaching Institute for S.C.D.M.H. and U.S.C. School of Medicine. Children & Adolescents who have been screened by the mental health center and found medically in need of psychiatric inpatient care. Admissions should be scheduled during daytime hours and children accompanied by parent or guardian.	
Patrick B. Harris Psychiatric Hospital PO Box 2907 Anderson, S.C. 29622 For information and prior to all admissions call: 231-2600 - All Hours	Serves 14 counties in the Piedmont Region and 7 Mental Health Centers.	Serves adolescents ages 6 through 16. Serves adult ages 17 through 64. Serves geriatrics 65 and older. Excludes criminal court cases and medically distressed cases.	
IMPORTANT NOTICE: All patients receiving treatment in a State Department of Mental Health facility will be charged the established fee for care and maintenance as approved by the South Carolina Mental Health Commission.			
PERTINENT ADMINISTRATIVE INFORMATION			
Present Name <u>Dickerson, William</u>		Full Name at Birth If Different From Present	
Education Level <u>6th</u>	Social Security Number <u>UNKNOWN</u>	Occupation <u>Student</u>	Monthly Income <u>0</u>
Employer's Name <u>Student</u>		Address <u>0</u>	
If not employed, source of income: ☐ Retirement ☐ Public Assistance ☐ Other			
HOSPITALIZATION INSURANCE Coverage including group insurance, Medicare, Medicaid, military medical care, etc.			
Policy No. or HIB	Name of Insurance Co. <u>None</u>	Address	If group insurance, name & address of firm
MILITARY SERVICE			
Branch	Service Number <u>None</u>	Dates of Service	Type Discharge
Monthly Pension		VA Claim No.	
FINANCIAL REPRESENTATIVE Please list the name, address and telephone numbers of the person to receive financial statements and other media related to the personal financial affairs on behalf of the patient.			
Last Name	First Name	Middle Initial	Relation to Patient
Street Address or Rural Route & Box		Telephone	
City, State, Zip		Telephone	

Clar. City
Adm 5/26
881-3294

REPORT OF DESIGNATED EXAMINER

I, the undersigned Examiner, having been directed by Court Order to do so, have examined

William Dickerson and am of the opinion that the said individual:

☒ A. IS NOT MENTALLY ILL.

☐ B. IS MENTALLY ILL.*

1. Basis of Finding. Evidence of the following signs and/or symptoms support this conclusion:

☐ DELUSIONAL THINKING

☐ THREATS OR IMPULSES TO HARM OTHERS

☐ SUSPICIOUSNESS AND/OR
PARANOIA

☐ SUICIDE THREATS AND/OR IDEATION

☐ HALLUCINATIONS

☐ DEPRESSION

☐ LOOSE ASSOCIATIONS

☐ HYPERACTIVITY AND /OR MANIA

☐ FLAT, LABILE, OR
INAPPROPRIATE AFFECT

☐ CONFUSION

☐ MARKED AMBIVALENCE

☐ POOR REALITY ORIENTATION

☐ OTHER (SPECIFY) _____

2. Recommendation for treatment

☐ Inpatient hospitalization.

☐ Outpatient treatment: _____

3. Further Comments by Examiner. _____

x Eric G. Hartley; MSW
Eric G. Hartley, Social Worker
Type or Print Name Title
1011 1st St. N.E.
Address
Comma, AL 35954

6/3/88
Date

*S. C. LAW DEFINITION: Mentally Ill Person means a person afflicted with a mental disease to such an extent that, for his own welfare or the welfare of others or the community, he requires care, treatment or hospitalization. (Please attach additional sheets if more space is needed.)

Chen City
Adm. 5/26
881-3294

REPORT OF DESIGNATED EXAMINER

I, the undersigned Examiner, having been directed by Court Order to do so, have examined

William Dickerson and am of the opinion that the said individual:

☒ A. IS NOT MENTALLY ILL.

☐ B. IS MENTALLY ILL.*

1. Basis of Finding. Evidence of the following signs and/or symptoms support this conclusion:

☐ DELUSIONAL THINKING	☐ THREATS OR IMPULSES TO HARM OTHERS
☐ SUSPICIOUSNESS AND/OR PARANOIA	☐ SUICIDE THREATS AND/OR IDEATION
☐ HALLUCINATIONS	☐ DEPRESSION
☐ LOOSE ASSOCIATIONS	☐ HYPERACTIVITY AND/OR MANIA
☐ FLAT, LABILE, OR INAPPROPRIATE AFFECT	☐ CONFUSION
☐ MARKED AMBIVALENCE	☐ POOR REALITY ORIENTATION
☐ OTHER (SPECIFY) _____	

2. Recommendation for treatment

☐ Inpatient hospitalization.

☐ Outpatient treatment: _____

3. Further Comments by Examiner.

PT alleges abuse from mother and substance abuse of mother - DSS notified. Temporary DSS placement is probably indicated.

x Ashtley

Ashtley
Type or Print Name

Title

Address

Cc

Date

6-2-88

*S. C. LAW DEFINITION: Mentally Ill Person means a person afflicted with a mental disease to such an extent that, for his own welfare or the welfare of others or the community, he requires care, treatment or hospitalization. (Please attach additional sheets if more space is needed.)

DATE OF ADMISSION: 5-26-88
HOSPITAL WARD: 160-C, Open Research

IDENTIFYING DATA: This is the first admission to William S. Hall Psychiatric Institute (WSHPI) of an 11-year-old black male on emergency papers because of his being potentially dangerous to himself. He was referred from Charleston, SC from the MUSC emergency room by a psychiatric resident.

CHIEF COMPLAINT: The patient has been running away from home and threatening to kill himself because of alleged punishment by his mother.

HISTORY OF PRESENT ILLNESS: The patient states that he became depressed approximately about one year ago and since that time has felt sad and discouraged most of the time with also worse feelings when he is criticized by his mother. He says that some of the times he does not know why he is being scolded and he has become fearful of her when she physically punishes him; that she sometimes uses a belt or some type of weapon, on one occasion, she inflicted an injury on his chest which has left a mark. He said his appetite has been good and that his sleep has been normal, that he is able to go back to sleep if he is awakened in the middle of the night. More recently, when when his mother has punished him, he would leave the house and run away and go to a friend's house and wait for her to quiet down before returning home. He was recently seen and brought to the MUSC-ER and then seen by a resident in psychiatry at MUSC in Charleston, SC, because of the statements of possibly wanting to harm himself. The boy was referred up here to WSHPI for evaluation for possible suicide ideation.

PAST MEDICAL HISTORY: No previous hospital admissions. No previous mental health treatment except for the most recent visit to MUSC. The patient denies any major diseases or use of medication and is not allergic to any medications. The patient has no history of seizures or fainting spells.

REVIEW OF SYSTEMS: Negative except for that of use of a knee support because of a weak knee apparently injured once in basketball.

FAMILY HISTORY: The patient lives at home with one brother, age 8, and his mother. William's father has been in CCI for the last 10 years for armed robbery. There is a question of use of alcohol and drugs on the part of the mother. There is no serious medical diseases.

DEVELOPMENTAL HISTORY: William was born one year after the marriage of his mother. During the prenatal period, his mother was said to have been physically abused and kicked. William was premature at birth in the seventh month weighing 3 lbs. and 3 oz.

DICKERSON, WILLIAM O.
881-3294

WILLIAM S. HALL PSYCHIATRIC INSTITUTE
PSYCHIATRIC EVALUATION 1

He remained in the hospital for the first two months of life. His developmental milestones were normal. He successfully passed his grades in school until this past year. He will be repeating the sixth grade at Rivers Middle School.

HABITS: The patient denies any contact with drugs or alcohol. He says he does not smoke and claims that he has not been sexually active. The patient is currently in the 6th grade at school.

MENTAL STATUS EXAM: This is an alert, black youth who is quiet, speaks in a soft voice, and in no acute distress. He is oriented as to time, place, and person. His affect is bright while he is slightly sad in appearance. His speech is slow and soft. Thought content appeared to be logical and goal directed. The patient denied any hallucinations or any thought of harming others. He gave no evidence of delusion. There is a question of a hypnagogic type of hallucinations occurring when he awoke one time to see a friend calling to help him. This was followed by his return to sleep. Memory and concentration are good. Judgement appears good at this time. He states that he has thoughts of suicide and that he would attempt to jump out of a window but actually has not developed his specific plan for carrying this out.

PHYSICAL EXAM: Blood pressure: 120/76. Pulse: 64. Respiration: 20. Temperature: 98.4. Well developed youth in no distress. Height: 61 inches, 88th percentile. Weight: 117, 92 percentile. Examination of the head, eyes, nose, and throat: Unremarkable. Neck: Supple without adenopathy or enlarged thyroid. Breast exam: Normal. Chest: Symmetrical. There is an area of tenderness over the left lower rib cage. Lungs: Clear to A & P. No wheezing is present. Heart: WNL. No murmurs are heard. Abdomen: Soft. Liver, spleen, and kidneys: Not felt. Bowel sounds are normal. No masses are present. Genitalia: Normal development. Tanner stage 2/5. Spine and back: Unremarkable. Extremities: WNL. No limitation of movement is noted.

NEUROLOGICAL EXAM: Cranial nerves I-XII are WNL. Motor and sensory functions are normal. Balance and coordination functions appear normal. Reflexes are 1-2+ and symmetrical bilateral.

SUMMARY OF FINDINGS: This is a 11-year-old boy with history of alleged physical abuse occurring within the family and that of evidence of depressive signs which he claims occurred over the past year but have been more pronounced during the past month. He has history of running away from physical abuse. At this time, we have no history of inappropriate behavior at school or difficulty with the law. He presents with a mild psychological retardation, slow speech, and statements of feeling sad and that of suicidal ideation. These findings are consistent with that of a major depression in a child. There is also recent events that the child reports that would cause an acute stress reaction.

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DICKERSON, WILLIAM O.
881-3294

WILLIAM S. HALL PSYCHIATRIC INSTITUTE
PSYCHIATRIC EVALUATION

6233

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DATE OF ADMISSION: 05/26/88
DATE OF DISCHARGE: 06/10/88
HOSPITAL WARD: 160-G, CHILDREN'S UNIT

This information has been disclosed to you from records whose confidentiality is protected by Federal regulations (42 CFR Part 2) and S. C. Code Section 44-23-600. This prohibits you from making any further disclosure of it without the specific written consent of the person to whom it pertains. A general authorization for the release of medical or other information is NOT sufficient for this purpose.

IDENTIFYING INFORMATION: This is a first admission to William S. Hall Psychiatric Institute (WSHPI) of a 11-year-old black male on emergency papers because of his being potentially dangerous to himself. He was referred from Charleston, SC from MUSC ER by psychiatric resident.

CHIEF COMPLAINT: "The patient has been running away from home and threatened to kill himself because of alleged punishment by his mother."

HISTORY OF PRESENT ILLNESS: The patient states that he became depressed approximately about one year ago. Since that time he has felt sad and discouraged most of the time with worse feelings when he is criticized by his mother. He claimed that he often does not know why he is being scolded, because of that he has become more fearful of his mother when she physically punishes him that some times she has used a belt or some type of weapon and on occasion has inflicted an injury on his chest. One such injury has left a mark. He said his appetite was good, his ability to sleep has been good, and that he is able to go back to sleep well if he should wake up in the middle of the night. Recently, he was brought to the MUSC ER and seen by resident psychiatry at MUSC because of statements of possibly wanting to harm himself. After evaluation he was referred up to WSHPI for evaluation because of possible suicidal ideation.

PAST MEDICAL HISTORY: Noncontributory. The patient has been a C student in school and has not failed in school until this year. He is suppose to repeat the 6th grade at Rivers Middle School in Charleston. The patient does not smoke, has not been sexually active and has no history of allergies to medications.

MENTAL STATUS EXAMINATION: The patient spoke in a soft voice. He was oriented as to person, place and time. His affect seemed to be reasonably bright, though he did have a sad appearance. Speech was slow and soft. His thought content appeared to be logical and goal directed. He denied any hallucinations and any thought of harming others. He gave no evidence of delusion. There was a question of the hypnagogic type of hallucination occurring one time when he awoke to see a friend calling to help him. This was followed by his returning sleep. His memory and concentration were good. His judgement appeared good. He stated he has had thoughts of suicide such as jumping out of a window, but actually has not developed a specific plan yet for carrying this out.

PHYSICAL EXAMINATION: Vital Signs: BP 120/76, pulse 64, respirations 20, temperature 98.4. General Appearance: This is a

DICKERSON, WILLIAM O.
881-3294

WILLIAM S. HALL PSYCHIATRIC INSTITUTE

well-developed youth in no acute distress. Height: 61 inches, 80th percentile. Weight: 117 pounds, 92nd percentile. HEENT: Unremarkable. Neck: Supple without adenopathy. Chest: Symmetrical with equal expansion. There was an area of tenderness over the left lower rib cage. Also a mark on the chest from a supposedly previous injury from a belt. Lungs: Clear to percussion and auscultation. Heart Exam: WNL. Liver, spleen, kidneys were normal. Bowel sounds were normal. No masses were felt. Genitalia: Normal developed, Tanner stage 2/5. Spine and Back: Unremarkable. Extremities: WNL. No limitation of movement is noted.

NEUROLOGICAL EXAMINATION: WNL. Reflexes: 1-2+ symmetrical bilaterally.

INITIAL DIAGNOSIS: AXIS I Adjustment disorder with mixed disturbance of emotions and conduct.
AXIS II No diagnosis.
AXIS III No diagnosis.

LABORATORY AND DIAGNOSTIC STUDIES: Admission CBC blood count 4.860000, white count 5,000 with 64 polys, 33 lymphs, 2 monos, 1 eosinophil. Hematocrit is 37.1, hemoglobin 12.0. MCHC 32.3%, MCH 24.7 mcg, MCV 76. Microcytes were 2+. Urinalysis specific gravity 1025 otherwise the exam was WNL. Thyroid function studies T-3 1.10, T-4 was 11.04, FTI was 10.06. The TSH which was a separate type of reading was read as .04 and this most likely to lab error. Serum iron 61 within the normal range, lower range of normal. Total iron binding capacity 299 which was in the normal range. Saturation 20%. SMA-18 was WNL. There was a high total protein of 8.8 which has no specific significance of the other readings.

CONSULTATIONS: An educational report was given by the school district. He was enrolled in the 6th grade where he continued to work on his subjects. His testing indicated that of a reading at 6E, Spelling 5B, Arithmetic 5B, Vocabulary 6.0, Comprehension 7.4, total testing is 6.9. His overall work indicated weakness in Language Arts, his writing skills needed improvement. His placement however did not appear appropriate for 6th placement. Hearing exam was normal. Electrocardiogram was WNL.

HOSPITAL COURSE: The patient was admitted to Ward 160 where he adjusted to ward milieu rapidly and in general provided good behavior during his hospitalization. There was a tendency of William to try to instigate problems and to direct other children into conflicts. These manipulative plays that he exhibited were identified and explained to the patient. He was assessed for a tendency to harm himself or others by court appointed designees and found to be not harmful to himself or others. During his hospital stay he denied any further thoughts of self-harm and agreed that this was not a good way to approach his problems. His

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DICKERSON, WILLIAM O.

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WILLIAM S. HALL PSYCHIATRIC INSTITUTE
FINAL SUMMARY 2

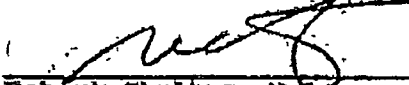
family situation went under evaluation by the DSS for possible child abuse. This case is pending further investigation. William's case was heard in the probate court and he was ordered released on the basis that he was not harmful to himself or others. At the time of his discharge, the patient was free of any evidence of psychotic features, hallucinations or delusions and had expressed no intentions to harm himself or others. He was ordered release from the facility to return to Charleston where he will be under the care of his aunt pending the investigation by the DSS. Because of borderline findings of his serum iron and the presence of microcytes on the blood smear, the patient was started a course of treatment of iron therapy Ferrous Sulfate 300 mg daily for three weeks.

CONDITION AT DISCHARGE: No evidence of psychosis. The patient was free of thoughts of self-harm or danger to others.

DISCHARGE MEDICATIONS: Ferrous Sulfate 300 mg daily.

DISCHARGE AND FOLLOW-UP ARRANGEMENTS: Charleston MUSC clinic. The patient was placed in the care of his aunt pending completion of the investigation by DSS.

FINAL DIAGNOSIS: AXIS I Adjustment disorder with depressed mood. 309.00
AXIS II No diagnosis
AXIS III No diagnosis


Robert Sholtes, M.D.
Attending Psychiatrist


John B. Burns, M.D.
Fellow in Child Psychiatry

RS/JBB/dko

DD: 07/05/88
RT: 07/12/88
FT: 07/25/88

CONFIDENTIAL
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whose confidentiality is protected by
(42 CFR Part 2) and is not to be
disclosed or otherwise made available
without the specific written consent of the person
to whom it pertains. A general authorization for the release of this
or other information is NOT sufficient for this purpose.

DICKERSON, WILLIAM O.
881-3294

WILLIAM S. HALL PSYCHIATRIC INSTITUTE
FINAL SUMMARY 3

FILED
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) ANNOT. & THE NINTH JUDICIAL CIRCUIT
Case No. 06-GS-10-2981, -3142
JULIE J. ARMSTRONG
CLERK OF COURT
STATE OF SOUTH CAROLINA) J.H.
BY)
-VS-)
MOTION TO BAR
THE DEATH PENALTY
WILLIAM O. DICKERSON) BASED UPON RACE
Defendant)

Respondent's
7
12-8-15 J

Counsel will move for the Court to bar the State from seeking the death penalty based upon race, at a hearing of April 3, 2009, or as soon as this matter can be heard.

On information and belief, the State sought the death penalty in this case based upon the race of the victim and/or the defendant.¹ The State's intention was to seek and obtain the death penalty where an African-American victim was at issue, in response to public pressure and outcry that the State only sought the death penalty where white victims were involved.

Prosecutorial discretion is an important tool in the administration of justice, as long as it is exercised properly. Generally speaking, courts will allow prosecutors wide latitude in making the discretionary judgments necessary to carry out their duties. *Imbler v. Pachtman*, 424 U.S. 409 (1979); *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987). This discretion is not limitless, however. Courts will step in where the prosecutor's exercise of his discretion discriminates against a class of people. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (selective enforcement against a distinct group of people based on their race violates Equal Protection), *Borkenkirch v. Hayes*, 434 U.S. 357 (1978) (vindictive prosecution against people for exercising other rights

¹ The State filed Notice of the death penalty on August 24, 2006.

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By *[Signature]*
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violates Due Process). Courts will also not tolerate the consideration of arbitrary factors such as race or religion in prosecutorial decision making. *Oyler*, 368 U.S. at 456, *Wayte*, 470 U.S. at 608, *Ex parte Littlefield*, 343 S.C. 212, 219, 540 S.E.2d 81, 84 (2000) (judiciary will review prosecutorial discretion where influenced by race, religion, or other arbitrary factors) (citing *State v. Needs*, 333 S.C. 134, 135, 508 S.E.2d 857, 862-63 (1998)). Race can never be an intentional factor, in any degree whatsoever, in the State's decision to seek death. *McKleskey v. Kemp*, 481 U.S. 279, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987); Also See *Batson v. Kentucky*, 476 U.S. 79 (1986) (Disallowing use of race in jury selection); *Turner v. Murray*, 476 U.S. 28, 90 L.Ed.2d 27, 106 S.Ct. 1669 (1986) (Allowing voir dire on race to probe for juror bias where black defendant charged with killing a white). The Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution bar the state from seeking death whenever race becomes a factor or consideration, such that discriminatory intent is established. *McKleskey*, *supra*.

The United States Supreme Court "has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race." *McKleskey*, 481 U.S. at 309 n.30 (citing cases). *McKleskey* specifically held that any proof that racial consideration had entered into a capital sentencing determination would mean that the sentence was unconstitutional under the Eighth and Fourteenth Amendments. *Id.* An inference of abuse of prosecutorial discretion motivated by racial discrimination may be made upon sufficient proof. *Id.* at 291 n.8 citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Improper racial influences would create an unconstitutionally arbitrary application of a capital punishment system. *Id.* at 297.

Furthermore, the Supreme Court has held that a conviction violates a defendant's Fourteenth Amendment due process rights and cannot be sustained if it is obtained at a trial

wherein the prosecution was impelled by "community coercion." See *Hawk v. Olson*, 326 U.S. 271, 275 (1945). It can be no more proper for a prosecutor to *decide* to seek a death sentence in response to the pressures of racially-based community sentiment. By comparison, the U.S. Supreme Court recently reversed a death penalty case where evidence involved a history by the prosecutor's office of possible racial discrimination in jury selection. *Miller-el v. Cockrell*, 537 U.S. 322 (2003) (Remanding case for full evidentiary hearing).

The introduction of the extraneous considerations of the race of the decedents and the sentiments of a racial community into the Solicitor's decision to seek a death sentence against Applicant constitute such a fundamental violation of due process as to have given rise to a basic, systemic error, so tainting the process of justice that prejudice need not be shown to require reversal. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such errors affect "[t]he entire conduct of the trial from beginning to end" and deprive the defendant of "basic protections," without which " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *Id.* at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). "Errors of this type are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999). If a criminal proceeding includes such an error, the resulting punishment "may [not] be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78.

The United States Supreme Court has paid particular attention to monitoring the improper intrusion of race into the criminal justice system. See, e.g., *Turner v. Murray*, 476 U.S. 28 (1986) (defendants must be able to question jurors on their views about race); *Castaneda v. Partida*, 430 U.S. 482 (1977) (grand juries must be assembled in a race neutral manner); *Batson*

v. Kentucky, 476 U.S. 79 (1986) (lawyers may not consider race in jury selection).

In order to prove that the consideration of race by the prosecutor violated Equal Protection, a litigant must demonstrate that the prosecutor acted with discriminatory purpose in his case. *McCleskey*, 481 U.S. at 292. Once purposeful discrimination has been proven, the inquiry is over. The United States Supreme Court has explained that certain errors so infect the process that prejudice will be presumed. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The injection of race into the earliest stages of criminal proceedings is one such instance. See, e.g., *Vasquez v. Hillary*, 474 U.S. 254, 263, 264 (1986) (racial discrimination in the selection of grand jurors).

Indeed, recently the Court again reiterated that state action is not ameliorated simply by a change in prosecutors: "...[W]e have held that, *once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show this factor was not determinative.*" *Snyder v. Louisiana*, ___ U.S. ___, 128 S. Ct. 1203, 1212, 170 L. Ed. 2d 175, 186 (2008) *citing Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (*emphasis supplied*).

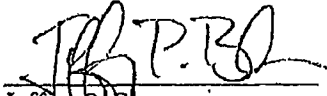
By way of example, in the capital-PCR case of *Kelly v. State* (Case No. 99-CP- 42-1174), trial counsel strongly suspected the prosecutor had sought the death penalty based on the race of the victim even though trial counsel had little evidence to actually present for the trial court. At PCR, the PCR Court granted relief on this issue (along with others), and also admonished trial counsel for failing to raise the issue of race whatsoever to the trial court. The PCR Order Granting Relief was affirmed on appeal by denial of certiorari by the S.C. Supreme Court. (Order of the S.C. Supreme Court, May 24, 2006). Similarly, in defendant Dickerson's case, the State

apparently sought the death penalty based upon the race of the victim.²

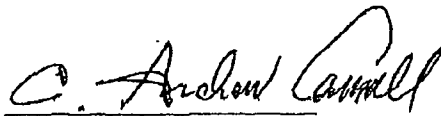
Therefore, counsel for the defendant seek the Court to issue an Order barring the State from seeking the death penalty based upon race.

This Motion is made pursuant to the U.S. Constitution Amend. 5, 6, 8, and 14; S.C. Constitution Art. I §§ 3, 14, 15; and other applicable law.

Respectfully submitted,


Jeffrey P. Bloom
Counsel for the Defendant
Dated: March 27, 2009

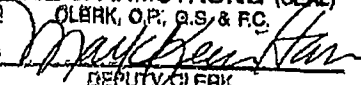
Attorney At Law
1911 Pickens St.
Columbia, S.C. 29201
Tele. # (803) 256-7001
Fax # (803) 256-7002
JPBloom803@aol.com


C. Andrew Carroll, Esq.
Counsel for the Defendant
Dated: March 27, 2009

The Joye Law Firm
5861 Rivers Avenue
N. Charleston, S.C., 29406
Tele. # (843) 554-3100
Fax # (843) 554-6539
drewcarroll@joyelawfirm.com

FILED
2009 MAR 30 AM 10:49
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CLERK OF COURT
BY 21

² The decedent, Gerard Roper, was African-American. The defendant is also African-American.

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BY 
DEPUTY CLERK

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

STATE OF SOUTH CAROLINA)

-VS-

WILLIAM O. DICKERSON)

Defendant

FILED
2009 MAR 30 AM 10:50

IN THE COURT OF GENERAL SESSIONS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No. 06-GS-10-2981, -3142

JULIE J. ARMSTRONG
CLERK OF COURT

BY J.P.

MOTION TO DISMISS THE DEATH PENALTY
DUE TO UNCONSTITUTIONALITY
OF STATE PROPORTIONALITY REVIEW

Counsel for the defense will move before the Circuit Court on April 3, 2009, or as soon as this matter may be heard, for a hearing on the defendant's motion to dismiss the death penalty due to the unconstitutionality of the State's method of proportionality review.

State law, as well as the Eighth Amendment, requires the state appellate court to conduct a proportionality review to determine if a defendant's death sentence is "proportionate" and/or constitutes cruel and unusual punishment. See S.C. Code § 16-3-25(C)(3). Current case law as set forth by the S.C. Supreme Court employs only other cases involving a death-sentenced inmate, and intentionally excludes cases in which a death-eligible defendant was sentenced to a sentence less than death.

This practice is constitutionally flawed. The S. C. Supreme Court fails to consider, and deliberately excludes, cases in which the defendant was not sentenced to death, and provides a perfunctory review. This is contrary to both the statute and the Eighth Amendment.

The statute, S.C. Code § 16-3-25(C)(3), reads as follows:

With regard to the sentence, the court shall determine: ... Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The Court's practice to intentionally exclude from the comparable class of cases as to

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By [Signature]
DEPUTY CLERK

proportionality those defendants who were death-eligible but sentenced to a sentence less than death is arbitrary, and contrary to the jurisprudence of the United States Supreme Court. Recently, in *Walker v. Georgia*, 555 U.S. ___, 129 S. Ct. 481, 129 S. Ct. 453, 172 L. Ed.2d 344, 2008 U.S. LEXIS 7763555 (2008) (cert. den.) (Stevens, J.; dissenting from denial of certiorari),¹ Justice Stevens outlines the line of cases which mandate that proportionality review not be a mere perfunctory or exclusive exercise. See *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Zant v. Stephens*, 462 U.S. 862 (1983). Indeed, the practice of the Georgia Supreme Court, which Justice Stevens derides as patently unconstitutional, includes the consideration of cases in which death was not imposed, but where the court has conducted a perfunctory review:

Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. And even then the court stated its review in the most conclusory terms ... Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment.

Walker, 129 S.Ct. at 455-456, 172 L. Ed.2d at 345-346 (Stevens, J., dissenting).

By comparison, the S.C. Supreme Court review on proportionality also consists of conclusory paragraphs in virtually each and every case, and specifically *excludes* cases in which death was not imposed. By way of example, the following are S.C. Supreme Court decisions on proportionality, in their entirety, on this significant legal constitutional requirement:

¹ Counsel for the defendant acknowledges that *Walker* is not precedent since it was a denial of certiorari. However, Justice Stevens' dissenting opinion outlines in clear detail the constitutional argument against an arbitrary application of proportionality review. (A copy is attached for reference).

In *State v. Stone*, 376 S.C. 32, 36-37, 655 S.E.2d 487, 489 (2007):

Our review of similar prior cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *See State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (holding that the death penalty was warranted where defendant killed a law enforcement officer while the officer was performing his official duties); *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (same); and *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991) (same).

Likewise, in *State v. Bowman*, 366 S.C. 485, 502-503, 623 S.E.2d 378, 387 (2006):

Under State law, S.C. Code Ann. § 16-3-25(C)(3) (2003) requires us to determine in a death case “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See State v. Binney*, 362 S.C. 353, 608 S.E.2d 418, *cert. denied*, 2005 WL 1333888 (2005); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689, *cert. denied*, 519 U.S. 972 (1996). Accordingly, appellant’s sentence is not disproportionate under State law.

Similarly, in *State v. Evins*, 373 S.C. 404, 422, 645 S.E.2d 904, 913 (2007):

We have conducted the proportionality review as required by S.C. Code Ann. § 16-3-25(C), and we find the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death sentence in this case would be neither excessive nor disproportionate in light of the crime and the defendant. *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) (death sentence warranted where defendant was convicted of murder, kidnapping, and first-degree criminal sexual conduct with a minor); *State v. Stokes*, 345 S.C. 368, 548 S.E.2d 202 (2001); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) *cert. denied* 528 U.S. 1050, 120 S. Ct. 588, 145 L. Ed. 2d 489 (1999); *State v. Tucker*, 319 S.C. 425, 462 S.E.2d 263 (1995) *cert. denied* 516 U.S. 1080, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

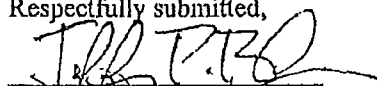
Additional capital cases could be cited with virtually identical results and language. The current proportionality review in South Carolina – both as interpreted by the State Supreme Court and as applied – fails under an Eighth Amendment analysis. The Court deliberately excludes capital cases in which a sentence less than capital punishment was imposed. The Court conducts a cursory and conclusory review of the cases under proportionality. Finally, the Court has never, since the

reinstatement of capital punishment in 1976, found a case to be disproportionate. This means that for over 30 years, the Court has never – not once – found a case to qualify under the statute or Eighth Amendment review to be disproportionate and thus ineligible for the death penalty.

Thus, this provides a system of proportionality review in name only, thereby rendering it an unconstitutional system of review under the Eighth Amendment as well as the statute. Therefore, defense counsel requests the Circuit Court to dismiss the death penalty for the reasons stated herein.

This Motion is made pursuant to *Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); the U.S. Constitution Amend. 5, 6, 8, and 14; S.C. Constitution Art. 1 §§ 3, 14, 15, and other applicable law.

Respectfully submitted,


Jeffrey P. Bloom
Counsel for the Defendant
Dated: March 27, 2009

Attorney At Law
1911 Pickens St.
Columbia, S.C. 29201
Tele. # (803) 256-7001
Fax # (803) 256-7002
JPBloom803@aol.com



C. Andrew Carroll, Esq.
Counsel for the Defendant
Dated: March 27, 2009

The Joye Law Firm
5861 Rivers Avenue
N. Charleston, S.C., 29406
Tele. # (843) 554-3100
Fax # (843) 554-6539
drewcarroll@joyelawfirm.com

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Respondent's

8

12-8-15 E

(2) Bennett Wyatt

can

William Dickerson

[Kanele's single son]

1913 - v. father of 1st child - March 7, 2006

1915 - car back to mother's house

1917 - 330-3645

1918 - missed calls - mother - same

1921 - went to D's house - police officer - 1930

1925 - Ervette Roberts arrested to phone

[Sharon's report]

1927 - mother of U

1930 - D said goes to James Esler

1934 - Willie G - 5545 base not

seen the U

1935 - screaming & police officer

1937 - called police Wednesday

1940 - Gerald Rogers - James Esler

1942 - Gerald - March 7, 2005 - v. Bros house

1944-1945 - Willie - Willie - guaranteed v

1946 - yelling & screaming - car - suburbs - 1947

1954 - March 17, 2005 - police

1960 - said never saw D

1961 - U - "I got your money"

1963 - big gun shot

1969 - bullet hole in door

1967 - will

1968 - money - "set in car" - suburbs

[Benjamin Drayton]

1976- 66 yrs old

1979- U - "Good man"

1980- March 7, 2006 - U, Steve & W

1983- Knock at Door - Willie -

1983- got money - "Don't shoot me -

1 shot - "pls. Don't Kill me."

1989- "they put him in the truck & left."

[Antonio Nelson]

1994

1998- 33 yrs old - wheelchair - shot in back

2000- D & "Willie D."

2001- D & V - best friends

2004- D's brother - Bubba

2005- March 7, 2010 - D knocked at

the Door - Dog - 2007

gun 2011- gave D a gun

2012- D - perverted - please - enjoy w/ girlfriend

D. Kicked hole in Door

2012- video - pen D

2015- Shelly cheating - thought "Red in"

2018- Dutch Driving, D & Dog & D

2019- pot & coke

2021- D tried to call D

2023- D - gun shot

2025- U - "See what he did to me"

bleeding & - got money

2029- Bubba's house - D & V

2030- "Don't have to drag me."

2033 Bubba got D & C

2035- Next Day - Bubba - "Everything's Good."

2036- D said "Not going to fuck me

any more."

2036 - March 8th - Steven Archer
looking for D & V

2038 - News - D - go

2051 - News - March 19th - VU body
Found - D arrested - March 19th

D - Warrington 2056 - D worried - lays out to
get him - 2057 - 2058 - sex on video
2059 - Baby Dean Sugar Beers

2063 - body - known Dickenson & hours
Bubba's house

2070 - Sugar Beer - Antonio Jesus

2071 - Sugar Beer after D - pick
him up - NO SENSE

[D & V Keeling]

2074 - "Duff" - 25 yrs old

2076 - knew D through Antonio Mexican

2077 - March 7 2006 - Tony - Favor

2078 - Tony & Suburban

2081 - Knock on Door - ask for ^{not there} 2090

2082 - D "check for himself"

Shot 2083-2084 - D & Rod come out

2085 - blood is scared, angry - Bubba & house

2086 - U - I can walk - 2089

INTERVIEW 2087 - Mousy - blood - 2088 - Bubba & house 2089

[Tomasha Nelson]

2153-30 yrs old - D - ex-boyfriend

2154- "Willie D" or Little Man

affected 2155- March 2006 - living together - V - best friend
Several - First of March - D affected w

phone 2156- phone - CUB on phone - 2159

affected 2157- March 3, 2006

2158- D grabbed w, choked

2160- phone - affair

2160/2160 - D returned - affected V

2162 hospital - D confined to cell

2163- D took w to hospital

2164, March 7, 2006 - b had V with him

- D angry at V

recorded 2168- recorded phone call

2169 - 4/11/09

2173- objects to Transcript

2188- states 307 - Transcript

2190- #2190 - played for jury

type

2193- V - Oper just ask for helper

that he is at Bobba's house

2194- says V not calm - b upset - put to rest him

2196- March 7, 2006 call between 4:00 - 4:30

2198- w called police - - b gone

2199 - D accused w of having sex

& continued to talk - 2200

network 2201-2202 - network of people - drugs

including V

2203 - Money under pressure

2254- to SA police secured of D

2240- try to call 10 times on

MARCH 4th - 12:03 am, 7:47 am -

2210- 11 calls - 29 calls

2213- March 8th - 4 calls - 2218

2221- call - D upset - someone at for him

2222- lots of call backed forth - 2222/2227

2235- resp. for - Pate - "try" to help him

2238- "out" to get him

[Dennis Proffitt]

2243- phone recorder - 245.4731

Phone 2244- 303005 - D's phone

Tower 2245- deconstructed - March 3, 2006

[Kimberly Gregg]

2243

March 22 2264- March 3, 2006 - D - Shelly JCO

D following her - D mad

2268- D mad - phone

100% 2269- female growing

[Steven Archibald]

2272

2273- shot Sept 20, 2005

2275- KNU V

2279- KNU D

2280- March 8, 2006 phone - D

45 2283- D, 45 "2p v's arr." -
conver for w

2284- par inter "looking for D" - 2297

2287- D - "gone" - f your mother

2301- Told D 2280 - March 3, 2006

[Tyre Johnson]

2308

2359- March 4th - aft. - - someone
covered up- called police -- homicide - 227

[Octavio Fabisicwicz]

2310

2316- Charles Police - March 7 2006 - 7:28pm.

2317- back door open - Franc broke only T-shirt

[Douglas Anderson]

2333- D - "Will. 8th" - Friend - 2274

2335- March 8, 2006 - D called - "Something happened"

2337- D - bleeding

out 2339- bus ticket - Columbia - Atlanta

to 2340- D denied involvement

got him 2341- D - scared

2343- phone - Shelley's people - looking for 2-

[Marlene Pickett]

2348- Derack [unclear] - charged in case

2351- Reshad Malik - Fight w/ D

intake 2352- March 11, 2006 -

car 2354- D took car -- wrecked it - 227

[Patrick Pontier]

2362

2362 2362 W. Charles Police March 11, 2006 -

Fl. 2365- D ran - D arrested

[Steven Hood]

2375. Police 2375

2376. Flamingo Rd - Apt E-4 - March 5, 2005

2383. No Furniture - Clean - to be rented -
body dumped in apt.

* 2389. Video

E-3 2396 - E-3 - search warrant - blood, tried to clean

2399. Video - E-3 - blood - E-3, 2406

2433 - brown stick & Fecal matter (2492)

2434. Nunchucks - 2439

2453 - blood - blood on floor

2458 - print - Arnon Dickerson

2465 - 2 - blood, sweat

2477 - black bottle - blood

2498 - McDonald's work clothes

2499 - Seena Rouse & Arnon Dickerson

prints 2502 - Arnon Dickerson - all 4 blood - prints

2503 - magazine -

2515 - No prints of [L]

[Jeffrey McLean]

2523. Police 2523

2523. March 9, 2006 - E-3

2524 - Blood evidence

2536 - tooth on floor

2541 - 17, 2009 - search at the -

guns 2 handguns #312 (gun)

[Oudith Gordon]

2550

2551. March 9, 2010 - Apt E-3

2551. E-4 vacant

2554 - Blood - E-4

[Michael Sherman]
2560

2561 - empty Apt - March 5, 2005 - E-4

[Jennifer Wooley]
2586

2587 - Police - E-4 - March 5, 2005 - vacant

Shore 2589 - E-3 shoes - size 9 - 2590

2591 - bath rug - water

McDonald 2592 - McDonald shirt

[Auntie Masters]

2593 - JNU 2594 March 5, 2005

2597 - cable cord

2600 - phone charger - store

[Renae Charles]

copy 2604 - March 2604, 2006 - copy

[Randy Underbrink]

2608 - Chans 2607

[Kinney Kinsler]
2609

2610 - SLED

2614 - Footwear - E-4

2625 - 2 guns - Feb 14, 2009

2627 - gun - Fred 2628

D excluded 2642 D - excluded on shoes - 2647

[Lilly G. Hines]
2665

2660 - SLED - DNA

2665 - AS shirt

2674 - Card - match U

2676 - 3668 ~~188~~ - K to low Floor - A
#187, 189, 188, #150, 192 (acc)

195 196, (E3 door #244) - A, 19 - v. dry

DNA 1057 - P (2680), #247, 280, (Gm.)

MA 2692 - 1 in 1.7 ~~from~~ point of 1100 (182000)

[Dr. Cynthia Schaud]

2733 - March 7, 2006 ~~2733~~ v - 5'8, 130

2740 - 59 Sharp wound to ear

Injury 2742 - broken bones - skull - fracture - 2748

2749 - like car accident

2754 - maybe struggled to death

2758 - 50 injuries to leg - bone

2765 - 50

2769 - rectum bleeding - inside injury

CAUSE - 2772 - blunt force to neck, fracture

2780 - V lived 17 - 20 hours

2788-2794 - urine - cocaine

[Armon DeKester]

2800 - 28 yrs old - "Babe"

2803 - murder charge

2805 - D - brother

2805 - Father - E-1, then E-3

2807 - Knocks v

2808 - best friend of A

2808 - March 7, 2006 - E-3

2809 - A candy w/ v + Tony Nelson

2810 - v bleeding - D - gun

v	2811- asked Nelson "What was going on"
all him	2812- D said "V trying to talk him high."
	2813- cell phone -- video - girlfriend
	2815- v - "Yoon brother is going crazy"
own	*2816- D but v put gun
fact	2816- locked both out -- 15-20 minutes
	2817- u - scared
	2820- u went to Nelson's house
blood	2822- got back - blood everywhere
	2823- D - get cleaning supplies
	2824-2825- Select a cleaning supply
	2826- D - bloody
	2829- D - Dault need car in yard
	2830- v lying on kitchen floor - bleeding
	2831- Popcorn to help move v -
apart	2832- Popcorn hit v
2 guns	*2834- D hitting v with 1 gun -- 1 in h.s. belt -- 2836 - Choking v - 2835
tape	2838- Tape recorder - D, W, popcorn
	2840- Tied v up -- put him in a closet
	2842-2843- v - "let me die" - blood
	2845- D locked w in closet
	2847- dragged v out -- D & v hit him
	2849-2850 hit v w/ table, kitchen
010	2851- v - fell & died
E-4	2852- wrapped v - D kitchen E-4
	2853- tried to clean up
	2856- guns in attic
	2858- went to hotel
100	2861- tried to block
	2862- Feb 2008 - Turn house 15 in
scared	2880 - didn't help because he was scared

look put 1000 2892 took part in R.N.W. home
2898-1000 to police - 2909; 2923

2901- protective court

2911- knew D thought people were
going to kill him

2932- charged w/ murder - proffered March 10, 2009 2934

10 2935- Sept 12, 2 Fastin, 351 SE 290
Came 581 SE 29 426

2937- Rule 801

2941- Feb 25, 2008 state, 2943

2946- warrant obstructed - issued Feb 15, 2008 -
served as for state

2948- murder charge - after the fact

2950- Jeff w told in advance of
the court

Esleau House

2956

2958- E-3

2959- Fla -- start over -

2963- cover for Bubba

2967- Fried - McDonald's

2968- cleaning Fluid

2973- D - take my car. Don't need it

Calin D - calm

2979- knew Kidnapped

2981 D - money for new Apt. - \$500

2984- send U back

2988

2985- "live or die" - U know you - 3023

2989- bushes

blood 2993- cleaning up blood

2993- putting guns in attic

3000- Bubba went to Coku

3048 - moved to Flm

3056 - 1143

Letter 3063 - Letter From N, 3064

[Rashid Malik]
3064

3067 - Popcorn

3070 - V & D - "Good Friends" - Drew - 3070
video 3072 - phone video - 3091, 3094

3075 - March 7, 2005 - D called

3076 - D - V "Flipped on line"

3079 - D - Threatened to kill Wj 3080, 3082,
Threat 3084 - 11000

3085 - Bobbie on drugs

3086 - 3087 - V - No past D - 3088 - 3088

3088 - punch V - Killed V - 3114

3091 - D stole car

3112 - went to Minnesota

3126 - D convinced people out of killing him

[Sandra Foley]

3130

3131 - D's mother

3132 - Popcorn - coming to see you

3134 - Popcorn - never came to see

3136 - D & Shelley at Togo

[Avery Roper]

3143

3144 - V - 500

3145 - V's video

Erandy Folow
347

3165- D's phone - West Astly

3169. O R N - address july 28th

in
cancer

3181 - access after the fact

3201-3202 - D's letter apologized - 3203

3242 - D's letter july 14

3278 - closing - B R M

3295 - Belcher

3357 - prison phone call

3359 - Belcher

SENTENCING PHASE

1.2
Answer

U.S. v. List; 419 F.Supp2d 1028 (2006)

[Lester Williams]

3361

3362, Charleston County Det. Carter

3263-6 of 28-29 2007-1-10

3366 - Dec 7, 2008 - D gon 62 of 100 - 12/7/08 - 3366

[Michael Haggard]

339 2- Dec 17, 1940

3393- Fight w/ D

3357.

2401-3401 - 11.11.2011

June

[Edward Haselden, Jr.]

3435 Family & Mgr. 3435

3434 - passiflora-stolnvechle

3438 Oct 28/96 - ungovernable

[Low frequency]

3440

542

3440 - Clerk's Office

438

3451-1954- ABHAN - (DPA- Acc 2H, 1576)

1028
Wf 107/1

3452 - robbery in 1989 - witness grand - jury

3453-1998- ABIR

[Round 20]

३५३

3458 - Police Doc 15, 1993 - D, Nevada

2. JK-25 (male)

10
Camera
[Holl]
3461

3461. Aug 20, 1993
3462 D's mother - gun

[George Fordham]
3463

3466. D robbed
3467 March 5, 1996
3468 - robbed - shot at D
3472. dropped charges

10
[Leon Flood]
3481

robbery 3482. Nov 5, 1993 - 3 robbers - 3483

[Antonio Nelson]
3488

robbery 3489. D, w/ 2000 - Nov 5, 1993 - robbery
3490. drug dealer - red

[Rest. D Mark]

robbery 3501. Nov 5, 1993 - robbery

[John Scott]
3505

-gun 3504. May 17, 1996 - Police
3512-3513 - D gun - F
3515 - D shot - crack

[Carlos Cepeda]
3524

3524. May 17, 1996
3528. D gun - pulled trigger - 3529 - not in report - 3536

[Jeffrey Miller]
3537

3538 - May 17, 1994 - gun found - 3540

IN
Cancer

3546 - statement at parole hearing - wished killed ³⁵⁴⁷osflem

[Cedrick Davis]
3550

3556 - 1996 - Probation hearing at court

3557 - June 4, 1996

3556 - wished he shot

3557 - Gardner v. Fla - No way to rebut

3557 [Lawrence Fairley]

IN

3565 - SLED 3565

3570 - Prison - 1996

3575 - Wrong ammunition

[Cedrick Davis]

3597 - Probation 3597 1996

3596 - June 4, 1996

3598 - wished he shot - didn't do it

[Tomiesha Nelson]
3586

3587 - D - Former boyfriend - March 3, 2006

3588 - beat up

Threat 3592 - Threatened to kill

3595 - Drug use - Treatment

[Linda Wilkins]
3696

3597 Dec 7, 2008 - destruction center
3601 - D attack CD

[Michael Haggard]
3609

3610-3611 - D grabbed w - Dec 7, 2008

July
007

3619 - Burkhead - Security level
3644 - Navy uniform - Naples

July
10

[Sharon Roper]
3654 - W 3653 + W
3661 - Navy

[Aunt Roper]
3671

[Dr. Cynthia Schenck]
3686 - U - 518 3680

3694 photos - bus screen
3699 - two trees

July
1824
hoo

3703 - 18-24 hours - all injuries 3704
3705 - painful

3710 - OR A window

[Joseph Ladd]

3717 - D - 5000000 - No problem

[John Hewitt]

3722 - D 3721 - 61 m.y. to flower

[Jenny Simmons]
3724

3725 - D - No problem
3725 - D [Sham]

[Luther Hood]
3720

3727 - D quiet

[David Grede]
3729

3735 - D - respectful

[James A. Kew]
3733

3741 - D - adjusted very well

3747 - Dec 7, 2008 - ad correction - policy

3749 - No weapon.

3754 - high level of security

[Barry Briff]
3745

3777 - D - Dec 7, 2008

3779 - Willbrow - best up.

[Dr. Alexander Morton]
3784

3784 - psychopharmacology

3791 - B - 13-14 yrs old - 3-4 pounds a day

3792 - pot, cocaine - ecstasy

3793 - March 6-7, blast - Ecstasy

3794 - "bizarre" behavior - personality 3799

3800-3801 - survival part of brain - listed cocaine

3807-3810 - Father & mother

Cocaine 3815 - cocaine caused behavior

3830 - D - positive in jail - pot only - 3833

mailed
paper

[Johnette Watkins]
3836-B - 1st Co. 8233

[Terrell McIntosh]
3894

3888 - Sherraton - D - Des Moines

[Dr. Johnnie Rivers]
3881

3801 - Wacoing mental health - D - 11-13 yrs old
3854 - Tara H. - explosive behavior - 3860 - sex 3866, 3872
3868 - 90 IQ

away
Allen
H. P.

[Mary Ellen Runk]
3897 - Clarkston P.D. - 1992 - A - unresponsive - O Kicked out

[Marjorie Harnock]
3809

3810 - social worker

3815 - extreme poverty, abuse & neglect, neglect - 3861

3815 - father, homicide

3821 - lead level

3822 - D's mother "did not want to be bothered"

3827 - Depressive condition - rats - D scared

put out

3832 3833 - put out - major depression

Mother

3834 - Major Depression

3846 - mother problem

[Donis Hall]
3888

3888 - Tara Hall School

[Emmy Mitchell]
3890 - Tara Hall

[JANE DUNN]
3993 - Tall Hall
3996 - D - level 3 - good

[Robert Phillips]
4014

4022 - 2nd decade in jail - 3rd offically diagnosed
out of control

4023 - Major Depression

4030 - over 20 naked

4039 - Shirley Nelson - constant drug use - 4047

cocaine
psych
4039 - Cocaine psychosis - hallucinations - 4040 - but then

4051 - Beach restaurant (competing?) - not on 2001

4052 - D - know it was wrong

4064 - brother's house

[MARK CUNNINGHAM]

4070 - Clinical psychology

4071 - prison violence

4086 - Tall Hall - not long enough

4091 - 4092 - lead paint - level 7 - 4090 - 2002
more likely

4093 - D - 1996 - shot in head -

4094 - Depression & anxiety

4115 - 19 yrs. - 8800 a wk. Drug Dealer

4116 - cocaine induced psychosis

mitigated 4117 - mitigated

[ADEL WATSON]

4143 - D's grandfather

4148 - ORR - testify - address June 403, 4171

also 4178, 4179, 4180, 4182, 4183

William Dickinson

2072- relevance of being a switcher.

2/02 - in proceedings Reefers "entire statement"

2105. Rule 106 Recl. by entire statement - 2108

prior constant states $7-801(0)-2121-2124-$

balancing - 2/22 - 2/25 - discrepancy sheet - 2/28/00

92145-57715 #305, p. 1 ex 6.8.73

2173-obj to Transfer of phone call - 218-^{not}_{sub}

2232-33 - ask answered on V entry for

附三

2267- Shirley - beat up (Rule 401, 404) -

1-2 not obj. before - 2304, 2307,

2361- rakusare & leangus Melik

2386. *Sporobolus*. - Lady Draggood

2467-5065 #285--swat Rule 403-3707

② 2788-2799 - U - Urine test pos, HIV, 2780, 2784, 2790

3182-2868- accessory 3182-2868-17-7000 The Fact - Collins (6000?) - E-3

2880-2884- 100th Anniversary RUC C/C, SG/

(2892).

2945 - Rok 80/81 (0) 112 106, 2948, 2953, 3010.

3194 DV-3196,

32 95 - Belchen

331- ^{4202, 4208} canyon before & after the Fest - 4053, 4200

3323-3324, *Saguerterius gurg*

3982-342-15, 1 Fight w/ officer

3416 - DUMIS CSC

34/11 of proportionality

3557-3561 - D's parole testimony Gardner v. F/a

3630 objects to 'all photographs, 3639, 3636, 3639-3639.

42-Memorial board - photos

362-141, 153, 161, 162, 166, 171-173, 177-178, 186, 184, 225-230

3708-DV-assessment

3766- Drug 75th 8892, 4178-4179

3886 Reverse Page EVIDENCE - Watson 3888

4A11-4A12 - ~~Current~~ ~~Ad~~ ~~national~~ ~~studies~~ - 1 - Annals

4058 - m.u. pol. etc - play Nintendo - reference

4164 - Dr. Phillips - right from work (4051-4053)

4182-4183

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

10

11 MARCH 31, 2016

12 RICHLAND, SOUTH CAROLINA

13

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

15 HONORABLE G. THOMAS COOPER, JUDGE;

16

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

18 FOR THE PLAINTIFF:

19 MS. BESTY FRANKLIN, ESQ.

20 MR. E. CHARLES GROSE, ESQ.

21 FOR THE DEFENDANT:

22 MR. MARK RAPOPORT, ESQ.

23 MS. MELODY BROWN, ESQ.

24 MR. ANTHONY MABRY

25 MR. DON ZELENKA

I-N-D-E-X

1		
2		PG.
3	EXAMINATION OF BARBARA O'BRIEN:	
4	DIRECT BY MS. FRANKLIN	32
5	VOIR DIER BY MS. BROWN	41
6	CROSS CONTINUED BY MS. FRANKLIN	45
7	CROSS BY MS. BROWN	80
8	REDIRECT BY MS. FRANKLIN	121
9	RECROSS BY MS. BROWN	129
10		
11	CERTIFICATE OF REPORTER:	164
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	E-X-H-I-B-I-T-S	
2	PL.	
3	NO.	EVD.
4	1. BARBARA O'BRIAN'S CV.	45
5	2. REPORT ON JURY SELECTION.	45
6	3. PRIVELEDGED PRODUCTION 11/30/2015.	134
7	4. PRIVELEDGED PRODUCTION 12/10/2015.	134
8	5. (SEALED) JURORS CRIMINAL HISTORY.	135
9	6. AFFIDAVIT OF EDDIE HASELDEN.	136
10	7. PROSECUTION COORDINATION FILE FOR WILLIAM DICKERSON.	139
11	8. DEPOSITION OF BRUCE DURANT.	145
12	9. DEPOSITION OF SCARLETT WILSON.	
13	10. DEPOSITION OF BRUCE DURANT 3/26/13.	
14	11. DEPOSITION OF RUTLEDE DURANT 3/25/13.	
15	12. APPELLATE CASE RONALD COULTER.	153
16	13. CASE OF JEMOL HAMILTON BROWN.	153
17	14. CASE OF ETHAN MACK.	153
18	15. CASE OF MICHAEL TYRUS JETER.	153
19	16. FLASH DRIVE.	
20		
21		
22		
23		
24		
25		

1 (The following proceedings were held on
2 March 31, 2016.)

3 THE COURT: Good morning, ladies and gentlemen,
4 this is a continuation of the post-conviction relief hearing
5 for William O. Dickerson.

6 Is the State ready to proceed?

7 MS. BROWN: Yes, sir, we are.

8 THE COURT: All right. Defense ready to proceed?

9 MS. FRANKLIN: Yes, Your Honor. We would ask
10 before we start if somebody could please take off Mr.
11 Dickerson's handcuffs.

12 THE COURT: All right. Let's release his
13 handcuffs. Who's got him, are they county or?

14 MS. FRANKLIN: SCDC.

15 THE COURT: He's been through this procedure
16 several times, I'm not concerned about it.

17 MS. FRANKLIN: And Your Honor, I've been informed
18 by one of the deputies that somebody with the -- a technical
19 person with the solicitor's office will be coming down here
20 to assist us in getting a projector, so if somebody walks
21 in, that's what it's going to be in reference to.

22 THE COURT: That's fine.

23 Any preliminary matters before we begin with the
24 testimony, Ms. Brown?

25 MS. BROWN: Your Honor, I believe the commission

1 has a motion that they would like to make before we get
2 started today.

3 THE COURT: All right.

4 And you are?

5 MR. RAPOPORT: My name is Mark Rapoport,
6 R-A-P-O-P-O-R-T, and I'm a staff attorney with the South
7 Carolina Commission of Prosecution Coordination in Columbia.
8 We received a FOIA request back in 2013 and we responded to
9 the subpoena. And we would ask to quash the subpoena in
10 whole or in part for several reasons.,

11 THE COURT: Can I see the subpoena? Does anybody
12 have a copy? What did it subpoena?

13 MR. RAPOPORT: They requested for me to be here,
14 but a response to FOIA request. They want to introduce our
15 trainings.

16 THE COURT: Your what?

17 MR. RAPOPORT: Our trainings, our training
18 material. And we want -- our motion is to prevent our
19 materials from being released.

20 THE COURT: I'm just not aware of what you're
21 talking about.

22 Does anybody have the subpoena?

23 MR. GROSE: I could e-mail you a copy of what was
24 --

25 THE COURT: Well, why don't you just tell me.

1 MR. GROSE: Okay. Your Honor, we actually sent
2 the subpoena, I believe, to both Ms. Clifford and David
3 Ross. As Mr. Rapoport has stated, in 2013, the commission
4 pursuant to a freedom of information act request produced a
5 number of documents which Ms. Franklin is going to introduce
6 this morning.

7 You will recall from our conversation, we were
8 going to try to avoid having issues regarding authenticity
9 of things that were produced by the government. And the
10 subpoena said, Please see the attached freedom of
11 information act, FOIA, parentheses, request previously sent
12 to the prosecution coordination commission. Please be
13 prepared to identify the documents you produced in response
14 to this FOIA request or, in the alternative, please bring
15 the original documents from which copies were made in
16 response to the FOIA request.

17 We've also had communications with prosecution
18 coordination that I believe the attorney general's office
19 was made privy of about whether they would stipulate to the
20 documents. We just want to be able to introduce what
21 they've already given us.

22 MS. FRANKLIN: That was the purpose of the
23 subpoena, Your Honor, just in case we have an authenticity
24 issue. I think after our telephone conversation earlier
25 this week, that shouldn't be an issue. But I think --

1 MR. RAPOPORT: Your Honor --

2 MS. FRANKLIN: I think now they're asking to keep
3 us from introducing materials that we obtained pursuant to
4 FOIA three years ago.

5 THE COURT: But he says he wants to quash the
6 subpoena.

7 MS. FRANKLIN: Okay. Well --

8 MR. RAPOPORT: Your Honor, we don't want the
9 material -- we don't believe our agency -- the problem with
10 our materials -- we did release them pursuant to FOIA, but
11 we don't want --

12 THE COURT: Well, let me start off, are they
13 authentic?

14 MR. RAPOPORT: I do have a copy of the materials
15 that they requested, yes, sir.

16 THE COURT: Well, they've got them, too, don't
17 they?

18 MS. FRANKLIN: Yes, Your Honor.

19 MR. GROSE: Yes, sir. So is there an authenticity
20 question? I think I asked that question of the attorney
21 general earlier in the week.

22 MR. RAPOPORT: I can't authenticate the materials
23 that we sent three years ago, no, sir, but I did run off an
24 identical copy of what we ran off in 2013.

25 THE COURT: Well, let's settle that issue first.

1 MS. FRANKLIN: Your Honor, I do have a copy --

2 THE COURT: If they're not authentic, I don't know
3 why we're talking.

4 MS. FRANKLIN: Your Honor, I have a copy if Mr.
5 Rapoport would like to review them, including --

6 THE COURT: Hand it to him.

7 MR. RAPOPORT: Your Honor, I can't -- honestly,
8 it's 800 pages of documents. I can't go through page by
9 page, line for line, but I did -- we did produce an
10 identical copy of these materials --

11 THE COURT: Where is that? Where is that?

12 MR. RAPOPORT: I'll get it.

13 THE COURT: Yeah, you get yours. I'll
14 authenticate it.

15 All right. These are copies of what you sent?

16 MR. RAPOPORT: This is the same response that we
17 sent.

18 THE COURT: Okay.

19 MR. RAPOPORT: That I know, those are the same
20 materials that they requested.

21 THE COURT: Okay.

22 MR. RAPOPORT: I'm not sure -- I can't go line for
23 line, word for --

24 THE COURT: I'll do that.

25 MR. RAPOPORT: Thank you.

1 THE COURT: That's why they pay us these real big
2 bucks.

3 MR. RAPOPORT: Yes, sir.

4 THE COURT: All right. Now, let's move on.
5 Assuming that they are authentic, what's your objection to
6 the applicant using these documents for whatever purpose
7 they want to use them?

8 MR. RAPOPORT: Well, the first reason is, all of
9 these materials, the majority of the materials were not
10 prepared by the commission. They were prepared by
11 individuals who provide materials in cases for our
12 particular training. They've given us permission to put
13 them into training materials that we give to our
14 participants.

15 THE COURT: Okay.

16 MR. RAPOPORT: I would argue that these
17 are intellectual property, that we -- we have no control
18 over who has permission to get these materials; therefore,
19 if we disseminate them, I think -- we do not have permission
20 from these authors to disseminate them. I think FOIA would
21 not apply in that situation. I think it should be prevented
22 from being disseminated out into the public amongst the
23 defense attorneys or anybody else who wants to read them.

24 Secondly, my understanding is this trial occurred
25 in 2009, and I don't see any relevance to materials that we

1 -- that we produced for our trainings that occurred after
2 2009. The majority of those trainings that are in the -- in
3 the materials that Your Honor has involve trainings after
4 2009. Not being too familiar with the issue that's here on
5 PCR, whether or not the particular prosecutors in this case
6 attended trainings post-trial, I don't think that will
7 reflect on how they conducted themselves at the time of the
8 trial.

9 Thirdly, I think the only trainings -- if
10 trainings are admitted for discussion during the PCR
11 proceedings and considered by the Court, I think the only
12 trainings that should be considered are the trainings that
13 the prosecutors attended, not every training that we offered
14 on jury selection -- on the jury selection process. A lot
15 of our training, as Your Honor will see, is through our TSRP
16 program, which is the Traffic Safety Resource Prosecutor
17 Program under the federal grant. Most of those trainings
18 are attended by law enforcement, very few attorneys attend.
19 Again, I think the only ones that might be arguably relevant
20 would be ones that the three prosecutors themselves
21 attended.

22 And, finally Your Honor, if you decide to admit
23 these materials in this proceeding, we would ask -- and I
24 think it's within your right under Rule 45, I believe, to
25 seal these materials or issue a protective order so they

1 cannot go beyond these proceedings and not go to other
2 attorneys.

3 And I did prepare -- we had three attorneys in our
4 office -- we have four attorneys, we had three attorneys
5 working on this and an administrative assistant. And I did
6 go through the training materials and we did a general
7 search on our computer and we plugged in the names of the
8 prosecutors in this case. I do have a list of the trainings
9 that they attended. Most of them -- most of them are
10 post-2009.

11 The only ones -- the only ones that I could
12 find -- and we actually went -- our driver on our computer
13 only goes back to 2003, so I -- as you know, I've been at a
14 training prosecutor boot camp this week before I was called
15 here to testify. I had someone go through our boxes in our
16 file room to look at other training materials that we did
17 not have on our computer, and I could only find three
18 trainings prior to 2009 that involved jury selection issues,
19 Batson issues that one or more of these prosecutors attended
20 or might have attended. Two of them, we have a registration
21 form that they registered to attend. I have to assume they
22 were there.

23 THE COURT: Have you got dates on those?

24 MR. RAPOPORT: I don't have dates of the training.
25 We have a -- we had solicitor's conference, there's an

1 annual conference that we do. We had one from 1991 that
2 involved jury selection Batson issues. And from 1997, jury
3 selection Batson issues from the 1997 training. Solicitor
4 Wilson and Bruce Durant were registered. We couldn't find
5 the sign-in sheets so far back, but, again, I would have to
6 assume -- I guess we could assume, I don't know if they
7 attended. I guess counsel could ask them. 2004, we had a
8 jury selection topic. Again, Bruce Durant and Solicitor
9 Wilson were registered. Again, I don't have the sign-in
10 sheet. 1991, the training, I don't know if either one of
11 them were actually at the solicitor's office at the time.
12 That's a long time ago.

13 THE COURT: So we have two?

14 MR. RAPOPORT: Excuse me, sir?

15 THE COURT: You have two?

16 MR. RAPOPORT: I have '91, a '97, and 2004.

17 THE COURT: But you only have two --

18 MR. RAPOPORT: Yes, sir. Yes, sir.

19 THE COURT: -- identified solicitors in this case?

20 MR. RAPOPORT: Yes. Rutledge Durant, we do not
21 have him at any pre-2009 trainings. And again, we go
22 through our computers and we punch in the names and
23 sometimes people do sign up and if they don't sign the
24 sign-up sheet, they don't get their CLE credit. We don't
25 report them to the commission on CLE. And that's it. All

1 the other ones --

2 THE COURT: I know from personal experience that
3 everybody that attends these solicitor conferences attends
4 every CLE that you offer.

5 MR. RAPOPORT: Exactly. And granted, at the
6 conference, usually, when the solicitors are there, they
7 have their own meetings that they attend with the
8 legislators and judges and they also have their own meetings
9 that they conduct among themselves, so a lot of them do not
10 attend the trainings.

11 THE COURT: I understand. Like I say, I've been
12 there.

13 MR. RAPOPORT: Well, they have a lot of business
14 they have to attend to at these meetings. Again, the only
15 things that should be considered if this Court is going to
16 admit any of our trainings would be pre-2009.

17 THE COURT: Okay. I think I understand your
18 position.

19 MR. RAPOPORT: Thank you.

20 THE COURT: What's the applicant's position?

21 MS. FRANKLIN: Yes, Your Honor. I do have a
22 number of objections to that. First of all, the prosecution
23 coordination commission is not a party to this litigation.
24 Their arguments regarding relevancy are, frankly, irrelevant
25 to this discussion. They lack standing to have a position

1 as to relevancy.

2 THE COURT: Well, you might have given them
3 standing, but go ahead.

4 MS. FRANKLIN: Well, Your Honor, we -- we
5 requested these materials nearly three years ago pursuant to
6 FOIA. They produced this materials without objection and
7 they've never sought any restriction up until this point.

8 THE COURT: All right.

9 MS. FRANKLIN: I mean, this is the day that we're
10 starting our hearing and for the first time, we're hearing
11 that they have these objections. Our first argument is they
12 have waived -- their argument has been waived by their
13 inaction.

14 But additionally, I mean, under Batson, under
15 Miller-El and Snyder in Louisiana, all circumstances bearing
16 on the issue of racial discrimination must be consulted.
17 That's the language in Batson. These are training materials
18 that have been provided to solicitors throughout the state
19 since, at least, 2001. These materials are clearly relevant
20 when you look at the deposition testimony that we intend to
21 introduce into evidence of Scarlett Wilson, Bruce Durant and
22 Rutledge Durant. They testified that these materials are
23 kept in the Ninth Circuit Solicitor's Office on their hard
24 drive and for use by all of their solicitors.

25 They also testified that the prosecution

1 coordination commissions provides nearly all of the training
2 that their solicitors receive regarding these issues. They
3 do not spend money sending their solicitors to national
4 events. They do not send them out of state. They rely on
5 these prosecution coordination materials.

6 What you will see and what we're prepared to show
7 is that some of the materials contain information that
8 directly violate Batson. We think that this is relevant for
9 purposes of showing --

10 THE COURT: All right. Address your comments to
11 the 2009 issue.

12 MS. FRANKLIN: To the -- well, again, I would --

13 THE COURT: Pre and post.

14 MS. FRANKLIN: I'm sorry?

15 THE COURT: Pre and post.

16 MS. FRANKLIN: Pre and post? Well, I mean, well
17 --

18 THE COURT: I might agree with you pre-2009.

19 MS. FRANKLIN: And I understand that, but I would
20 say that under Batson, under Miller-El and under Snyder, all
21 circumstances -- there's not a, you know, prior to a
22 particular trial or after a particular trial. I mean, the
23 culture of the particular office is relevant for assessing
24 the Batson violation that we are alleging occurred in this
25 particular case.

1 THE COURT: Well --

2 MS. FRANKLIN: One thing that you will see is that
3 the material has not really changed, frankly, from 2009 to
4 present.

5 THE COURT: Well, that's true.

6 MS. FRANKLIN: But we think that we're entitled to
7 show all circumstances that bear on this issue.

8 THE COURT: I disagree with that. This is not --
9 this is not a forum for the global indictment of all
10 solicitors in the State of South Carolina and their training
11 for jury selection issues. That's not this case. And I'm
12 going to rule that way.

13 MS. FRANKLIN: Okay.. Does that mean, Your Honor,
14 just so I'm clear, that we -- that there's a 2009 cut off?

15 THE COURT: Unless -- I'm going to allow you to
16 proffer whatever you want to proffer post-2009. And I think
17 --

18 MS. FRANKLIN: Or pre-2009 -- oh, I'm sorry.

19 THE COURT: No, I think your absolutely right on,
20 at least, the two conferences where these solicitors
21 attended and presumably attended Batson jury selection CLE
22 programs, so I think those are relevant.

23 MS. FRANKLIN: Okay.

24 THE COURT: Go ahead.

25 MS. FRANKLIN: Well, those are our objections.

1 THE COURT: Okay. Go ahead. Put anything you
2 think you need to put on the record.

3 MS. FRANKLIN: Okay. No, I think -- respectfully,
4 you know, we take objection to that. We think it's all
5 relevant, but we will be prepared to proffer additional
6 materials.

7 THE COURT: I've been wrong before.

8 MS. FRANKLIN: Thank you, Your Honor.

9 THE COURT: Thank you.

10 Anything further, Mr. Rapoport?

11 MR. RAPOPORT: Your Honor, I did want to submit --
12 we went through this week and we -- it's kind of an outline
13 of all the materials that we provided.

14 THE COURT: Well, let me ask you, Mr. Rapoport,
15 while you're here, you handed up a stack of documents to the
16 Court. And it just so happens that the first document on
17 this group is jury selection and Batson issues presented by
18 Ted Lupton.

19 MR. RAPOPORT: Yes, sir.

20 THE COURT: Now, how do I identify if this is or
21 is not pre-2009?

22 MR. RAPOPORT: Here's our log here. I think this
23 might be helpful.

24 THE COURT: All right.

25 MR. RAPOPORT: And in addition, I did have in my

1 box the other training that I was referring to from 2001 and
2 2004. We do have them. Someone ran them off for me and I
3 picked them up this morning. I would like to submit these
4 as well.

5 THE COURT: These are for what years?

6 MR. RAPOPORT: These would be from 2001, I
7 believe, and 2000 -- no, excuse me, 1991 and 1997.

8 THE COURT: Okay.

9 MR. RAPOPORT: We found these in our boxes and
10 hard drive.

11 THE COURT: But you don't have any evidence that
12 either of these solicitors or any of the solicitors appeared
13 in 1991?

14 MR. RAPOPORT: No, sir, I'm not sure when they
15 were even admitted to the bar or if they were in the
16 solicitor's office at the time. And again, with the
17 solicitors, even if we provide these materials, there's no
18 indication that they one, attended; two, they would have
19 based their Batson issues --

20 THE COURT: Well, I understand.

21 MR. RAPOPORT: -- on the materials.

22 THE COURT: I don't think that can be adequately
23 proved anyway.

24 MR. RAPOPORT: But I did want to supply the log,
25 Your Honor.

1 THE COURT: All right. Thank you.

2 And you have this, also?

3 MS. FRANKLIN: Well, we just received this, Your
4 Honor. Prior to this, this is what we had been provided by
5 the prosecution coordination commission. I will hand this
6 up (indicating). I've never seen this document that
7 Mr. Rapoport has just provided to the Court, so I cannot --

8 THE COURT: What is this?

9 MS. FRANKLIN: That is what the prosecution
10 commission provided me at the time that they disclosed these
11 documents back in May of 2013.

12 THE COURT: All right.

13 Anything further from the State?

14 MS. BROWN: Your Honor, I have no position on the
15 authentication. For me, it was a relevancy issue. And I do
16 agree that I think it should be pre-2009 and only those
17 materials that could be connected to any of the three
18 prosecutors in this case.

19 THE COURT: All right. Thank you.

20 MS. BROWN: Thank you, Your Honor.

21 THE COURT: Anything further, Ms. Franklin?

22 MS. FRANKLIN: No, Your Honor.

23 THE COURT: All right. Now, are we ready to
24 proceed?

25 MS. FRANKLIN: No, Your Honor. We're waiting for

1 -- I think it may be here, if you can give us a few minutes
2 to --

3 THE COURT: Set up the technology.

4 MS. FRANKLIN: Set up the technology and we will
5 be prepared to go forward.

6 (Whereupon, a short recess was held.)

7 MS. BROWN: Your Honor, I will have an objection
8 to put on the record before we start the testimony. I just
9 wanted to make you aware of that.

10 THE COURT: Okay.

11 (Whereupon, a short recess was held.)

12 THE COURT: Let's go back to Mr. Rapoport for just
13 a minute.

14 Mr. Rapoport, I will issue a protective order
15 regarding whatever documents come up during the course of
16 this proceeding. I don't know who's going to draft that,
17 but it should be drafted and circulated.

18 MR. RAPOPORT: We'll do that, Your Honor.

19 THE COURT: Okay. Good.

20 MR. RAPOPORT: Thank you, sir.

21 THE COURT: Thank you.

22 All right. Is the applicant ready to proceed?

23 MS. FRANKLIN: Yes, Your Honor.

24 THE COURT: All right.

25 MS. FRANKLIN: Your Honor, I would like to start

1 off with just some opening remarks to give the Court an idea
2 of just a roadmap of what we are intending to do today in
3 this part of the presentation.

4 We're here today and are prepared to submit
5 evidence showing that the Charleston County Solicitor,
6 Scarlett Wilson, impermissibly used race during capital jury
7 selection. We have alleged two distinct claims in our
8 application for post-conviction relief.

9 Number one that trial counsel rendered ineffective
10 assistance of counsel by failing to insist that the trial
11 court undertake comparative juror analysis. Had he done so,
12 the trial court judge would have realized that Ms. Wilson
13 struck all five African-American jurors and they were
14 similarly situated white jurors who were not struck.

15 There are other issues that we are prepared to
16 highlight when we brief this issue, including the
17 solicitor's use of targeted questioning for the five
18 African-American potential jurors that she struck, and the
19 solicitor misstating the record when offering her reasons
20 for exercising the strikes. It also bears mentioning with
21 respect to the juror comparative analysis that trial counsel
22 did not have access to the jury criminal rap sheets, nor did
23 the trial court judge.

24 So for purposes of this litigation, just to recap,
25 Your Honor issued a subpoena on our behalf to the FBI so we

1 could obtain the criminal histories of the jurors. The
2 solicitor's office informed us that they have destroyed
3 those records. But also during the course of this
4 litigation, Your Honor ordered the solicitor's office to
5 disclose a number of documents, which included a spreadsheet
6 that appears to include what Solicitor Wilson believed the
7 criminal histories of her jurors were. When we say believe,
8 it's not completely clear what the source of the information
9 on the spreadsheet is. But Ms. Wilson did testify during
10 her deposition to the existence of such a spreadsheet, so
11 that is the basis for our inference. That will be one of
12 the documents that we'd introduce.

13 So in support of this claim, which we will offer
14 by way of briefing, we would like to move into evidence the
15 response to the FBI subpoena and the solicitor -- the
16 solicitor's office two discovery productions, and then also
17 the original depositions of Scarlett Wilson, Bruce Durant
18 and Rutledge Durant. So we've got those and we can mark
19 those and maybe review those with the attorney general for
20 purposes of moving that into the record.

21 We are also alleging that the solicitor engaged in
22 misconduct by committing a Batson violation. And we're
23 prepared to offer into evidence several pieces of evidence
24 that is probative of that claim. First, we commissioned the
25 study by two Michigan State law professors, Dr. Barbara

1 O'Brien, who's here in the courtroom, Your Honor, and
2 Professor Catherine Grosso, to analyze the jury strike
3 patterns in both Williams specific case, but also to assess
4 the entire universe of Ms. Wilson's trials from her time as
5 solicitor in the Ninth Circuit to present and in which she
6 actually made the jury strikes.

7 Dr. O'Brien is here. She will testify to the
8 study, its design, analysis and the conclusions that can be
9 drawn from it. Just as a preview, though, the results of
10 their study illustrates striking disparities between the
11 rate of which the solicitor struck African-Americans
12 compared to the strike rate of Caucasians. The studies are
13 the type approved of by Justice Souter of the United States
14 Supreme Court when he authored the opinion in Miller-El V.
15 Dretke. Justice Kennedy had authored the first Miller-El,
16 which made it the certificate of appealability on this
17 particular issue. This study illustrates vividly that there
18 was a Batson violation that occurred in William Dickerson's
19 case and that the solicitor has a long history of striking
20 African-Americans from her jurors.

21 We'll be moving the study into evidence along with
22 the underlying raw data used in it, which includes
23 transcripts of the various four years and the jury list,
24 which this Court assisted us in securing from the Charleston
25 County attorney's office. We're also offering an affidavit

1 from the Charleston County Clerk of Court's office attesting
2 that jury lists have been destroyed by that office. So we
3 have as complete a copy of these lists as exist.

4 We also plan to move into evidence materials
5 provided by the South Carolina Prosecution Coordination
6 Commission in response to a FOIA we served on them in May of
7 2013. We asked for the training materials they provide to
8 solicitors throughout the state regarding jury selection and
9 Batson. Again, these training materials are relevant to our
10 claim of a Batson violation because it illustrates a
11 fundamental failure to adequately train prosecutors how not
12 to discriminate against qualified African-American jurors.
13 Again, the opinion in Miller-El V. Dretke highlights the
14 relevance and the importance of this kind of evidence.

15 Solicitor Wilson testified at her deposition that
16 her attorneys attend prosecution coordination commission
17 trainings and that the desk book is available on the shared
18 hard drive in her office. Bruce Durant and Rutledge Durant
19 also testified at their depositions --

20 MS. BROWN: Your Honor, I'm very hesitant to
21 object, but I'm going to have to object because she's just
22 talking about things that have not been admitted into
23 evidence. Now, as far as what she might like to show,
24 that's different. But I did want to object and put that on
25 the record.

1 THE COURT: Okay. I think it's just an opening
2 statement. It's not evidence.

3 Go ahead.

4 MS. FRANKLIN: Not at this point. Bruce Durant --

5 THE COURT: For the record, I overrule that
6 objection.

7 MS. FRANKLIN: Thank you, Your Honor.

8 Bruce Durant and Rutledge Durant also testified at
9 their depositions as to their access to these same
10 materials. These materials evidence a significant race and
11 gender consciousness and we will outline for Your Honor in
12 our briefing. For example, the desk book now contains
13 Appendix C, which contains a list of 12 race neutral reasons
14 for excluding a juror that a solicitor can give a court in
15 order to avoid being found to have violated Batson.

16 Also, since 2001, training materials provided by
17 the prosecution coordination commission teach that -- and
18 this is straight from their materials, when evaluating
19 perspective jurors, one must keep in mind that Batson limits
20 striking perspective jurors based on race or gender.
21 Therefore, race or gender would never be a proper reason to
22 strike a juror. Race or gender may be one consideration for
23 wishing to strike; however, to prevent a Batson motion,
24 another valid reason must be evident.

25 The training materials also teach solicitors how

1 to find bases for removing jurors, which, frankly, suggest
2 they treat jurors like criminal suspects. And this, again,
3 is part of the materials. Visual clues provide helpful
4 information. What is the juror wearing? Is he underdressed
5 for a court of law? Perhaps, indicating a lack of respect
6 for the court. Is he overdressed for the occasion? Watch
7 for slogans on T-shirts, hats, et.cetera. An attorney must
8 carefully observe a perspective juror's body language.
9 Certain visual clues may indicate anxiety or deception, such
10 as ringing hands, shifting from side the side and repetitive
11 movements. Rigid body posture, folded arms and crossed legs
12 may suggest a rigid, determined personality. A juror's eyes
13 can tell you much about him. Little eye contact and lots of
14 blinking can indicate deception or hostility. Facial
15 expressions, such as frowns, sceptical looks and detached or
16 fixed smiles are clues for perspective jurors' attitude.
17 Verbal clues also reveal information. Does he sound
18 intelligent, sarcastic? Does he choose words that
19 distinguish and distance himself from certain ethnic or
20 racial groups?
21 What is lacking in any of these materials is an
22 affirmation of a solicitor's Constitutional duty to ensure
23 that they do not discriminate against potential jurors on
24 the basis of race and gender. So we'll also be putting
25 these training materials into evidence.

1 There is more. And we intend to put in additional
2 evidence contained in materials that indicate a disturbing
3 race and gender consciousness that we believe contributes to
4 solicitors improperly striking qualified African-American
5 jurors from juries when those jurors have a right to serve.

6 So in conclusion, as this Court is aware, during
7 the pendency of these proceedings, the United States Supreme
8 Court granted certiorari and heard oral argument in the case
9 of Foster V. Chapman, a case out of Georgia that involves a
10 prosecutor's improper removal of African-American jurors in
11 violation of Batson. This is the first Batson case out of
12 the Supreme Court since Snyder V. Louisiana in 2008. I
13 think it's reasonable to believe that the Court will be
14 providing some additional guidance on the issue at that
15 time. And in light of that, we would ask the Court to, at
16 least, keep this record open until the end of this Supreme
17 Court term, which will be over at the end of June of 2016,
18 in case either party needs to file any additional pleadings
19 or, potentially, take additional evidence in light of that
20 opinion.

21 So aside from that, we intend to fully brief our
22 two Batson claims for pointed references to materials that
23 are being moved into the record today. Batson claims are a
24 bit different, I think, from other claim in that the facts
25 will simply speak for themselves. We're prepared to show,

1 based on the documentary evidence we have amassed and that
2 was available to trial counsel at the time of William
3 Dickerson's trial, that the solicitor improperly struck
4 qualified African-American potential jurors in violation of
5 William Dickerson's and also the excluded jurors' right to
6 due process. We believe we will be entitled to prevail on
7 both of our claims. And in support of our claims, we would
8 like to offer now the testimony of Dr. Barbara O'Brien.

9 THE COURT: All right. Call your witness.

10 I'm sorry, hold on just a minute. Didn't you say
11 you had an objection to something?

12 MS. BROWN: Yes, we have an objection.

13 Your Honor, the report that's been referenced
14 today is a March 8th, 2016, report that we did receive on
15 March 8th and we have been going through it --

16 THE COURT: Wait a minute. What are you talking
17 about?

18 MS. BROWN: This is the report that will be
19 described in a few minutes with this next witness --

20 THE COURT: Oh, okay.

21 MS. BROWN: -- by Professor O'Brien.

22 THE COURT: Okay.

23 MS. BROWN: Page 7 of the report contains -- well,
24 we object to the testimony and the report coming in for this
25 basic reason, Your Honor. As you heard in the allegations

1 supplied this morning, the report will summarize an opinion
2 that race was a significant factor in prosecutorial strikes.
3 Statistics are not proved with intent. That's not something
4 that can be proven by raw numbers. It's an improper
5 conclusion to make. It's -- our court has found it's
6 especially improper when there is an exercise of, quote,
7 various intangible factors entering into prosecutorial
8 decision. And that's Thompson V. Aiken, it's a 1984 case
9 from our State Supreme Court. And I do have a copy of it,
10 if I can hand that up to the Court as well?

11 THE COURT: Yes, ma'am, you may.

12 MS. FRANKLIN: What was it?

13 MS. BROWN: It's Thompson V. Aiken.

14 May I approach, Your Honor?

15 THE COURT: Yes, ma'am, certainly.

16 Go ahead.

17 MS. BROWN: In Thompson V. Aiken, our Supreme
18 Court looked at the use of just gross figures and had some
19 very strong language, that it's time consuming, they
20 shouldn't be heard or accepted in post-conviction relief.
21 In fact, in that case, the Court said the petitioner has
22 relied upon gross statistics and probabilities. The
23 petitioner has elected not to consider various intangible
24 factors entering into prosecutorial decisions.

25 The Court goes on, Our role as appellate court is

1 not to base rulings on such probabilities -- or
2 possibilities, excuse me. Far less are we entitled to
3 intrude upon the operations of executive officers when we
4 have no more than general data compiled for academic
5 purposes. We recommend that the bench and bar focus
6 attention upon real and substantial issues in future capital
7 cases. Now, that was selection of cases for capital
8 proceedings, but the gross numbers are the same. It's use
9 of statistics, that's exactly what it is.

10 Now, I do have a Batson case that goes to this and
11 it's an unpublished Fourth Circuit case that just recently
12 came out, it's Juniper V. Zook. And in footnote 10, the
13 Court goes on to say after discussing Batson a bit that
14 Juniper contends that the statistics that the prosecution
15 struck black venire members at nearly three times the rate
16 of white venire members wouldn't get him anywhere.
17 Essentially, even if the Court accepted Juniper's
18 statistical arguments, they still only provide evidence of a
19 prima facie case at the first step, not purposeful
20 discrimination at the third step.

21 Your Honor, we don't have to show prima facie case
22 here, either side. We don't have to do that because we
23 already have a Batson motion. Batson motion was made in
24 2009 before Judge Dennis. Judge Dennis heard it and Judge
25 Dennis denied it. The solicitor, importantly, has already

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 put all of her reasons for the strikes on the record. Those
2 can be challenged and considered within this action as part
3 of the claim of ineffective assistance of counsel.

4 Your Honor, as we see here, because it's a claim
5 of ineffective assistance of counsel, Your Honor has heard
6 this argument several times now from several sources. It's
7 going to be restricted to pre-May 2009 materials. The
8 references in the report that will be offered -- or is being
9 offered, Your Honor, has, at least, three cases that
10 occurred after the 2009 trial, Broughton, September 2009,
11 Simmons, 2010, Dellison, 2013. To be relevant to the
12 ineffective assistance counsel claim, the only claim that
13 this Court is allowed, those would have to be extracted, so
14 the numbers won't even be any good at this point. And
15 that's Maryland vs. Kawecki, Harrington vs. Richter, Drayton
16 V. Evett. They are restricted to pre-2009.

17 Our objection is to the report and testimony based
18 on this. The testimony, if received at all, should be
19 limited to the correct time frame, pre-2009. That would be
20 our objection to the report and to the testimony today, Your
21 Honor.

22 THE COURT: All right. Thank you.

23 MS. FRANKLIN: Well, in response to that, first of
24 all, we will be offering testimony as to the entire
25 universe, but we're also prepared to address Ms. Brown's

BARBARA O'BRIAN DIRECT BY MS. FRANKLIN

1 specific concern that everything that we present be prior to
2 2009, we're prepared to do that as well.

3 THE COURT: All right. I'm going to overrule the
4 objection at this point. A lot of these issues are subject
5 to cross-examination and the issue of relevance to the
6 Court, so I will hear the testimony.

7 MS. FRANKLIN: Okay. Thank you, Your Honor.

8 In that case, the applicant would like to call Dr.
9 Barbara O'Brien to the stand.

10 THEREUPON,

11 BARBARA O'BRIEN,

12 after having been duly sworn, testified as follows:

13 THE COURT: Have a seat in the witness stand and
14 state your full name for the record.

15 MS. FRANKLIN: Yes, Your Honor, may I approach?

16 THE COURT: Sure.

17 Do you have a CV?

18 MS. BROWN: No, sir, we do not.

19 THE COURT: All right.

20 MS. BROWN: We were not advised that Ms -- excuse
21 me, Professor O'Brien would be testifying today.

22 DIRECT EXAMINATION

23 BY MS. FRANKLIN:

24 Q. Good morning.

25 A. Good morning.

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 Q. Now, let's just kind of start off by going through some
2 basic biographical information. If you would, please
3 state your name for the record.

4 A. Barbara O'Brien.

5 Q. And can you tell us how you are employed?

6 A. Yes, I am an associate professor of law and associate
7 dean of research at Michigan State University College
8 of Law.

9 Q. And I would like to start off about -- talking about
10 your background and education. Can you tell us where
11 you went to college?

12 A. Yes, I went to Bowman College, where I graduated in
13 1993 with a degree in economics. Then after that, I
14 went to University Of Colorado School of Law and I
15 graduated in 1996.

16 Q. And so you have legal training, is this correct?

17 A. Yes.

18 Q. And did you do your graduate studies immediately after
19 law school?

20 A. No, I worked as a lawyer for a while.

21 Q. And where did you work?

22 A. I first worked at the office of the state appellate
23 defender in Illinois. I worked there for about two
24 years. And I then clerked in the federal district
25 court for the central district of Illinois for three

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 years.

2 Q. And did you also work at a particular law school?

3 A. Yes. So after I ended my clerkship, for one year after
4 I moved to Michigan, I worked as an adjunct professor
5 at Cooley Law School, and also, I did some contract
6 work for the appellate defender's office that I had
7 previously worked.

8 Q. Okay. And then after you finished your legal
9 education, what did you do after that?

10 A. So in 2002, I began the graduate program at the
11 University of Michigan in social psychology and
12 received my Ph.D in 2007.

13 Q. Can you tell us what social psychology is?

14 A. Yes, social psychology is the scientific -- it's the
15 application of scientific methods to study social
16 phenomenon, so things like social perception, group
17 dynamics, judgment, decision-making, cognitive, things
18 like that.

19 Q. And what did you do after you received your Doctorate?

20 A. That's when I began working as a professor at Michigan
21 State.

22 Q. Just to kind of get into some of your professional
23 expertise, first of all, what is empirical research?

24 A. The empirical research is a broad term that, basically,
25 just means using actual observations, data, something

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 you can quantify and measure to answer a question. So
2 it's used across all sorts of fields.

3 Q. And could you describe for the Court what expertise and
4 training you've had in the area of methods? Can you
5 also tell the Court what that is?

6 A. Methods refers to sort of how you go about answering
7 the questions that you have, so there's different kinds
8 of studies you can use. You can do an experiment. You
9 can look at existing data to look at relationships.

10 The training I've had in that is I took a class
11 specifically devoted to research methods in graduate
12 school, but it is really something that came up in all
13 of the classes. Every time we would read an article
14 and evaluate an article, talk about whether the study
15 was any good, what inferences we can draw from it, you
16 draw and talk about methods.

17 Q. Okay. And what about statistics and how is that
18 different from methods and what is your training and
19 expertise in that particular area?

20 A. So statistics and methods are quite related, but
21 statistics refers more to the tools that you use. You
22 have your study design. You get your data and try to
23 figure out how to -- how to make sense of the data, how
24 to draw inferences from it. There's different
25 statistical tools you can use to answer those

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 questions.

2 I took a year-long graduate school class in
3 statistics when I was in my Ph.D program, but I also
4 took a number of intensive summer classes at University
5 of Michigan on different more advanced topics.

6 Q. Can you talk a little bit about that program that you
7 attended at University of Michigan, the summer program?

8 A. Yes, that was at -- that's a program that they run.
9 It's called ICPSR. I can't quite remember what all of
10 those letters stand for. But it's -- there are about
11 four-week classes, sometimes two-week classes that
12 people come from different universities. Faculty come
13 from different universities, sometime the teacher has
14 to take a class to learn how to do -- to do new methods
15 or do statistical methods, I should say.

16 Q. Okay. How many times did you attend that or how long
17 is that program?

18 A. I think I did that for three summers. I think I took
19 -- I think I took four classes, four of those classes.

20 Q. Okay. Have you personally conducted any empirical
21 legal studies?

22 A. Yes, I have.

23 Q. And could you please tell the Court about those
24 studies?

25 A. Sure. I'm sorry, could I have some water?

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 Q. Yes.

2 A. I'm sorry. So I've done a number of different studies.

3 So just to give you some examples, I've done some
4 experimental work looking at decision-making in the
5 legal process prosecutorial charging or the experiments
6 in graduate school looking at various legal
7 decision-making processes. I've also done some studies
8 looking at the rate of false conviction among people
9 sentenced to death, so I've done some empirical
10 research looking at false convictions. I've also done
11 a jury selection study in the State of North Carolina
12 looking at racial -- racial disparities in jury
13 selection in capital cases in the State of North
14 Carolina.

15 Q. And was that in connection with the racial justice act
16 litigation?

17 A. Yes, it was.

18 Q. And can you give me the time frame during which that
19 work occurred?

20 A. I believe the act was passed in summer of 2009, so --
21 this is a study that I conducted with my colleague,
22 Professor Grosso. We worked on that study for the
23 entire year of 2009. It was -- the affidavits in that
24 case were filed the following summer. And then we did
25 some followup research and I believe that the hearings

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 were held in 2012. I think maybe one was 2011, there
2 were two.

3 Q. Okay. And did you participate in both of those
4 hearings?

5 A. Yes, I testified as an expert.

6 Q. Okay. And have any of these empirical legal studies
7 been published?

8 A. Yes.

9 Q. Has anything relative to the racial justice act
10 litigation been published?

11 A. Yes. Well, the jury selection portion of it, we
12 published our findings in the ILR Review.

13 Q. Okay. And have you prepared a curriculum vitae for the
14 Court?

15 A. Yes, I have.

16 Q. And if I may?

17 (WHEREUPON, Plaintiff's Exhibit No. 1
18 and 2 was marked for identification
19 only.)

20 MS. FRANKLIN: Your Honor, may I approach the
21 witness?

22 THE COURT: Yes, ma'am.

23 BY MS. FRANKLIN:

24 Q. I'm going to hand you what's marked as Plaintiff's
25 Exhibit 1 for identification and Plaintiff's Exhibit 2

BARBA O'BRIAN DIRECT BY MS. FRANKLIN

1 for identification. Can you tell me if you recognize
2 these documents?

3 A. Yes.

4 Q. And what are they?

5 A. Plaintiff's Exhibit 1 is a copy of my most recent CV
6 and Plaintiff's Exhibit 2 is the report that I prepared
7 with Catherine Grosso on our study of the jury
8 selection.

9 Q. And would reviewing your CV help you identify your
10 publications that have been published?

11 A. Yes.

12 Q. Would you mind looking over that document and informing
13 the Court about what you have published in these areas?

14 A. When you say these areas, do you mean in empirical
15 legals that we've done?

16 Q. Yes, empirical legal studies generally.

17 A. Okay. I think most of the article here involve some
18 sort of empirical study. There's a few that were more
19 essay types. So, for instance, in the second line
20 down, the second publication down is a paper that I
21 published with some colleague -- a colleague at
22 University of Michigan Law School and biostatistician
23 using survival analysis to estimate the rate of false
24 convictions among defendants who were sentenced to
25 death. And that was published in the Proceedings of

BARBA O'BRIAN VOIR DIER BY MS. BROWN

1 the National Academy of Science.

2 I've also published, you can see about halfway
3 down, the paper with Catherine Grosso reporting the
4 findings from our jury selection study in North
5 Carolina in the ILR Review. And there are also some
6 articles that I published based on some experimental
7 work that I did as a graduate student looking at
8 decision-making in criminal investigations.

9 Q. Okay. So when you're doing some of your studies, you
10 draw on both your legal training and your social
11 psychology training? Are you drawing on all of your
12 experiences?

13 A. Yes.

14 Q. Could you also tell the Court about your receipt of the
15 National Science Foundation grant?

16 A. Yes, with Catherine Grosso, I have received a grant for
17 just a little under \$300,000 from the National Science
18 Foundation to examine information seeking a jury
19 selection using the materials that we have on jury
20 selection from North Carolina.

21 MS. FRANKLIN: And Your Honor, at this point, we
22 would tender Dr. O'Brien as an expert in legal science
23 research and empirical legal studies.

24 THE COURT: Any voir dire or objection?

25 MS. BROWN: Just a few questions on voir dire,

BARBA O'BRIAN VOIR DIER BY MS. BROWN

1 Your Honor.

2 THE COURT: Go ahead.

3 MS. BROWN: Thank you, Your Honor.

4 VOIR DIRE

5 BY MS. BROWN:

6 Q. Professor, I was trying to make a few notes. And as I
7 understand it, you took one class in research methods,
8 but you don't have a degree or anything like that?
9 It's one class during -- what was that in, in trying to
10 get the AB or the Ph.D?

11 A. So the research methods class is just one of the
12 classes you take as part of your Ph.D program.

13 Q. So that would have been the social psychology program?

14 A. Yes.

15 Q. And you mentioned statistics design, I believe, the
16 study design?

17 A. (The witness nodded head.)

18 Q. And you had a year-long graduate class for that, was
19 that again under social psychology?

20 A. That was taught across the whole psychology department,
21 so all of the psychology grad students took it.

22 Q. Okay. And actually working with the compilation of
23 statistics, is there a specialty in that?

24 A. Yes, there are people who are -- there are people who
25 have Ph.Ds in statistics and they are the ones who

BARBA O'BRIAN VOIR DIER BY MS. BROWN

1 develop the most cutting edge work and they can do the
2 most complicated kinds of statistical methods.

3 Q. And do you consult with statistical experts for lack of
4 a better term when you do these investigations?

5 A. Sure. It really depends on the nature of the question
6 I'm asking. There are -- so the kinds of analysis I
7 did here were very basic statistics. They were the
8 kinds of things I would have learned in undergrad stats
9 class. But there have been many occasions when I have
10 seen -- I know enough to know when I see something that
11 I'm -- you know, maybe I need to talk to an expert so I
12 have in other situations.

13 For example, the paper that I published in the
14 Proceedings of the National Academy of Science, we
15 brought in two epidemiologists to help us with the
16 statistical methods and they were biostatisticians. So
17 I often draw on the expertise of people with great --
18 more expertise in statistics to do more complicated
19 things.

20 Q. Okay. Are you qualified to crunch the numbers?

21 A. It really depends on the type of number crunching
22 you're talking about. If it's a simple chi square or a
23 parrot Sample T test like I'm presenting here,
24 absolutely. If it's a simple regression, absolutely.

25 Q. Did you crunch the numbers here that we're talking

BARBA O'BRIAN VOIR DIER BY MS. BROWN

1 about?

2 A. I did.

3 Q. Okay. And you said something about experimental work.

4 What is experimental work and how does that go into
5 your statistical background?

6 A. So experimental work, that's a different kind of method
7 that you would use to answer a question. So within
8 experiment, you would have two groups, for instance,
9 and you would, you know, give one -- try to make
10 them -- everything exactly the same in every way except
11 for one thing. So if you were testing a drug, you want
12 to see if it worked, you can give one group placebo and
13 one group the medicine you're testing, then see if
14 there's any kind of a difference.

15 Q. Okay. So the experimental work doesn't go to
16 statistics?

17 A. Oh, no, you use statistics. Statistics are what you
18 use when you get the data and you say okay, these two
19 groups look different, but is it just noise or is there
20 something real about the differences that we're seeing.

21 Q. Okay. And you said you were qualified to give
22 testimony in North Carolina?

23 A. I was, yes.

24 Q. And that was an action under racial justice act --

25 A. Yes.

BARBA O'BRIAN VOIR DIER BY MS. BROWN

1 Q. -- correct? And that litigation is still ongoing?

2 A. Yes.

3 Q. Okay. Let me ask you just a few more questions if
4 would you bear with me. On your CV that you handed up
5 that was provided this morning, under grant, it looks
6 to me like you have -- well, you've gotten a lot of
7 grants for a pretty significant amount of money, but it
8 appears to me that there are principle investigator
9 positions for the grant. Can you explain to me what a
10 principal investigator would be?

11 A. Sure. Let me just turn to the page of the grants.

12 Q. Absolutely.

13 A. So a principle investigator is just the term you use
14 when you have a grant. It's sort of like the
15 equivalent of the council or first offer on a paper.
16 Sometimes you could be -- you could be part of a grant,
17 but just be a consultant on the grant. This basically
18 just means that we were the ones who were awarded the
19 grant, so we're sort of the lead.

20 Q. Does that mean that you were retained to actually
21 crunch numbers?

22 A. We were retained to do the research, yes. That
23 involves -- at the end, it involves identifying the
24 research question, collecting the data, figuring out
25 the methodology to use, then, ultimately, get the data.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 And that's when you run your statistical test to sort
2 of make sense of the data that you do get.

3 MS. FRANKLIN: Thank you, Professor.

4 Your Honor, it sounds to me like there is a some
5 limited experience with statistics, so that -- whatever
6 questions I have would go to weight, so I have no objection
7 to qualification.

8 THE COURT: All right. Thank you very much.

9 You may proceed, Ms. Franklin.

10 MS. FRANKLIN: Your Honor, I ask that she be
11 deemed as an expert in social psychology and empirical legal
12 studies.

13 THE COURT: She is so qualified.

14 MS. FRANKLIN: And Your Honor, I'd also like to
15 move her CV and the reports into evidence.

16 THE COURT: Without objection.

17 (WHEREUPON, Plaintiff's Exhibit No. 1
18 and 2 were admitted into evidence.)

19 BY MS. FRANKLIN:

20 Q. Now, moving on to the study. Could you describe how
21 you became involved in this study?

22 A. Yes, my colleague, Catherine Grosso, and I were
23 contacted by you and your co-counsel about looking into
24 the jury selection -- the jury selection practices in
25 Charleston County under Solicitor Wilson.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 Q. And what research question did you seek to address?

2 A. Whether the prosecution was exercising its preemptory
3 strikes in a way that was disproportionately against
4 African-American venire members compared to other
5 venire members.

6 Q. And how do you evaluate different approaches to
7 answering this question?

8 A. So -- there are a couple of different ways. So one is
9 you look to prior research that's been done on it. So,
10 of course, we had previously done a study very similar
11 to this in North Carolina. And in designing that
12 study, we looked to a study that Professor David Baldus
13 had done in Philadelphia looking at the use of
14 preemptory strikes and that -- that's how we kind of
15 came up with our basic approach. And also what informs
16 how you design the study is what kind of material is
17 available to you, what kind of data do you have.

18 Q. Okay. And what cases did you -- what cases did you
19 include in this particular study and how did you decide
20 to include those particular cases?

21 A. Since the research question we were asking was whether
22 prosecutor -- or Solicitor Scarlett Wilson was
23 exercising preemptory strikes in a racially
24 inappropriate manner in the cases in which she was
25 lead prosecutor. We considered the relevant universe

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 to be those cases in which she was the lead prosecutor.

2 Q. And what data did you have about those cases?

3 A. We didn't have data for all of those cases that were --
4 that were identified as fitting that, but the data that
5 we did have that was adequate to answer these
6 questions, there were nine cases and 10 proceedings.

7 Q. And could you describe why there were nine cases and
8 still 10 proceedings?

9 A. Sure. In Beyaz case, there was a complete jury
10 selection and then a successful Batson motion, so jury
11 selection started from scratch. So that we treated as
12 two jury selections.

13 Q. So just to be clear, there had been one jury selection,
14 defense counsel had made a motion alleging that there
15 was, in fact, a Batson violation, she had improperly
16 excluded African-American jurors. And then the Court
17 agreed with that?

18 A. Yes.

19 Q. So then there was a second selection after that?

20 A. Yes, because it started all over again from scratch,
21 there were really two complete jury selections, so we
22 didn't want to throw out one jury selection. We
23 considered them both to be good candidates for
24 inclusion.

25 Q. Can you sort of describe -- I mean, I guess you're

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 looking for the exercise of discretion in these jury
2 selections. Can you talk a little bit more about that
3 and why we got two different, you know, proceedings and
4 one case?

5 A. So because the research question is whether the
6 prosecution was exercising its preemptory strikes in a
7 way that was rationally bias, we wanted to isolate the
8 question as much as possible to decision points. So to
9 look at each point at which the solicitors had a chance
10 to either present or strike a juror and made that
11 decision.

12 So in that case, in Beyaz case, for instance, you
13 have all of those decision points and then you have an
14 additional set of decision points. So they're all
15 relevant to showing how they're exercising this
16 discretion.

17 Q. Okay. And where did you obtain the data that you used?

18 A. I got it from you.

19 Q. Okay. And how did you prepare the data that we
20 collected for analysis?

21 A. So at this point, we have the basic raw materials, the
22 source of the information that we would need to answer
23 this question. We have it in the form of transcripts,
24 juror summons list, couple of cases, we had
25 questionnaires. I think maybe just one case we had

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 questionnaires. So then the next step is to put it
2 into a format that you can actually compare cross
3 cases.

4 And so we prepared a form that the -- our coders
5 could fill out. This is a data collection instrument,
6 or a DCI for short, which sets out all the questions
7 that we want them to answer by reviewing the material.

8 Q. And is that DCI part of the appendix in your study?

9 A. Yes, it is.

10 Q. Do you recall just which appendix number or letter it
11 is?

12 A. I think it would be near the beginning, probably --
13 Appendix C.

14 Q. Okay. So that is the data collection legislation as
15 part of the appendix in the study. And you said that
16 you had people code the material?

17 A. Yes.

18 Q. Code the information. Who were those folks?

19 A. We hired three attorneys.

20 Q. Okay. So they were attorneys? They were law school
21 graduates?

22 A. Yes.

23 Q. How did you ensure the reliability of that coding?

24 A. So there's a few steps that we took to ensure
25 reliability. The first really important step is simply

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 just really thorough training of the coders and
2 consistent supervision of the coders.

3 The other step which I consider to be the most
4 important is our double coding procedure. So in
5 each -- for each venire member that we coded -- and by
6 coding, I simply mean filling out the information into
7 the DCI. Two of our coders would code independently.
8 So they would code the same information, but they would
9 do it independent of each other.

10 And then we would check the two DCIs to make sure
11 they matched. And if there was any discrepancy, no
12 matter how slight, you know, reversing a letter in a
13 name or something like that, I would resolve it. I
14 would look at the materials and I would resolve the --
15 figure out if somebody just made a mistake or if it was
16 a judgment call, but I would resolve any difference,
17 any discrepancy between the coders. And then that
18 would become the data that would be then inputted into
19 our database.

20 Q. And is this fairly a typical method for doing this kind
21 of stuff? I mean, is this how information is resolved?

22 A. It's a bit of overkill in that most of the studies -- a
23 lot of studies I've been involved with, you wouldn't
24 double code everything. You might double code a sample
25 and just get a sense of how reliable they are with

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 some -- you know, knowing there's going to be a little
2 bit of error, but I felt that in this case because
3 there weren't that many jurors to code, I thought it
4 was important enough to get it right, that we would do
5 double coding for every single venire member.

6 Q. And regarding the actual analysis that y'all perform
7 now, could you describe to the Court what method you
8 used to analyze the data?

9 A. So the -- the -- this is a pretty simple analysis. And
10 so first, I just look at numbers. I just look at the
11 proportions. I -- part of the coding is figuring out
12 whether a person was strike eligible, meaning did the
13 party have a chance to strike that person. If somebody
14 is excused for cause, there's no strike decision to be
15 made, so that person shouldn't be in the study.

16 So really, the first step is just looking at some
17 very basic numbers, just some basic fractions. How
18 many African-American jurors were eligible to be struck
19 and how many were struck, and just look at that ratio.
20 How many white jurors were available to be struck and
21 how many were, in fact, struck. So it's really just a
22 simple fraction of percentage in the first step.

23 Q. I mean, was there any reason why you used this
24 particular method versus some other statistical?

25 A. Well, I did actually followup with some more because

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 you can just look and see is there a difference, but
2 that doesn't tell you everything you need to know. You
3 can see a difference, but how do you know that it's not
4 just a fluke? If you just pick any five jurors
5 compared to any other five jurors, how do you know the
6 difference you see in just 'due to the fact that you
7 happen to pick these five and compared them to these
8 five? So there's statistical tests that account for
9 that.

10 And there's really two ways that I look at it just
11 to sort of be careful. One is the chi square analysis.
12 And that's just pooling all of the jurors together
13 across all the 10 proceedings, all of the nine cases.
14 I think it was 271 who were strike eligible. And just
15 seeing how they fall in these four categories, white,
16 black, excused -- or excused or presented. And just
17 seeing whether or not they fall in those categories in
18 the way you'd expect if black and white had nothing to
19 do with being struck or excused.

20 And then the chi square statistic is something
21 that the statistical program gives me that tells me
22 whether or not statistic is significant, meaning is
23 this just due to chance or is there just too much noise
24 here and we can't tell.

25 Q. Okay. And this leads me to the next question. Can you

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 describe what a P value is?

2 A. P value is a -- it's basically a measure of just sort
3 of how sure you can be that this difference that you
4 see isn't just some fluke or just due to chance. So if
5 I would just go ask five random people who they were
6 voting for and I compared the people wearing red shirts
7 to blue shirts and I saw a difference. You say well,
8 it doesn't mean anything, you just asked these five
9 random people.

10 So the statistical -- the P value is a way of
11 evaluating whether or not this is real or we just -- we
12 don't know if it's real, it's probably just chance.

13 Q. And I -- in the report there, I think there are
14 different P values in different areas of the report.
15 Can you describe what -- or explain why that is so?

16 A. Yes. Well, it's important to note that a P value --
17 that the convention is P less than point 05, any less
18 than a five percent change you observed these
19 differences just due to chance. That's sort of the
20 standard scientific cut off.

21 Q. It's what percent?

22 A. Yes, P less than point 05 is sort of the magic number.
23 But you'll see differences in P values even below that
24 because P value is driven by not only the size of the
25 difference you're looking at, so the magnitude of the

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

- 1 effect, but also the size of the sample you're looking
2 at. If you have a huge sample you're looking at, even
3 a small difference, you say okay, this is a real
4 difference because we have a huge sample. If you have
5 a smaller sample, you could have the same size
6 difference and have a higher P value.
- 7 Q. Okay. And so you used both the P value and chi square
8 in both principles that you used when you conducted
9 this particular analysis?
- 10 A. Yes, so the chi square test gives you P value.
- 11 Q. Okay.
- 12 A. And there are -- and I use the statistical program that
13 calculates this for me and they give you different --
14 they will run different tests to sort of account for
15 different things because statisticians have -- some
16 will argue it should be done exactly this way or
17 exactly that way. So they give you all of that. If
18 you see all of them are well below statistical
19 significance, then you're good.
- 20 Q. And that is an indication that you're --
- 21 A. That you've identified a difference that is not just a
22 product of some random chance.
- 23 Q. Okay. And so I think you just answered the question,
24 but P value is not something that you just figure out
25 yourself, is that correct?.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 A. No, I let the computer do that.

2 Q. Right. And I want to sort of kind of focus a little
3 bit on the slides that we have. And these are just
4 tables that are contained in the report. And this --
5 can you sort of describe real quickly what is up here
6 on the screen at this point?

7 A. Yes, these are bar graphs that show the rate at which
8 black qualified venire members were struck compared to
9 the rate at which white qualified venire members were
10 struck in each of the 10 proceedings that we examined.

11 Q. Okay. So this is just -- so this is the entire
12 universe that we have?

13 A. Yes.

14 Q. Okay. So this -- I'm showing to the Court and others
15 right now what is contained in table one.

16 THE COURT: All right. Let's just -- I don't see
17 any bar graphs in the report.

18 MS. FRANKLIN: I'm sorry, Your Honor, I have one
19 bar graph that is not contained in the report that is just a
20 visual representation of what this is. You should have
21 table one in the report.

22 THE COURT: I do have table one.

23 MS. FRANKLIN: Okay. I will give you copy of that
24 first slide, but --

25 THE COURT: Do you want me to see this?

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 THE WITNESS: Yes.

2 THE COURT: Well, I can't see it, so either I'm
3 going to have to move or --

4 THE WITNESS: I don't know how to move.

5 THE COURT: I think I --

6 MS. FRANKLIN: I'm sorry, Your Honor.

7 THE COURT: That's all right.

8 BY MS. FRANKLIN:

9 Q. Okay. So I have table one up on the screen. And could
10 you please describe and explain --

11 THE COURT: Does she need to come down?

12 BY MS. FRANKLIN:

13 Q. Do you need to come down?

14 A. I do have exactly this table in the report if I could
15 rely on that?

16 Q. And it's the same table?

17 A. This is the same table.

18 Q. Yes.

19 A. I'm happy to come down if you think that would be
20 better.

21 Q. Would you like to come down?

22 A. I'll stay.

23 Q. Whatever is easiest for you. If you'd like come down,
24 otherwise, can you sort of tell what is contained in
25 table one?

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 A. Yes, this is a list of all of the defendants whose jury
2 selection proceedings we analyzed. And it gives the
3 percentage of black qualified venire members who were
4 struck and the percentage of white qualified venire
5 members who were struck as well as the raw numbers
6 those were based on in parentheses.

7 Q. So we look at number one, Michael Barnes. This is the
8 year 2005. I'm just asking so we can interpret this.
9 It says black qualified venire members 40 percent, and
10 then two over five. Can you just describe what that
11 means?

12 A. So two out of five, there are five qualified black
13 venire members. By qualified, I mean not excused for
14 case. And two were struck, so two divided by five is
15 point four.

16 Q. Okay. And then on the other side, we have white
17 qualified venire members and it says 15 percent and
18 then three over 20?

19 A. Yes. So 15 percent of the white qualified venire
20 members were struck, three out of 20.

21 Q. Okay. So there were 20 white potential jurors in the
22 venire and the solicitor struck three of them?

23 A. Yes.

24 THE COURT: Let me -- the solicitor, this is the
25 solicitor's office or are we talking about this specific

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 solicitor?

2 MS. FRANKLIN: We are speaking of this specific
3 solicitor..

4 THE COURT: All right. So Solicitor Wilson's
5 involved in all of these cases?

6 MS. FRANKLIN: These are all Solicitor Wilson's
7 trials.

8 THE COURT: Okay. And we don't know what the
9 trial is for, not that that's relevant?

10 MS. FRANKLIN: I do know what they're for, with
11 the exception --

12 THE COURT: Ask the expert.

13 BY MS. FRANKLIN:

14 Q. Do you know what all of the trials were for?

15 A. I don't know them off the top of my head, but I looked
16 at all of the transcripts at some point or another.

17 THE COURT: All right. Go ahead.

18 MS. FRANKLIN: But I will tell you, with the
19 exception of Brandon Simmons, which was either an attempted
20 murder or assault and battery with intent to kill, the
21 others are homicides. Number four, Collin Broughton, was
22 also a death penalty case.

23 BY MS. FRANKLIN:

24 Q. Can you tell us what a mean strike rate is?

25 A. So the mean strike rate is just simply taking an

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 average of all of those numbers in the first 10 rows of
2 -- so you would take an average of the strike rates for
3 those first 10 rows, that would be the average strike
4 rate for these 10 cases. And then you do the same for
5 the white qualified venire members. So you would
6 actually see -- the average of these strike rates can
7 be seen in table three, which isn't on the screen.

8 Q. So in Michael Barnes's case, for example, the solicitor
9 removed 40 percent of the African-American qualified
10 jurors and 15 percent of the Caucasian qualified
11 members?

12 A. Yes.

13 Q. And then in number two, in Mr. Beyaz's first juror
14 selection in 2004, she removed 55.6 percent of the
15 qualified African-American jurors and none of the white
16 qualified jurors, is that accurate?

17 A. Yes.

18 Q. And then for the second jury selection, after she was
19 found to have violated Batson and they pulled a second
20 jury, she then removed 37.5 percent of the qualified
21 African-American jurors, and again, none of the
22 Caucasian qualified venire members, is that accurate?

23 A. Yes.

24 Q. And then in Collin Broughton's case, which is also a
25 death penalty case, she removed 50 percent of the

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 qualified African-American jurors and 14.8 percent of
2 the qualified white jurors?

3 A. Yes.

4 Q. And then in 2013, she removed 33.3 percent of the
5 qualified African-American venire members, and again,
6 no white potential jury members?

7 A. Correct.

8 Q. And Derico in 2008, 37.5 percent of the qualified
9 African-American jurors, but again, none of the
10 qualified white jurors?

11 A. Yes.

12 Q. And then in Mr. Dickerson's case, which we will discuss
13 in greater detail in a few minutes, she removed 50
14 percent of the qualified African-American jurors, and
15 then 4.6 percent of the qualified white jurors?

16 A. Yes.

17 Q. And then in Mr. Lamar Mack, it doesn't look like she
18 removed any of the African-American jurors?

19 A. Correct.

20 Q. But she did remove eight percent of the qualified white
21 jurors?

22 A. Yes.

23 Q. And is there anything sort of notable about that
24 particular case, the number of African-Americans who
25 were in that venire?

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 A. I do believe it's the -- it was the case with the
2 fewest. I think the others had, at least, five was the
3 next lowest number.

4 Q. Okay. But for some reason, this venire only had two?

5 A. That's right.

6 Q. So the other ones had eight or nine qualified
7 African-Americans in the venire?

8 A. All except for Barnes.

9 Q. All right. Then so for Mr. Michael G. Shine, a 2007
10 case, solicitor removed 27.3 percent of the qualified
11 African-American juror members, and again, none of the
12 white potential juror members?

13 A. That's right.

14 Q. And Mr. Simmons, a 2010 case, it appears that she
15 removed 30 percent of the qualified black venire
16 members and only 6.7 of the qualified white venire
17 members?

18 A. Yes.

19 Q. And could you tell us what the totals are in terms of
20 percentage? Like, what percentage of African-Americans
21 taking all this as a whole she has struck versus the
22 number of white potential venire members she has
23 struck?

24 A. Okay. So if you were to add up the numbers in
25 parentheses, you would have 30 -- there would have been

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 78 -- across these 10 proceedings, there were 78 black
2 qualified venire members, 30 of whom were struck.
3 That's 38.5 percent. Do the same thing in the next
4 column, there was 193 eligible white venire members and
5 11 were struck, for 5.7 percent.

6 Q. Okay. And going to table two, could you just describe
7 for the Court and explain what we're looking at in this
8 particular table?

9 A. This is really just another way of looking at what we
10 just talked about with the totals row in the last
11 slide. This shows -- it creates really four
12 categories, black venire members, by which I mean
13 qualified venire members, white venire members, and
14 then pass or struck. And the total that were passed --
15 the total of the -- so if I look and say column A, row
16 one, there were 48 black venire members who were
17 passed, that was 61.5 percent. If you go down a row to
18 struck, there were 30 that were struck for a percentage
19 of 38.5. And then the bottom would be that hundred
20 percent, that's the total, that's 78. And you would do
21 the same thing for white venire members in column B.

22 Q. Okay. And I'm probably going to come back to this
23 particular table in just a minute to compare it, but
24 this is accurate, is that correct?

25 A. That's right. So this just pools all the strike

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 eligible venire members into -- just all together. So
2 for across these 10 proceeding, you had 271 strike
3 eligible jurors. And this is how it shook out between
4 black and white presented and struck.

5 THE COURT: Isn't it true that if you have fewer
6 African-American jurors in the pool, your percentage of
7 strikes are going to be higher regardless of what the actual
8 number is? I mean, if you've got four African-Americans in
9 the pool and you strike two, you get the figure of 50
10 percent. If you've got the same -- if you've got 10 whites
11 in the pool and you strike two. It skews the percentages,
12 doesn't it?

13 THE WITNESS: I don't necessarily think that it
14 skews it, but you're right, those percentages would be very
15 different. But if what you're looking at is the rate at
16 which were struck and if it was -- if race wasn't associated
17 at all with being struck, we would expect to see that -- say
18 you're striking on average two out of every 10 white people,
19 you would expect to see striking on average two out of every
20 10 potential black jurors. And that might be true in any
21 one case, but two would make the percentage look bigger, but
22 then it would average out in other cases. It could be zero,
23 in other cases, it could be -- so when you pool them
24 together, you can sort of account for that -- for that fact
25 that you point out.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 THE COURT: Thank you.

2 BY MS. FRANKLIN:

3 Q. Okay. And so this is another table, it also says table
4 two, comparing strike rates, but this is the same
5 information presented in a different manner?

6 A. Yes.

7 Q. Okay. Could you please describe that?

8 A. So in this table, we carry over the strike rates from
9 table two that we just went over. And then row three
10 is just the difference in the strike rate. So 38.5
11 minus 5.7 is 32.8. And then the ratio is just like it
12 sounds, the ratio is the percentage of black potential
13 that were struck over the percentage of white potential
14 jurors that were struck, and that gives you a ratio of
15 6.75. So if the percentage was the same across cases,
16 then you just get a ratio of one or close to one.

17 Q. Okay. So does this mean that an African-American juror
18 had 6.75 percent chance higher of being struck or how
19 is the best way to articulate what this means?

20 A. So it means they were struck at 6.75 times the rate.

21 Q. Okay.

22 A. Of white --

23 Q. More often than white?

24 A. Yes.

25 Q. Okay. And again, the P value, can you describe what

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 that particular P value means?

2 A. So this comes from the chi square test, which is
3 looking at whether -- the previous table that we
4 showed, whether those distributions that any
5 differences you see in them are just sort of too small
6 to be counted or analyzed. So the chi square test is a
7 statistical measure that gives you a P value that tells
8 you how sure you are these differences are something
9 real and not just due to chance. And here, it's less
10 than point 001, which is well below statistical
11 significance levels of point 05.

12 Q. Okay. So does that P value mean that what we're
13 looking at here is reliable?

14 A. Well, it tells you that the difference that you can be
15 quite confident, that it's not just a function of --
16 the differences you're seeing aren't just because it
17 happens to be this case and just happened to be looking
18 at these jurors versus these jurors, but it's such a
19 big difference that you can be sure that it's a real
20 difference.

21 Q. Okay. And can you please describe what we are seeing
22 in table three?

23 A. Okay. So this goes a little bit to actually what Your
24 Honor had just been speaking about. When you have --
25 you know, if you look at any one case, you have a

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 strike rate, but that doesn't tell you about how many
2 people were involved. So if you have one potential
3 black juror and it was struck, it would be a hundred
4 percent strike rate. If you had none, it would be zero
5 percent. So the previous table, by pooling them all
6 together, you sort of deal with that problem. Whereas,
7 what this does, it's just another way of looking at it
8 to see if it's a robust effect.

9 So what I do here is just look at -- take the
10 strike rate for each case and just take an average of
11 them. And so we wouldn't expect it to be exactly the
12 same, but it's -- they're roughly similar. So it's
13 really just a way of checking that there's not some
14 weird outlier that's driving the effect you're seeing.

15 Q. Okay. So would this be like two different methods of
16 looking at the same data?

17 A. Yes.

18 Q. And what would be the purpose of looking at the data in
19 two different ways?

20 A. Just to be sure that you haven't done anything wrong or
21 that there's not some one weird case that's driving the
22 effect you're seeing. It's just two ways of looking at
23 the same question. What you would hope to see is you
24 get basically the same result.

25 Q. Okay. So there's some minor statistical variation

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

- 1 here, but nothing that --
- 2 A. Yeah.
- 3 Q. This is still reliable -- is the study still reliable
- 4 even though we have these small differences and these
- 5 numbers?
- 6 A. Yes.
- 7 Q. Okay. And again, second table three, just describe.
- 8 A. Yeah, so the first two rows just bring forward the
- 9 average strike rates that were presented in the prior
- 10 side. And again, row three presents the difference
- 11 between these strike rates, 36.1 minus 4.9, so there's
- 12 a 31.2 percentage difference. And then again, the
- 13 ratio, the average strike rate of African-American
- 14 potential jurors divided by the average strike rate of
- 15 white potential jurors. And 36.1 divided 4.9 and that
- 16 is strike ratio of 7.4.
- 17 Q. Okay. So the other slide, we saw 6.75 and now we're
- 18 seeing 7.4?
- 19 A. Yes. And that could be due to the fact that a case
- 20 with only a couple of potential white jurors may have a
- 21 very large percentage struck, but it counts as one data
- 22 point.
- 23 Q. Okay.
- 24 A. So that's why you do it both ways just to make sure
- 25 they're consistent with each other.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 Q. Okay. And again, we've got that P value. Can you just
2 reiterate what the P value means in the context of this
3 particular table?

4 A. Yes. So for this analysis, because I'm comparing two
5 group means, I used something called a parrot sample T
6 test. And it calculates whether or not the difference
7 between the means given the size of the sample is
8 statistically significant. And here again, it is well
9 below the standard level of statistic significance at
10 less than point 001.

11 THE COURT: That slide is not in there.

12 MS. FRANKLIN: Okay. We will update our slides.
13 There was some last minute adjustments.

14 THE COURT: Is that slide in yours?

15 MS. BROWN: No, sir.

16 THE COURT: All right.

17 MS. BROWN: We will get it updated. I apologize,
18 Your Honor.

19 THE COURT: Where is that?

20 MS. FRANKLIN: We did this one, Your Honor, after
21 we had our conversation on the phone and Ms. Brown was
22 raising the objection that -- the same objection she raised
23 earlier, which is that some of these -- some of the cases
24 included in the universe included cases that occurred after
25 William Dickerson's case, so we spoke with our experts and

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 had them review the data up until the time of William
2 Dickerson's trial.

3 MS. BROWN: Your Honor?

4 THE COURT: Yes, ma'am.

5 MS. BROWN: I have to object. Discovery
6 violation. It hasn't been given to me and I haven't had any
7 opportunity to review this. I can't respond to this, Your
8 Honor.

9 MS. FRANKLIN: Your Honor, we were trying to
10 address Ms. Brown's concern. I mean, we can give her a copy
11 of this.

12 THE COURT: Well, you know, it's kind of late.
13 I'm not going to allow it in evidence at this point. I will
14 let you proffer it, but.

15 MS. FRANKLIN: As my co-counsel points out to me,
16 I mean, the attorney's general has been in possession of all
17 the data, all of the raw data that has been used in this
18 proceeding.

19 THE COURT: It's not good enough.

20 MS. FRANKLIN: We will go forward and proffer
21 this, Your Honor.

22 THE COURT: Table four.

23 MS. FRANKLIN: Table four.

24 BY MS. FRANKLIN:

25 Q. If you can please describe what we see in table four.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 A. Table four is just a replication of what was in table
2 two. The only difference was I took out the
3 post-Dickerson cases. Just ran exactly the same
4 analysis, just took out those cases to see if it looked
5 any different.

6 Q. Okay. And so again, we're looking at the aggregated
7 number here. And I see there at the bottom, it says
8 the disparity strike rates presented here is 34.7
9 percentage points and then the ratio between rates is
10 8.7?

11 A. Yes.

12 Q. Now, how does that compare with the conclusions in your
13 earlier analysis?

14 A. So removing those three cases actually made the
15 disparity bigger.

16 Q. And again, would you please describe what we are seeing
17 in this?

18 THE COURT: Any objection to table five?

19 MS. BROWN: Your Honor, I can't respond to any
20 statistics --

21 THE COURT: Just is there an objection?

22 MS. BROWN: I do have an objection. I can't
23 respond --

24 THE COURT: Sustained.

25 MS. BROWN: Well, I just wanted -- if I may --

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 THE COURT: Sustained.

2 MS. BROWN: I just wanted to clarify they had
3 asserted before that I have all the information. I don't
4 have this information.

5 THE COURT: Well --

6 MS. BROWN: I just wanted to clarify.

7 THE COURT: You're going to talk me out of it.

8 MS. BROWN: Pardon me?

9 THE COURT: You're going to talk me out of it.

10 MS. BROWN: Well, I hope not, Your Honor.

11 THE COURT: I sustained your objection.

12 MS. BROWN: Thank you, sir.

13 BY MS. FRANKLIN:

14 Q. If you could please describe what we're looking at in
15 this particular table.

16 A. So in this table, this is basically the same as table
17 three that we just talked about. And the difference is
18 that -- so in the spreadsheet that has all the data for
19 all the cases, I just took out the cases that were in
20 dispute -- or those post-Dickerson cases and then just
21 calculated the averages.

22 Q. Okay.

23 A. And --

24 Q. Do you want to add something to that?

25 A. No, I was just going to talk about the note.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 Q. Okay. Let's talk about the note.

2 A. The disparity in the strike rates here is there was a
3 31.5 percentage point difference and the ratio between
4 the strike rate is 8.98.

5 Q. Okay. So that's almost nine --

6 A. Yes.

7 Q. -- percent? So that would be like a nine to one
8 disparity rate?

9 A. Yes.

10 Q. Okay. And earlier, we had maybe approximately seven to
11 one disparity rate?

12 A. I believe so.

13 Q. Is that the correct way of articulating it?

14 A. Yes.

15 Q. Okay. I think that may be our last slide. So then I'd
16 like to kind of go over specific findings and your
17 opinions.

18 MS. FRANKLIN: And then we'll be finished, Your
19 Honor.

20 THE COURT: All right.

21 MS. FRANKLIN: I don't know if you want to go back
22 to your bench.

23 THE COURT: I just got comfortable.

24 (Laughter.)

25 MS. FRANKLIN: Okay. Thank you, Your Honor.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 BY MS. FRANKLIN:

2 Q. Okay. What can you tell us about the racial
3 disparities between Solicitor Wilson striking qualified
4 African-American jurors versus her striking white
5 potential jurors?

6 A. They're substantially higher.

7 Q. And what are those disparities when considering just
8 pre-Dickerson and post-Dickerson -- or once you exclude
9 the post-Dickerson cases --

10 MS. BROWN: Objection, Your Honor, not in
11 evidence.

12 THE COURT: That's -- my concern is that this
13 testimony is based on excluded evidence that was not
14 provided to the State. And I'm going to have to sustain the
15 objection.

16 MS. FRANKLIN: Okay. Well, I'm trying to
17 understand because they do have a full universe of the cases
18 that we relied on, which have been used in the study. Is
19 the objection just to the particular conclusion about what
20 is the statistical effect in excluding the post-Dickerson
21 cases? And if so, Your Honor, I would just ask --

22 THE COURT: Let Ms. Brown be more specific about
23 her objection.

24 MS. BROWN: I'm sorry, Your Honor, I didn't hear.

25 THE COURT: I said state your objection with

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 specificity.

2 MS. BROWN: Thank you, Your Honor. We object to
3 any testimony based on the new statistical analysis
4 contained in table four and five, which you disallowed in
5 presentation as we haven't had an opportunity to review
6 those statistics at all. They had not been presented to us.

7 MS. FRANKLIN: And, Your Honor, we would just ask
8 to be allowed to proffer this information, you know, even
9 though the attorney general's office has had access to all
10 the same information that we have had. They've known that
11 we have been -- that we've undertaken this kind of a study.
12 If they've had some concerns about what the study would have
13 produced, I mean, they were welcome to get their own expert
14 to review this material. I'm unaware of whether or not
15 they've done that.

16 THE COURT: Well, let the witness be specific
17 about it.

18 BY MS. FRANKLIN:

19 Q. Okay, to be specific, what are the racial disparities
20 when you are considering just the cases up to and
21 including William Dickerson's case and excluding the
22 universal cases that occurred after this trial?

23 MS. BROWN: Your Honor, it's the same objection.

24 THE COURT: All right. I'll allow that.

25 Go ahead.

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 THE WITNESS: The disparities, when I run the same
2 tests and just exclude those other cases from the picture,
3 just take them out of the equation, it makes the disparity
4 bigger.

5 BY MS. FRANKLIN:

6 Q. Okay. So if trial counsel had tried to undertake a
7 study at this point, he would have had a study with
8 higher disparities, is that accurate to say?

9 A. Assuming he had access to the same cases that I did,
10 yes.

11 Q. Okay. And now, just to discuss your opinions based on
12 the study and we'll be finished. This was an
13 unadjusted study, is that correct?

14 A. Yes.

15 Q. Can you tell us what that means?

16 A. It's unadjusted in that we didn't control for other
17 factors, couldn't account for other variables that
18 could have something to do with both strike decision
19 and --

20 Q. Okay. And based on the study, do you have an opinion
21 as to whether race was a factor in Solicitor Wilson's
22 decisions to exercise preemptory challenges in
23 Charleston County during this relevant time frame?

24 MS. BROWN: Objection, Your Honor. Based on
25 previous objections, that would be not proper in the

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 statistical analysis.

2 THE COURT: Overruled.

3 Go ahead.

4 BY MS. FRANKLIN:.

5 Q. You may answer it.

6 A. Yes, I do.

7 Q. You do have an opinion?

8 A. Yes..

9 Q. And could you tell us what the opinion is?

10 A. Yes, I believe that race was a factor.

11 Q. And based --

12 THE COURT: I didn't hear your answer.

13 THE WITNESS: I believe race was a factor.

14 BY MS. FRANKLIN:

15 Q. During the time frame, which is from 2004 to 2014, in

16 these universal cases?

17 A. In these cases, yes.

18 Q. Okay. And based on the study, do you have an opinion

19 whether race was a factor in Solicitor Wilson's

20 decisions to exercise preemptory challenges in William

21 Dickerson's case?

22 A. Yes, I do.

23 Q. And what is that opinion?

24 A. I believe it was a factor.

25 Q. Okay. Now, you've been involved in other studies of

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 this nature. How do the racial disparities that you
2 see in this case measure up to the disparities that
3 you've noticed in other cases?

4 MS. BROWN: Objection, Your Honor, relevance.

5 THE COURT: Overruled.

6 Go ahead.

7 THE WITNESS: They're quite a bit bigger.

8 BY MS. FRANKLIN:

9 Q. They're bigger?

10 A. Yes.

11 Q. And in the North Carolina -- can you talk a little bit
12 about the North Carolina study, about whether it was
13 adjusted or nonadjusted?

14 A. Yes, in that study, we always start with unadjusted.

15 You just kind of look and see just what the simple
16 numbers tell you, just the simple ratio. And we found
17 that prosecutors struck eligible black jurors at about
18 2.4 times the rate they struck eligible white jurors.

19 We were -- we had access to additional information
20 about the jurors in those cases so we could do a
21 controlled analysis. That's when you get into
22 regression where you can code for other factors to see
23 if that can account for the disparity observed.

24 Something that's both really predictive of strike and
25 also highly associated with race might make the effect

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 go away. So we controlled for a number of different
2 factors and found that while there were many other
3 factors that predicted the decision to strike, none of
4 them made much of a difference or to get -- singly or
5 collectively made much of a difference in the strike
6 disparity. The race effect still held even when we
7 controlled for all these other factors.

8 Q. Okay. So, for example, in North Carolina, did you
9 control for a criminal history?

10 A. Yes.

11 Q. And did you control for opinions regarding the death
12 penalty?

13 A. Yes, because those were all capital cases and that was
14 quite relevant.

15 Q. So when you did do a control, when you did that
16 analysis, how did that measure up next to your
17 unadjusted study?

18 A. So it was -- it was -- as you would expect, those
19 factors were very highly predictive of strikes somebody
20 who had some ambivalence about the death penalty. A
21 death penalty case who didn't quite get spooned off the
22 case would be much more likely to be struck. Same
23 thing with prior criminal accusation, they were much
24 more likely to have been struck. But it didn't make
25 the race effect go away. Whether we did it in a

BARBA O'BRIAN CROSS CONTINUED BY MS. FRANKLIN

1 regression or simply just took them out of the pool,
2 anybody with these characteristics, just take them out
3 the pool that we were looking at, you still saw these
4 more than two to one ratio.

5 Q. So more than two to one. So in the North Carolina
6 study, you had a two to one disparity --

7 A. About two, 2.4, yeah.

8 Q. Two point four. And then in these studies, what are
9 the disparities here?

10 A. So I think it was 6.7 when I pulled everybody and then
11 I think it was over seven -- or I'm sorry, I have the
12 paper right in front of me. It was 7.4 if I just
13 compared the mean strike rates for each case and 6.75
14 when I pooled all of the jurors into one big pot.

15 Q. And that is the entire universe?

16 A. Yes.

17 Q. Okay. And do you have an opinion as to whether the
18 disparities seen in these cases supports an inference
19 of intentional discrimination by the Charleston County
20 solicitor in her decision to exercise preemptory
21 challenges in William Dickerson's case?

22 MS. BROWN: Your Honor, same objection. I just
23 want to be preserved on the record.

24 THE COURT: Overruled.

25 Go ahead.

BARBA O'RIAN CROSS BY MS. BROWN

1 MS. BROWN: Thank you.

2 THE WITNESS: Yes, I do.

3 BY MS. FRANKLIN:

4 Q. Okay. Would you please state that opinion?

5 A. I do believe it supports an inference of intentional
6 discrimination.

7 Q. Can you also tell the Court how much you have been paid
8 to perform this study?

9 A. I haven't been paid anything.

10 Q. Okay. And so we have gotten funding for this, can you
11 tell us where that funding has gone?

12 A. The funding has gone to pay the coders that I hired.

13 Q. Okay.

14 MS. FRANKLIN: Would you give me just a moment,
15 Your Honor, to sort of check with co-counsel.

16 No more questions, Your Honor.

17 THE COURT: All right. Let's take a short break.

18 (Whereupon, a short recess was held.)

19 THE COURT: All right. Ms. Brown, you may
20 proceed.

21 MS. BROWN: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. BROWN:

24 Q. Professor O'Brien, we received a report dated
25 March 8th, 2016, is that the only report that you've

BARBA O'RIAN CROSS BY MS. BROWN

- 1 done?
- 2 A. Yes.
- 3 Q. For this case?
- 4 A. Yes.
- 5 Q. And how long did it take you to produce that report?
- 6 A. We started coding the data in November, so we trained
7 our coders in November. It took them a few months to
8 code it, and then to -- for me to do my reliability
9 check -- or after it was entered. And then it wasn't
10 much -- it wasn't very long after that. The analysis
11 didn't take very long. I don't remember quite how
12 long, though, and then probably a week or so to write
13 the report.
- 14 Q. Okay. And when you wrote the report, you sent it down
15 to opposing counsel and we received it on March 8th,
16 but what I want to know is exactly how long it took you
17 to analyze the data?
- 18 A. So just to clarify, when you say analyze --
- 19 Q. So you've got everything coded, you've got everything
20 presented to you and you're going to start crunching
21 the numbers, how long does it take for you to crunch
22 those numbers?
- 23 A. I don't think it took me more than a day. The long
24 part is coding.
- 25 Q. Okay. And you had referenced the North Carolina action

BARBA O'RIAN CROSS BY MS. BROWN

- 1 in your direct. And just to be clear, that was under
2 a -- was it a racial equality act that they had in
3 North Carolina, is that correct?
- 4 A. Yes, it was the racial justice act.
- 5 Q. And that act was -- has been appealed; correct?
- 6 A. Yes, it has.
- 7 Q. But at the time that you were doing the study, that act
8 had a provision that you could use statistics, isn't
9 this correct?
- 10 A. Yes.
- 11 Q. And you're not going under such an act here in South
12 Carolina because we don't have that; correct?
- 13 A. I'm not aware. I don't know of any such act here.
- 14 Q. Okay. And I believe you told me during voir dire for
15 qualification that the North Carolina actions are still
16 actually ongoing?
- 17 A. Yes, there were, I believe, 170 -- I don't remember now
18 exactly how many, but upwards of 150 defendants who
19 filed claims under the act.
- 20 Q. Uh-huh.
- 21 A. Whose claims are -- they had filed their claims and now
22 there's issues as to what the significance of the
23 repeal was. And the four defendants who did go to a
24 hearing, that is ongoing as well.
- 25 Q. Uh-huh. And the defendants who went to the hearing,

BARBA O'RIAN CROSS BY MS. BROWN

1 those cases are still ongoing; right? There's actually
2 decision made and the Supreme Court of North Carolina
3 reversed it; correct?

4 A. Yes.

5 Q. Why did they reverse it?

6 A. Because the State wanted an additional continuance,
7 asked for a continuance, and on the date of hearing,
8 the judge denied it. I believe that was the --

9 Q. In fact, it was a late discloser of statistical
10 information, wasn't it?

11 A. Well, not exactly. We had filed the report and handed
12 over the data and then they had a continuance. And
13 so -- we had corrected some errors, so it was an
14 updated report, but it --

15 Q. All right. I see. So the numbers had changed, but the
16 North Carolina courts found it wasn't right not to give
17 the State some time to look at those new numbers, isn't
18 that right?

19 A. Yes, the Court said that the trial judge used its
20 discretion by not granting another continuance.

21 Q. All right. Page 2 of your report look likes
22 Mr. Dickerson's present PCR counsel created the
23 universe that wanted you to look at here with the
24 cases, is that correct?

25 A. Yes, they framed the question and identified the

BARBA O'RIAN CROSS BY MS. BROWN

1 universal cases that were filed. Their question was
2 look at -- they wanted us to look at Solicitor Wilson's
3 use of preemptory strikes, so that's how they were able
4 to find the universe which was the right universe for
5 that question.

6 Q. Okay. So they focused on Solicitor Wilson, but you
7 didn't suggest I need this, this and this for your
8 study; correct?

9 A. Well --

10 Q. They provided you that information, didn't they?

11 A. To -- sure. Absolutely. If their research question is
12 looking at Solicitor Wilson's use of preemptory
13 strikes, then I would want to know what are all of the
14 cases and these are the materials I would need to be
15 able to do that analysis.

16 Q. Okay. Okay. And also on Page 2, you set out something
17 called a study design. A study that would vigorously
18 analyze the role of race in the exercise of preemptory
19 challenges. But that's really not quite right, is it?
20 Isn't it a little bit more restrictive, isn't that what
21 you said on direct? That what you were looking at only
22 were strikes by the solicitor against African-American
23 jurors, not the jury pool?

24 A. Oh, no. I -- to be able to assess whether or not black
25 potential jurors were being struck disproportionately,

BARBA O'RIAN CROSS BY MS. BROWN

1 you have to compare them, so we're coding all potential
2 jurors, not just the black potential jurors because
3 that wouldn't tell us anything.

4 Q. Okay. That wouldn't tell you anything?

5 A. No. If you just looked at the number of black
6 potential jurors struck. You need a comparison group.

7 Q. Uh-huh. So you didn't look at the overall jury
8 selection process, you only looked at the overall jury
9 selection process by the solicitor? You would agree
10 with me that there's a defense attorney there?

11 A. Yes. And the data that we have that's provided
12 accounts for both defense strikes and State strikes, so
13 that data is in there as well.

14 Q. Okay. Any other analysis or attempted analysis made on
15 the data provided to you?

16 A. I'm sorry, could you clarify?

17 Q. Sure. The formation of the jury pool or anything like
18 that? Any other analysis or just strikes?

19 A. I just looked at strikes. I didn't look at, say, the
20 representativeness of the initial jury pool.

21 Q. Now, you also stated about this design -- the study
22 design that we're talking about on Page 2 that there
23 are other studies out there that you modeled this one
24 after; correct?

25 A. Yes.

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Q. Let's look at the pool of cases. Philadelphia County,
2 that was one study?
- 3 A. Yes.
- 4 Q. I think you wrote 317 capital murder trials; correct?
- 5 A. Yes, that appears right. I don't know the specifics of
6 the study off of the top of my head, but --
- 7 Q. Okay.
- 8 A. -- that sounds right.
- 9 Q. And the North Carolina study has been referenced
10 several times today?
- 11 A. Uh-huh.
- 12 Q. 173 capital murder trials; correct?
- 13 A. Yes, that was the statewide study, but we also did
14 county level analysis --
- 15 Q. Uh-huh.
- 16 A. -- district level analysis and different time periods
17 as well.
- 18 Q. Did you do solicitor-specific or DA-specific analysis
19 in North Carolina?
- 20 A. Yes, I did present that analysis at the hearing in
21 Cumberland in North Carolina.
- 22 Q. But what you were talking about before in the racial
23 justice act, that was global, that was North Carolina
24 cases totally?
- 25 A. So that was the whole universe, but once you have a

BARBA O'RIAN CROSS BY MS. BROWN

1 whole universe, you can select a subset of the cases
2 for, say, a specific county or particular prosecutor
3 and do the analysis. So I had done an analysis
4 specific to Cumberland County, for instance. I also
5 present an analysis specific to a particular prosecutor
6 as well.

7 Q. So --

8 A. Because once you have that, it's easy to select a piece
9 of it out.

10 Q. But you can always compared, can't you? Say, if you
11 look at it here, here's the global strike pattern for
12 prosecutors in the state?

13 A. Right.

14 Q. And compare it to a prosecutor in one county, one
15 prosecutor?

16 A. You could do that, sure. You could -- you could do --

17 Q. Well, I mean, you have nine cases here; right?

18 A. Yes.

19 Q. That's not close to the 317 pool or the 173 pool on the
20 studies that you've listed as the models for this one;
21 correct?

22 A. Well, that -- that is true in that in those cases, the
23 universe was bigger, but the design should really be
24 the same in looking at the best way to go about -- to
25 test this question. The model translates even if

BARBA O'RIAN CROSS BY MS. BROWN

- 1 you're talking about a smaller pool. And you should
2 'know, in Cumberland County, the analysis I presented in
3 that case was 11 cases. .
- 4 Q. Uh-huh. But these were capital murder trials in
5 Philadelphia County and North Carolina; right?
- 6 A. Yes.
- 7 Q. You get a lot more information in capital trials in
8 voir dire than you do in the noncapital trials?
- 9 A. That's right.
- 10 Q. And the trials here, you have one, beside
11 Mr. Dickerson, that was originally started as a capital
12 trial; correct?
- 13 A. That's right.
- 14 Q. But everything else, you wouldn't have that expanded
15 voir dire?
- 16 A. You wouldn't have expanded voir dire, so you would have
17 less information that was available to the attorneys to
18 rely upon in exercising their discretion. So in a
19 sense, it's limited -- it does limit your ability to
20 have control variables, but it's not -- what would
21 trouble me more is if there was an extensive voir dire
22 and we didn't have it. So the attorneys had all this
23 information they might have been relying on making
24 their strike decisions, but we don't know what that is.
25 And so if you're doing a control study, you want to

BARBA O'RIAN CROSS BY MS. BROWN

1 have as much information as possibly available, not
2 just about this juror generally, but what's available
3 to the decision makers making the strikes.

4 Q. And that's a general rule of science, isn't it, the
5 more information, the better?

6 A. That's right, unless you have some reason to think that
7 it's -- the information you're getting is skewed
8 somehow and that it just could be a result.

9 Q. Okay. And you focused, of course, on the one
10 prosecutor here, Ms. Wilson. Can you tell us how these
11 totals compare with other strike patterns from other
12 prosecutors across the state?

13 A. Of South Carolina?

14 Q. Yes.

15 A. Oh, no, I couldn't.

16 Q. What about other prosecutors within Charleston County?

17 A. I do not have those data.

18 Q. So how do we know where our average would be? We don't
19 have that information, certainly, not in this report,
20 do we?

21 A. No, but the question here isn't so much is the
22 prosecutor -- is the disparity greater than what other
23 prosecutors are doing, but rather, are they striking --
24 the point of comparison is to white jurors. So are
25 they striking black jurors at a higher rate than they

BARBA O'RIAN CROSS BY MS. BROWN

1 are white jurors. I don't really know what it would
2 tell me to know that other prosecutors were doing the
3 same thing or that her disparities are greater than
4 others. It's an interesting question, but it isn't
5 really answering the question here.

6 Q. But I think you said in your direct testimony that a
7 lot of the strike correlations has to do with the pool
8 and the percentages in the pool itself; correct?

9 A. No, I'm sorry, I don't quite follow you.

10 Q. I understood -- and please correct me if I understood
11 wrong, but on direct, you said that if you have, let's
12 say, 30 percent of a minority group in the jury pool
13 you select from, 70 percent from another race --

14 A. Uh-huh.

15 Q. -- to select from, then that would skew the results
16 because there's only one pool to select from?

17 A. So -- okay, I think I remember now what I said then.
18 What I mean by that is that's why I would look at both
19 pooling all of the jurors and looking at the overall
20 strike rate and not just -- and also calculating it by
21 case. When I say skew, I mean, like, suppose you had a
22 case where there was one black potential juror and they
23 were striking at a hundred percent strike rate. In
24 that case, it would look huge.

25 So you want to look at it both ways. You want

BARBA O'RIAN CROSS BY MS. BROWN

1 to -- you don't want to just say high percentage, high
2 percentage. You want to also pool them and see how it
3 shakes out. Because what you should expect to see is
4 if race has nothing to do with it, it just happens
5 because you have only have a few eligible in this case
6 and so there's maybe a very high number struck, but in
7 another case, you have a few African-American jurors
8 and very low number struck. And if you pool them
9 together, if it's just something random about that
10 case, it should even out over -- when you look at the
11 whole pool together or just over a number of
12 proceedings.

13 Q. Uh-huh. Now, I think you mentioned before in your
14 direct testimony that you might even have sometimes
15 when there's zero percent of a minority struck if it's
16 just perchance striking, is that correct?

17 A. Yeah, right.

18 Q. How many African-American jurors did Solicitor Wilson
19 strike in the Mack case?

20 A. Zero.

21 Q. That would be under your theory indicative of random --
22 the randomness of the strike; correct, not race
23 related?

24 A. I'm sorry, I don't understand.

25 Q. You said in a random, nonrace-related striking method,

BARBA O'RIAN CROSS BY MS. BROWN

- 1 you might have cases where there's zero minorities
2 struck. That's Mr. Mack's case, isn't it?
- 3 A. Sure. If I only had Mr. Mack's case to look at and if
4 it was zero out of two, or if it was two out of two,
5 say, if it was the opposite, it was a hundred percent,
6 there's no way that would be specifically significant
7 because it's too small to know it's not just chance.
- 8 Q. Uh-huh.
- 9 A. So in any -- what you're looking at is the pattern over
10 time because in any one case, you might see a
11 particular pattern that just has something to do with
12 the particular jurors that came into the box that day.
13 When you can look across a lot of cases and you see
14 it's a consistent pattern, that doesn't necessarily
15 mean you see it in every single case, but consistent
16 pattern, that's where the -- that's where the P value
17 is sort of a way of measuring whether or not you've
18 actually like tapped into something real.
- 19 Q. Okay. Then it goes back to that more information is
20 generally better; correct?
- 21 A. Yes.
- 22 Q. Okay. And you wanted just cases that Ms. Wilson
23 prosecuted when she was in the ninth circuit; correct?
- 24 A. Yes, that was the -- that was the research question,
25 her use of strike during her tenure -- when she was

BARBA O'RIAN CROSS BY MS. BROWN

1 lead prosecutor -- her cases as lead prosecutor in the
2 ninth court.

3 Q. Why didn't you want to -- ask to see the cases before
4 that time? She's been an attorney quite a while. She
5 was an attorney before she went to the solicitor's
6 office. Why didn't you want to look at the other
7 cases?

8 A. I would be happy to look at those cases if those were
9 available to me.

10 Q. But they weren't given to you and that wasn't part of
11 what you were asked to do, was it?

12 A. No.

13 Q. Okay. I want to go back to the report a little bit.
14 You were to study the use of challenges during jury
15 selection by Ms. Wilson. I have an exhibit I would
16 like to go over with you. This is the strikes that --
17 well, actually, the jury selection at Mr. Dickerson's
18 trial?

19 MS. BROWN: Your Honor, this is just kind of a
20 cleaned-up chart. It is -- the original is already part of
21 the PCR record. It can be found on record pages 4469 and
22 4470. And this is being offered under Rule 1006 just as a
23 collection and it's easy for us to look at.

24 BY MS. BROWN:

25 Q. And you said you've looked at the jury selection in Mr.

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Dickerson's case; correct?
- 2 A. I have not read it cover to cover.
- 3 Q. Okay. All right. Well, you're familiar that there
- 4 were some strikes made; correct?
- 5 A. Yes.
- 6 Q. Okay. And you're aware in South Carolina that the
- 7 State has five strikes; correct? You'd have to know
- 8 that for your analysis, wouldn't you?
- 9 A. Yes.
- 10 Q. All right. And you know the defense has 10?
- 11 A. Yes.
- 12 Q. Okay. And Ms. Wilson didn't use all five of her
- 13 strikes; correct?
- 14 A. So my numbers include alternates, so it looks like
- 15 there was a total of five strikes, so I assume with
- 16 alternates that she did not use all strikes.
- 17 Q. Okay. Let's just look at the major 12 jurors selected.
- 18 A. All right.
- 19 Q. You get five strikes. There would be separate strikes
- 20 for alternates, so --
- 21 A. Okay.
- 22 Q. -- let's not go there yet; okay?
- 23 A. Okay.
- 24 Q. How many strikes did Solicitor Wilson use in selecting
- 25 the jury in the 2009 trial?

BARBA O'RIAN CROSS BY MS. BROWN

- 1 A. Looks like four.
- 2 Q. Four. So she had one strike available --
- 3 A. Yes.
- 4 Q. -- correct? And Ms. Prelow here, African-American, was
- 5 she struck?
- 6 A. No.
- 7 Q. Was there a strike available?
- 8 A. Yes.
- 9 Q. Okay.
- 10 A. It appears so from that list.
- 11 Q. And Juror No. 14, Ms. Deborah Grant, African-American,
- 12 was she struck?
- 13 A. No.
- 14 Q. Were strikes available?
- 15 A. Yes.
- 16 Q. Okay. And how about No. 12, Ms. Lisa Robinson,
- 17 African-American?
- 18 A. Yes.
- 19 Q. Was she struck?
- 20 A. Appears not.
- 21 Q. Strikes available?
- 22 A. Yes.
- 23 Q. Okay. What inference from your statistics would
- 24 account for that?
- 25 A. What inference from my statistics?

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Q. Uh-huh.
- 2 A. That it was not a hundred percent. It's not really a
3 statistical inference, it's just that it's not a
4 hundred percent strikes against African-Americans.
- 5 Q. Right. And she certainly had the ability to strike any
6 African-American who would come up?
- 7 A. Yes. And I mean, to be clear, when I say strike
8 eligible -- and I believe that we explained this in the
9 report, I only count jurors for whom there was an
10 ability to strike. So if -- if the State had exhausted
11 its strikes, the jurors that came after wouldn't count
12 because there's no decision point at that point. So
13 that's right, these aren't a hundred percent strikes.
14 So there are -- any black jurors on this table who were
15 not struck could have been struck.
- 16 Q. Could have been?
- 17 A. Correct.
- 18 Q. Thank you. I appreciate that. I just want to move on.
19 Let's look at the defense strikes. In this
20 jurisdiction, they get 10. Were you aware of that?
- 21 A. Yes.
- 22 Q. Did you look at the defense strikes as well and their
23 pattern?
- 24 A. No, I have not.
- 25 Q. You have not, okay. Well, let's just look, we'll start

BARBA O'RIAN CROSS BY MS. BROWN

- 1 off here with the first one, No. 8, Diane Buchanan,
2 white female, defense strike, white male, defense
3 strike, white female, defense strike, white male,
4 defense strike, white male, white female, white male,
5 white male, all 10 Caucasian strikes; correct?
- 6 A. Yes, that appears to be so.
- 7 Q. Well, that's one hundred percent, isn't it?
- 8 A. Yeah, my eyes aren't quite that good, but it does
9 appear to be hundred percent.
- 10 Q. Okay. You just let me know if I need to move that
11 closer to you or anything. But you didn't note that as
12 striking in your report, though, did you?
- 13 A. I didn't analyze defense strikes.
- 14 Q. And you mentioned that one of the models that you
15 followed was by Professor David Baldus; correct?
- 16 A. Yes.
- 17 Q. And he has opined that defense counsel strikes shape
18 the jury as an issue, too?
- 19 A. Yes, they do.
- 20 Q. And he's even actually said, perhaps, more than
21 prosecutor strikes?
- 22 A. I don't recall that, but that could very well be.
- 23 Q. Well, have you read his work, The Use of Preemptory
24 Challenges in Capital Murder Trials?
- 25 A. I'm sure I have at some point.

BARBA O'RIAN CROSS BY MS. BROWN

1 Q. Okay.

2 A. I don't doubt he said that, I just don't have a direct
3 memory of it.

4 Q. Okay. Well, that's all right. Let's move on a little
5 bit. Are you familiar with the United States Census
6 Bureau?

7 A. Yes.

8 Q. And statisticians generally can go by the stats from
9 the Bureau; correct?

10 A. Yes.

11 Q. Okay. And you know the composition of the jury in
12 Mr. Dickerson's trial; correct?

13 A. I would be able to calculate that using the data that I
14 have, yes.

15 Q. Okay. I'm just going to leave this here in case you
16 need to refer to it, but I would like for you look at
17 Respondent's Exhibit 2 for this proceeding?

18 MS. FRANKLIN: Your Honor, I do think I'm going to
19 have an objection to this, if I can put this on the record.
20 I think Ms. Brown is getting ready to talk about U.S. Census
21 data. The jurors in the jury pool are not representative of
22 census data. I mean, they are drawn from the voter roles
23 and the department of motor vehicles roles, so this could
24 not be relevant -- this source of the information would not
25 be relevant to who was in the jury pool that day.

BARBA O'RIAN CROSS BY MS. BROWN

1 THE COURT: All right. This is cross-examination,
2 I'll allow it.

3 Go ahead.

4 MS. BROWN: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. BROWN:

7 Q. Would you agree with me that there were three
8 African-American jurors who were seated?

9 A. I have no actual memory of this, but I have no reason
10 to believe that's not true.

11 MS. BROWN: May I approach the witness?

12 THE COURT: Sure, absolutely.

13 BY MS. BROWN:

14 Q. Would these job your memory, perhaps?

15 A. I have no reason to think those numbers are wrong. I
16 just want to make clear, I haven't -- I don't have
17 those numbers at my fingertips.

18 Q. You were aware that there were African-American jurors
19 who were not struck and the prosecution had the ability
20 do so. Three African-American jurors were seated, five
21 Caucasian female, four Caucasian male. Now, raw
22 statistics -- this probably takes me a lot longer than
23 it will take you, but I said if there are three out of
24 12, wouldn't that be 25 percent?

25 A. Yes, I think so.

BARBA O'RIAN CROSS BY MS. BROWN

1 Q. All right. Nine out of 12, 75 percent; correct?

2 A. Yes.

3 Q. And Charleston County statistics for 2010, according to
4 the Census Bureau, 25.4 percent African-American, 70.2
5 percent Caucasian. How close is the makeup of the jury
6 to the values of -- the statistical values for this
7 2010 information?

8 A. It appears to be roughly proportional to the population
9 according to the census.

10 Q. Okay. And again, we're not talking about a all-white
11 jury that was selected in Mr. Dickerson's case either?

12 A. That's right.

13 Q. Okay. I want to go back to Page 2 of your report and
14 the strikes you're looking at just by -- you're just
15 looking at the strikes by Ms. Wilson, we've
16 established, and I want to look at her first strike.
17 The first strike that Ms. -- that Ms. Wilson used in
18 the 2009 trial was against Mr. Nicholas; right?

19 A. Yes.

20 Q. His information is Caucasian male?

21 A. Yes.

22 Q. And then her one, two, three next strikes, having one
23 remaining, were against African-American jurors; right?

24 A. Yes.

25 Q. And do you remember that she supplied the reasons that

BARBA O'RIAN CROSS BY MS. BROWN

- 1 she struck those individual jurors on the record?
- 2 A. No, I don't recall the reasons.
- 3 Q. Okay. And I believe you told us on your direct
4 examination that you had the transcripts for all of the
5 nine cases that you used in your analysis; correct?
- 6 A. Yes.
- 7 Q. And you spent a couple of pages in your report about
8 coding and checking the information and that sort of
9 thing. By the way, who were the attorneys who helped
10 you with this?
- 11 A. They were recent graduates from the MUSC College of
12 Law.
- 13 Q. And who were they?
- 14 A. Would you like their names?
- 15 Q. Please.
- 16 A. Emily Smith, Malorie Donnicks and Steven Roustick.
- 17 Q. Okay. Had they worked with you before on statistical
18 analysis or coding?
- 19 A. No, they hadn't. They didn't do any statistical
20 analysis.
- 21 Q. Okay. And pardon me if I mispronounce this, but is it
22 Professor Grosso?
- 23 A. Uh-huh, yes.
- 24 Q. Professor Grosso, what was her participation in this
25 study?

BARBA O'RIAN CROSS BY MS. BROWN

- 1 A. She and I worked very closely at every stage. We
2 worked on the study design, the data collection
3 instrument, training the coders. I did the primary
4 data analysis, but consulted with her on the data
5 analysis, and she I drafted the report.
- 6 Q. Okay. Let's look at the report that you have. Of
7 course, you know table one was shown over here, this is
8 the exact same one. I don't have all of the tables,
9 but let's look at table one. You recall that table;
10 correct?
- 11 A. Yes.
- 12 Q. That was all of the information that you had, that you
13 worked with?
- 14 A. Yes.
- 15 Q. Okay. And Mr. Barnes's case, looks like two and three,
16 so five strikes there. Five strikes by Ms. Wilson in
17 Beyaz one, Beyaz two, three strikes. Broughton?
- 18 A. Yes.
- 19 Q. What is this four and four?
- 20 A. I believe there may have been more alternates in
21 Broughton. I can't remember exactly. I know that was
22 a capital case, so I think they may have selected extra
23 alternates in that case.
- 24 Q. Extra, so you have combined the number of strikes?
- 25 A. Yes, the strikes reported here, the strikes in the pass

BARBA O'RIAN CROSS BY MS. BROWN

1 include both jurors that are seated and jurors that are
2 questioned for alternate status.

3 Q. Okay. So could that be two jurors struck in the main
4 12-member juror and two alternates?

5 A. Yes, that could be.

6 Q. That would make the makeup of the jury a little bit
7 different, not really shown by that raw statistic, is
8 it?

9 A. That's right. And because the study is not looking at
10 the makeup of the jury, so we're not -- you could do a
11 study that looks at jury composition --

12 Q. Uh-huh.

13 A. -- just like you could do a study that looks at the
14 jury pool and see how representative it is. But since
15 we're looking at the exercise of discretion of
16 preemptory strikes, we thought it appropriate to
17 include the strikes for the 12-person jury as well as
18 the alternate strikes. The data that I've worked on
19 that's been provided would allow you to dis-acclimate
20 that and would tell you if someone was selected as
21 either an alternate or a main juror.

22 Q. Okay. Well, did I misunderstand that you said
23 something about a North Carolina case that had an all
24 white jury and that was a concern to you?

25 A. I don't believe I said anything about an all white

BARBA O'RIAN CROSS BY MS. BROWN

1 jury.

2 Q. Perhaps, that was the Foster case that was mentioned.

3 You don't find it interesting or something significant
4 where an all-white juror was seated?

5 A. It could very well be, and it could be a different
6 study. It could be a study looking at jury
7 composition. It wouldn't be a study looking at jury
8 strikes.

9 Q. Okay. And some of these cases, you have three strikes,
10 zero, we pointed out before, three, three. It doesn't
11 like a whole lot of strikes -- or a lot of cases have
12 strikes exhausted by Ms. Wilson. Isn't that kind of
13 indicative of selective use of preemptory strikes?

14 A. That she didn't use all of her strikes?

15 Q. That would be right. Just statistically speaking?

16 A. Well, what you're looking at statistically is the rate.
17 And so even if you're -- say, you're striking half the
18 eligible black jurors, that wouldn't be a disparity if
19 you're also striking half of the eligible white jurors.
20 What you're looking at is if you're striking, say --
21 even if you're only striking 30 percent of the eligible
22 black jurors, if you're only striking 10 percent of the
23 eligible white jurors, that's the interesting -- I
24 think that's the disparity that we were interested in
25 looking at.

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Q. Okay. In your report, you go over the information you
2 thought you were going to get by the subpoena or, at
3 least, that's the way -- please tell me, on an addendum
4 in your report, I believe it's Page 14, you have a copy
5 of the subpoena for information on, I believe, a list
6 of 14 cases?
- 7 A. Yes.
- 8 Q. And then on Page 2 of your report, you have a footnote
9 that explains that certain cases were not available?
- 10 A. That's right.
- 11 Q. So you were -- you were just trying to get all of the
12 information you had that would fit into your model and
13 then use that and you were explained what happened to
14 these other cases; right?
- 15 A. That's right.
- 16 Q. But that's from your point of view what you received;
17 correct?
- 18 A. Yes.
- 19 Q. You didn't go out and look or anything?
- 20 A. No, I wanted to be very transparent about why the cases
21 that are in the study are in the study. We didn't look
22 at cases and say this seems like a good one, this seems
23 like a good one.
- 24 Q. Okay. All right. On these cases that you listed here,
25 you had transcripts. And there's a little information

BARBA O'RIAN CROSS BY MS. BROWN

- 1 in the transcript that's not included here, isn't
2 there?
- 3 A. I beg your pardon?
- 4 Q. You would know whether a Batson motion was ever made in
5 any of these cases; correct?
- 6 A. Yes, I believe there were some, yes.
- 7 Q. But you didn't include that on your chart, did you?
- 8 A. No, this chart is just the raw and adjusted numbers.
- 9 Q. And you'd have information whether there were different
10 judges who heard different motions in different cases?
- 11 A. That's correct.
- 12 Q. But you don't have that in your chart, do you?
- 13 A. No.
- 14 Q. But you access to that because you had the transcript;
15 correct?
- 16 A. That's right.
- 17 Q. Okay. Were you aware that Mr. Beyaz in his second jury
18 selection had a Batson motion, that he made that Batson
19 motion and it was denied?
- 20 A. Yes, I actually was -- I was aware of that. I'm not
21 aware of all of them, but that one, I do recall.
- 22 Q. What about Mr. Broughton, that was the other capital
23 case. Were you aware there was a Batson motion made
24 and denied?
- 25 A. No, I don't recall that.

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Q. Okay. Do you have the transcript with you?
- 2 A. It is -- I do not have it physically with me, no. I
- 3 have it on my computer.
- 4 Q. You would have had access to the information?
- 5 A. Absolutely, yes.
- 6 Q. Okay. And Mr. Dellison, do you remember there was a
- 7 Batson motion made there and denied?
- 8 A. I don't -- I don't recall that.
- 9 Q. Well, you certainly recall Mr. Dickerson had a Batson
- 10 motion and it was denied?
- 11 A. Yes, I believe so. I don't doubt any of this, I just
- 12 don't have -- I just can't remember the specifics.
- 13 Q. Okay. And these Batson motions, that would have been a
- 14 Batson motion made to Judge Goodstein in Beyaz, Judge
- 15 Nicholson in Broughton, Judge Harrington in Dellison,
- 16 and Judge Dennis in Mr. Dickerson's trial. You would
- 17 have had that because it's on the transcript; correct?
- 18 A. Yes.
- 19 Q. You didn't include that?
- 20 A. No. I should note that our -- we do record a lot of
- 21 information in our DCIs. This table doesn't reflect
- 22 any of that information, no.
- 23 Q. Okay. So in the other cases, you agree with me there
- 24 were no Batson motions made?
- 25 A. I don't know of any others, no.

BARBA O'RIAN CROSS BY MS. BROWN

- 1 Q. But you did have some information, but you decided not
2 to use it in your study?
- 3 A. Use it in what way?
- 4 Q. Record it, have it mentioned in your report. I mean,
5 that has to do with the strikes, doesn't it, a Batson
6 motion?
- 7 A. Right. You could look at that, but again, it would be
8 sort of tangential to the question of whether the
9 strikes were exercised disproportionately. It would be
10 a slightly different issue.
- 11 Q. But your opinion, which I've objected to because I do
12 think it's outside of the scope of what we allow, but
13 your opinion is that this pattern shows a racial
14 motivation with the strikes?
- 15 A. Yes. I think the disparities are so large that they
16 are evidence that race was a factor in the exercise of
17 preemptory strikes.
- 18 Q. So these four circuit court judges are just wrong?
- 19 A. Well, they might have been in any particular motion or
20 they might not have been, but when I'm looking at all
21 this evidence in the aggregate, it tells, I think, a
22 very clear story.
- 23 Q. And the other five cases, just ineffective assistance,
24 they didn't raise the motion?
- 25 A. Perhaps. I don't feel like I'm in a position to

BARBA O'RIAN CROSS BY MS. BROWN

1 comment on the adequacy of their counsel.

2 Q. Okay. Okay. Now, in footnote one of your report --
3 like I said, we've gone over this a little bit, you
4 made mention of cases that you asked for -- or PCR
5 counsel asked for records and you said they were not
6 available?

7 A. That's right.

8 Q. First one, Coker and Coulter, I think that's also
9 Crocker and Coulter. I think it's an AKA. And you
10 mentioned there that the case file could not be located
11 and did not include. I would like to show you a
12 document. And you're familiar with transcripts,
13 correct, from South Carolina?

14 A. Yes.

15 MS. BROWN: May I approach the witness, Your
16 Honor?

17 THE COURT: Yes, ma'am.

18 BY MS. BROWN:

19 Q. Could you tell me what that document appears to be?

20 MS. FRANKLIN: Can I see what it is?

21 MS. BROWN: Oh, I'm sorry. Yes.

22 MS. FRANKLIN: What is this?

23 MS. BROWN: It's a transcript.

24 Your Honor, I think they have an objection to it.

25 MS. FRANKLIN: Your Honor --

BARBA O'RIAN CROSS BY MS. BROWN

1 THE COURT: All they have to do is state it.

2 MS. FRANKLIN: Your Honor, this is information
3 that we asked the Charleston County Solicitor, county
4 attorney's office to secure for us and they informed us they
5 didn't have a file. So we -- I do not have a copy of the
6 transcript. I don't think we have a copy --

7 THE COURT: Transcript of what?

8 MS. FRANKLIN: -- of this particular case. That
9 is not included in the universe because these materials were
10 not available to us. I couldn't locate them after
11 extensive searching for it.

12 THE COURT: What is it, Ms. Brown?

13 MS. BROWN: Your Honor, it's a transcript from
14 proceedings with Mr. Crocker and Mr. Coulter. They've said
15 that that was not available in their report. I did a search
16 for it and I found it. I would like to remind Your Honor
17 what they did, they went through the freedom of information
18 act and just went apparently to the solicitor's office for
19 attorney notes and what have you. They never asked me in
20 discovery, it was never part of discovery and it's not
21 relevant. We've always said it's not relevant --

22 THE COURT: What's not relevant?

23 MS. BROWN: -- but if you're looking at it --
24 these other cases as to the Batson selection here. But if
25 you're looking at it, all you have to do is look at any of

BARBA O'RIAN CROSS BY MS. BROWN

1 the appellate documents and there's transcripts available.
2 And that's the only point I'm making is they could have
3 found additional transcripts.

4 THE COURT: So you're not asking her any questions
5 about this particular transcript?

6 MS. FRANKLIN: No, sir.

7 THE COURT: Just whether she was aware of it?

8 MS. FRANKLIN: Well, Your Honor, I'll just say if
9 the attorney general's has got the materials that we have
10 been looking for and that we have, you know, exhausted every
11 way I knew how to get, I would ask that they turn them over.
12 And if they're sufficient to be included in this analysis,
13 let's include them.

14 MS. BROWN: And, you know, if they had adhered to
15 discovery rules, that would have been something to bring up
16 to you. And, of course, I would have made my objection on
17 being outside, irrelevant, that sort of thing. We've had
18 that happen a couple of times. They went outside of the
19 norm. They went outside and used --

20 THE COURT: All right.

21 MS. BROWN: -- freedom of information. That's
22 where we are.

23 THE COURT: Let's not -- I'll overrule the
24 objection. Let her identify them.

25 THE WITNESS: This is the record on appeal for the

BARBA O'RIAN CROSS BY MS. BROWN

1 State vs. Ronald Coulter.

2 BY MS. BROWN:

3 Q. Okay. And does that appear to have jury selection and
4 any Batson motion requests?

5 A. Well, I --

6 Q. You really can just flip through to the end of page
7 178?

8 A. Oh.

9 Q. I don't want you to analyze it, I just know if in the
10 answer if it's there?

11 A. This goes to 176. I'm sorry, this goes to 176, did you
12 say 178?

13 Q. One-seven-eight?

14 A. Yeah, this goes to 176. Is there --

15 Q. I'm sorry, that's probably my mistake. Would you look
16 at 176 and see if the judge ask if there are any
17 motions after jury selection, please?

18 A. Yes, it does.

19 Q. Okay. Thank you. And you also said in your footnote
20 --

21 MR. GROSE: Your Honor, may we get a copy of the
22 transcript?

23 THE COURT: What are you doing? Just hold on.

24 Just hold on. Don't be running up here.

25 What are you going to do with that?

BARBA O'RIAN CROSS BY MS. BROWN

1 MS. BROWN: I wasn't going to introduce it. I'm
2 just saying that it was out there, but she hasn't had the
3 opportunity to analyze it. She hasn't had the opportunity
4 to read it.

5 THE COURT: But you're not proffering it?

6 MS. BROWN: No, sir.

7 THE COURT: You're not making it a part of this
8 record?

9 MS. BROWN: No, sir.

10 THE COURT: All right.

11 MR. GROSE: And I just want to examine it and
12 see --

13 THE COURT: That's fine. That's fine. You just
14 don't have to rush up and grab it. No. I'm telling you,
15 sit down.

16 MR. GROSE: I thought you said it was fine, I
17 apologize.

18 THE COURT: I'm going to give it to you, but you
19 don't have to run up and get it.

20 Ms. Brown, let Mr. Grose see it.

21 MS. BROWN: Certainly.

22 THE COURT: Just a minute. Let him look at it.

23 MS. BROWN: Can we hand over all of them at the
24 end or should we do it one by one?

25 THE COURT: I don't know what you're going to do

BARBA O'RIAN CROSS BY MS. BROWN

1 next, but let him look at that.

2 MS. BROWN: Sure, absolutely. Excuse me.

3 THE COURT: Now, you continue.

4 MS. BROWN: Your Honor, may I continue?

5 THE COURT: Yes, ma'am.

6 BY MS. BROWN:

7 Q. Okay. On Page 2, you also mentioned Jamal Brown, you
8 could not find the jury list. And again, I wanted to
9 show you a document and see if you could tell me what
10 this appears to be?

11 A. This appears to be the transcript of the jury selection
12 from Jamal Brown's case, but not the jury list.

13 Q. Okay. And on Page 37, does that appear to be no motion
14 from the attorney? And some of these have -- I will
15 tell you right off, some of them have the pages sort of
16 cut off, so you let me know if there's a problem with
17 seeing it.

18 A. Yes, this says there was no motions.

19 Q. Okay. And Ethan Mack was another case that you said --
20 let me see, inform no transcript of voir dire in
21 existence. And I would like to show you this and see
22 if you can identify this document, please.

23 THE COURT: Follow the same procedure.

24 MS. FRANKLIN: Your Honor, this is material I
25 tried to get from the South Carolina Supreme Court.

BARBA O'RIAN CROSS BY MS. BROWN

1 THE COURT: I'm going to allow her to go ahead.

2 Have a seat, Ms. Franklin.

3 THE WITNESS: This is a transcript of the jury
4 selection from the State V. Ethan Mack.

5 BY MS. BROWN:

6 Q. And on Page 69 --

7 MS. FRANKLIN: Again, Your Honor, I do have a
8 relevancy objection because there are two different trials
9 and I'm not sure if --

10 THE COURT: Overruled.

11 MS. FRANKLIN: -- this is the proper trial.

12 THE COURT: Overruled. Let her proceed.

13 Identify it, Ms. Brown.

14 MS. BROWN: May I approach the witness, Your
15 Honor?

16 THE COURT: Sure.

17 MS. BROWN: And what I've handed the witness, Your
18 Honor, is a portion of the transcript of the jury trial,
19 State vs. Ethan Mack. The case number is 10-GS-10-1265,
20 appearances by Scarlett Wilson, Solicitor, Bruce Durant,
21 Chief Deputy, David Alord, and Stephen Harris for the
22 Defendant.

23 THE COURT: What's the date of it?

24 MS. BROWN: It is October 4th, 2010, through
25 October 15th, 2010, before the Honorable J. C. Nicholson,

BARBA O'RIAN CROSS BY MS. BROWN

1 Jr.

2 THE COURT: Uh-huh.

3 BY MS. BROWN:

4 Q. And it may have been lost in the shuffle there, but I
5 was asking if you could please turn to Page 69 and
6 confirm that there was no motion on that one either?

7 A. There was none.

8 Q. Okay. May I retrieve that please? Thank you.

9 Okay. Now, also on Page 14 of your report, that's
10 the attached list for that freedom of information request.
11 You've put in -- or I'm sorry, PCR counsel put in Michael
12 Geter vs. State. And there's no reference that I can find
13 to Mr. Geter's trial either in the table or in the footnote
14 explaining why material is not available. And I wondered if
15 you can tell us what happened to Mr. Geter? Why is he
16 simply left off?

17 A. I don't know. It may have been an oversight in writing
18 that footnote that I didn't account for that case, but
19 I don't -- but I'm confident that we didn't have the
20 materials that we would need to code or we would have
21 included it. But I don't recall specifically what we
22 were lacking in that case.

23 Q. Well, may I show you one more document to identify? If
24 you could please tell us what this appears to be?

25 A. This is South Carolina V. Michael Tyrus Geter. It's a

BARBA O'RIAN CROSS BY MS. BROWN

1 transcript.

2 Q. And if you'll flip over in the first couple of pages of
3 that portion of the transcript, there's a page labeled
4 Appendix one, does that appear to be a strike sheet?

5 A. Is it attached to this or is it --

6 Q. It should be in the front. It's an odd place to do an
7 appendix, but that's the way the document came to me.

8 A. Yes.

9 Q. Okay. And on Page 31, is that again showing no Batson
10 motion was made against the solicitor by the people who
11 were there at trial?

12 MS. FRANKLIN: Can we see Geter?

13 THE WITNESS: Well, just to be clear, what I'm
14 testifying to is that just at the end of jury selection,
15 there were no motions.

16 BY MS. BROWN:

17 Q. Right.

18 A. I can't testify to what had preceded that.

19 Q. I certainly understand.

20 A. But it says there's no objections.

21 Q. Okay. Thank you. May I retrieve that? Appreciate it.

22 Okay. So going under the premise that more
23 information is better generally in science, we can show
24 that you have this information that was available
25 because you had transcripts of all of these Batson

BARBA.O'RIAN CROSS BY MS. BROWN

1 motions actually considered by sitting circuit court
2 judges and denied. And then below this line, there
3 were transcripts available for one, two, three, four
4 other cases; correct?

5 A. Yeah, it does appear those transcripts are in
6 existence. I would also need something like the Batson
7 list that you showed me in Geter or a jury summons list
8 so that I have both race and strike information to
9 include that.

10 Q. Okay. And this is just information from the transcript
11 or data that Batson was -- either a Batson motion was
12 made or a Batson motion was not made. But you don't
13 have anything about the individual jurors in the
14 transcript, is that correct?

15 A. What do you mean by the individual jurors?

16 Q. Like a clerk's office record of name, birth dates, all
17 of that sort of thing. That's not information you
18 received in your study; correct?

19 A. Yes, actually, we did receive that for a number of the
20 cases. The juror summons list, they included the race,
21 the gender and some other basic information about --
22 that's actually where we got the race information for
23 about three-quarters of venire members in the study.

24 Q. Okay. And for the entire pool? You didn't have that
25 just for the people who were actually struck, is that

BARBA O'RIAN CROSS BY MS. BROWN

- 1 correct? What I'm getting at, there wouldn't have been
2 a disqualifying offense that would have been recorded
3 on the information you have because these are people
4 who advanced to jury selection?
- 5 A. Do you mean were they not struck for cause?
- 6 Q. Right.
- 7 A. Well, we would have information about people who were
8 struck for cause, but they're not included in the
9 analysis I'm presenting because there's no strike
10 decision.
- 11 Q. Okay. Now, the more cases that go into the pool,
12 wouldn't you agree with me the more this one grant
13 looks like an anomaly?
- 14 A. The one grant of a Batson --
- 15 Q. Uh-huh.
- 16 A. -- motion?
- 17 Q. You spoke a little bit about Mr. Beyaz's case and the
18 motion that was made and granted and that the second
19 jury was immediately selected?
- 20 A. Yes.
- 21 Q. And my point is the State doesn't have the ability to
22 appeal?
- 23 A. Yes.
- 24 Q. Isn't that correct?
- 25 A. That's right.

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

- 1 Q. Even if we disagree with the ruling, if we had reasons
2 on the record -- and Ms. Wilson put her reasons on the
3 record, they were discussed; correct?
- 4 A. Yes.
- 5 Q. Okay. And they -- I don't know if you remember, but
6 let me ask you, those reasons, they were pretty
7 specific, weren't they? They were hairstyle and
8 criminal background, not on any kind of nuance, facial
9 expression or anything like that?
- 10 A. I'm sorry, I just don't recall what the specific
11 reasons were.
- 12 Q. Okay. So at the end of the day, we can say that you
13 looked at two things, who made the strikes, Ms. Wilson,
14 and whether the strike involved an African-American
15 juror. But you to have to agree with me, I believe,
16 that jurors are individuals?
- 17 A. Yes.
- 18 Q. They are whole people. They're not defined by their
19 race?
- 20 A. That's right.
- 21 Q. They have different views and different life
22 experiences, different biases, different opinions, but
23 all this does is strip all of that away and look at the
24 numbers?
- 25 A. Yes, it does aggregate across all of these individuals

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 to see what the pattern is.

2 MS. BROWN: Beg the Court's indulgence?

3 THE COURT: Yes, ma'am.

4 MS. BROWN: No further questions, Your Honor.

5 THE COURT: All right. Cross-examination -- I

6 mean, redirect?

7 REDIRECT EXAMINATION

8 BY MS. FRANKLIN:

9 Q. In order to collect a sufficient amount of information
10 for purposes of conducting your study, what two pieces
11 of information do you -- did we need -- did you need?

12 A. To do this study, I needed to know -- I would actually
13 say three pieces. I needed to know the potential
14 venire member's race, whether they were eligible to be
15 struck by the State and whether they were, in fact,
16 struck.

17 Q. And so for the cases that you analyzed, what documents
18 did you have?

19 A. I had transcripts, juror summons list that provided
20 race information, and I think in one case, we had juror
21 questionnaires that we could use for the race
22 information.

23 Q. Okay. So when Ms. Brown showed you the Coulter
24 transcript, did she also show you any of the jury
25 lists?

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 A. . No, I didn't -- I do not believe I saw one.

2 MS. FRANKLIN: And, Your Honor, I would ask if you
3 would inquire of the AG whether that exist?

4 THE COURT: Go ahead. We'll do it after your
5 cross.

6 MS. FRANKLIN: Okay.

7 THE COURT: I mean, your redirect.

8 BY MS. FRANKLIN:

9 Q. And I believe you also looked at the case of Jamal
10 Brown. Did she show you the transcript or the juror
11 list?

12 A. I believe that was just the transcript.

13 Q. Okay. So you don't -- you don't recall if she just
14 handed you up the jury list with that as well?

15 A. No, and I didn't have a chance to look at the
16 transcript to see. Occasionally, race isn't mention in
17 the transcript.

18 THE COURT: Now, wait just -- never mind. Go
19 ahead.

20 BY MS. FRANKLIN:

21 Q. And so, again, you were shown the trial transcript of
22 Ethan Mack, but were you shown any jury list?

23 A. I don't recall seeing one.

24 Q. And Michael Geter, what were you just provided with?

25 A. I do believe, if I'm remembering correctly, that that

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 had a Batson list which provided race information, so
2 that might have had that.

3 Q. Did it also have the trial transcript and then did it
4 amass the race of all the jurors(in the venire?

5 A. I do not -- I don't know.

6 Q. Would you have needed the race of all the members of
7 the venire in order to do your assessment?

8 A. I would need to know the race of all the venire members
9 who were strike eligible.

10 Q. Who were strike eligible. So let's talk a little bit
11 about the universe.

12 THE COURT: Hold on a second.

13 (Pause.)

14 THE COURT: Proceed.

15 BY MS. FRANKLIN:

16 Q. Let's talk about the universe of cases that were
17 selected for this study. Do you recall how we
18 determined what the universe would be?

19 A. I believe it was all of the cases for which Solicitor
20 Wilson was the lead solicitor in her time in that
21 particular office.

22 Q. And do you recall whether or not there was a decision
23 just to choose some cases and not to choose other
24 cases?

25 A. No, I never would have -- I would have never agreed to

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 cherry pick the cases.

2 Q. Okay. So is it true then the cases that you have were
3 as full an accounting of the materials as were
4 available?

5 MS. BROWN: Objection, speculation.

6 THE COURT: Overruled.

7 Go ahead.

8 THE WITNESS: Yes, I believe so.

9 BY MS. FRANKLIN:

10 Q. And in terms of randomness, when you have a universe of
11 cases and you know that you can't get every single case
12 that's out there, how does that, the randomness of --
13 the limitations of the information that you've been
14 able to collect, I mean, how does that impact the
15 statistics as to your findings in this report?

16 A. So it's something that I consider very, very carefully
17 if I do not have the complete universe. My first
18 question is is there something about the cases I'm
19 missing -- do I have some reason to think the cases I'm
20 missing are missing, not at random, but there's
21 something fundamentally different about them. If I
22 can't think of any reason why the cases are missing in
23 anything but -- anything but randomly -- there's
24 nothing specifically different about these cases that
25 causes them to be missing, they're just missing at

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 random, then I don't worry that it's skewing my
2 results.

3 So it doesn't really under mind the -- it doesn't
4 really under mind the findings. Of course, I would
5 love to get these materials and also look at them and
6 add them to the study, but it doesn't concern me that
7 they're somehow -- that the universe I worked with was
8 somehow unrepresentative.

9 Q. That's what I want to get back to, were there any
10 problems with the universe of cases that you assessed
11 that would call into question your ability to opine or
12 render any opinions?

13 A. There was nothing that suggested to me there was -- I
14 didn't know -- there wasn't anything that I noticed
15 that suggested that it was skewed in some way.

16 Q. And so a study with a universe of 10, is that
17 statistically valid?

18 A. It can be, right, because it depends on -- so a
19 universe of 10 cases is actually a lot of strike
20 decisions. And part of what makes something
21 statistically significant is, is the size of the sample
22 you're looking at, whether it be 10 cases, like what we
23 present in table three, or just pooling all the jurors
24 where we have 271 strike decisions. If the disparity
25 is really big, then you're going to detect a

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 statistically significant difference with a smaller
2 sample than you would if you had -- if this was a
3 difference of say, like, point one, the strike ratio
4 was one point one to one, then you would really need a
5 big sample to know -- to be confident that it's not
6 just noise. The bigger the disparity, the smaller a
7 sample is necessary for the result to be statistically
8 significant.

9 Q. Okay. And so again, I mean, the disparities in this
10 case were approximately seven to one or nine to one,
11 and are those large disparities?

12 A. Yes.

13 Q. And the disparities you found in the racial justice act
14 litigation in North Carolina were roughly two point
15 four to one?

16 A. That's right.

17 MS. FRANKLIN: And I believe I have no further
18 questions -- oh, just a moment.

19 And, Your Honor, we would ask that the documents
20 that Ms. Brown used to cross-examine --

21 THE COURT: Ms. Brown.

22 MS. FRANKLIN: -- be made part of the record in
23 this case.

24 MS. BROWN: I'm sorry, Your Honor.

25 THE COURT: That's what I thought.

BARBA O'BRIAN REDIRECT BY MS. FRANKLIN

1 MS. BROWN: I object to that coming in because
2 nobody has used that, it's not part of the record. We were
3 just identifying it as information that was out there that
4 was inconsistent with the assertions in the report.

5 MS. FRANKLIN: Your Honor, if I may respond. As
6 she said, she was trying to use this to impeach the quality
7 of this project and it is relevant. I think it's more
8 relevant since I've searched for this stuff and enlisted the
9 help of the South Carolina Supreme Court and Court of
10 Appeals to track down these documents and now the solicitor
11 has it in its possession and decided to hold back until
12 today.

13 THE COURT: Well, you --

14 MS. BROWN: Well, I do want to clarify. That's
15 not from the solicitor, that's what I found after this
16 report was dropped on me in March.

17 THE COURT: Okay. Public records?

18 MS. BROWN: Yes, sir.

19 THE COURT: Right.

20 MS. BROWN: Yes, sir.

21 THE COURT: Well, if she -- let's put it this way,
22 you can't put them in with this witness, okay. This witness
23 didn't even -- had never seen them. She didn't know
24 anything about them.

25 MS. FRANKLIN: Well, actually, since my co-counsel

BARBA O'BRIAN RECROSS BY MS. BROWN

1 knows evidence so much better than I do, we would argue that
2 these are self-authenticating since they're transcripts.
3 And if there's a problem with authenticating, then we can
4 call Ms. Brown to the stand.

5 THE COURT: No. Nobody's raised authenticity as
6 an issue.

7 MS. FRANKLIN: I'm sorry?

8 THE COURT: I said nobody has raised authenticity
9 as an issue.

10 MS. FRANKLIN: I mean, I'm just saying, Your Honor
11 --

12 THE COURT: So I assume you're correct, they're
13 self-authenticating.

14 MS. FRANKLIN: Yes.

15 THE COURT: But that doesn't make them admissible.

16 MS. FRANKLIN: We would -- again, we're going to
17 argue that they're admissible because the attorney general's
18 office has used these to try to impeach our expert.

19 THE COURT: All right.

20 MS. FRANKLIN: And in the alternative, we'd ask to
21 proffer them.

22 THE COURT: We'll do that later, but not through
23 this witness.

24 Any recross?

25 MS. BROWN: May I have one question, Your Honor?

BARBA O'BRIAN RECROSS BY MS. BROWN

1 THE COURT: Yes, ma'am. You get two bites at the
2 apple.

3 RECROSS-EXAMINATION

4 BY MS. BROWN:

5 Q. You said you had the transcripts, stated reasons for
6 the strike and your opinion in your report doesn't
7 account for any of the disparity that you testified
8 about, is that correct?

9 A. Are you referring to the --

10 Q. The stated reason for the strikes?

11 A. In Batson cases?

12 Q. Yes.

13 A. Because they're so limited to only those cases, how
14 would I -- I couldn't account for them -- the only way
15 that I could account for that in a study of this type
16 is if we had system where the solicitor had to proffer
17 a reason for every strike, and then I could account for
18 the stated reasons.

19 But if you only -- so I was talking about skewing
20 the sample. If you only have proper reasons when it's
21 called into question, you're talking about a very, very
22 limited sample of -- and a skewed sample because it's
23 going to be predominantly -- I assume the Batson
24 motions -- although they can go both ways, I assume
25 they were directed at the striking of an

BARBA O'BRIAN RECROSS BY MS. BROWN

1 African-American juror. It doesn't -- there's no way
2 to deal with that statistically because it's entirely
3 skewed. We're just looking at black jurors who were
4 struck if you have those stated reasons and only in a
5 tiny number of those, only a few venire members. So it
6 doesn't -- it really couldn't tell you anything.

7 But even, you know, if I took out or if your
8 expert were to say take all of the jurors for whom a
9 reason was proper, you still have all of these
10 African-American jurors for whom there is no stated
11 reason and you would -- given the size of these
12 disparities, it wouldn't make much of a dent in the
13 disparities that we found.

14 Q. So if a prosecutor uses a strike, that's automatically
15 suspicious in your mind?

16 A. Oh, no, I'm not testifying about an individual strike
17 being suspicious. I'm looking at the overall pattern
18 of strikes and saying across all of these cases, there
19 is a huge disparity. That is what I am arguing -- or
20 I'm sorry, that is what I am opining is evidence of.

21 Q. Prima facie evidence of could be racial discrimination;
22 correct?

23 A. The large disparity is -- is evidence of racial
24 discrimination in jury selection.

25 MS. BROWN: No further questions. Your Honor.

BARBA O'BRIAN RECROSS BY MS. BROWN

1 Thank you very much for your indulgence.

2 THE COURT: You may come down, ma'am.

3 May this witness be excused? Any objection?

4 MS. BROWN: No objection.

5 MR. GROSE: No.

6 MS. FRANKLIN: No objection, Your Honor.

7 THE COURT: All right. You're free to go, ma'am.

8 Thank you very much.

9 All right. Counsel, let's talk about scheduling.

10 What's next?

11 MS. FRANKLIN: Well, next, I would like to -- I
12 spoke with Ms. Brown during the break about moving a number
13 of these items into evidence.

14 THE COURT: These items?

15 MS. FRANKLIN: I would bring them around and have
16 them identified and by consent, we're moving them into
17 evidence.

18 THE COURT: By consent?

19 MS. BROWN: I agree to several of the items. I do
20 not agree to depositions, their discovery depositions. We
21 didn't even have most of the information when those were
22 taken, so I don't agree to --

23 MS. FRANKLIN: Well, we're prepared to argue that.
24 We don't have any more witnesses, Your Honor, so after we
25 move in this evidence --

1 MS. BROWN: Your Honor, if I could explain one --

2 THE COURT: Let her finish her sentence.

3 MS. BROWN: Oh, I'm sorry.

4 THE COURT: You were about to say?

5 MS. FRANKLIN: I was going to say we wanted to go
6 ahead and move these items into evidence.

7 THE COURT: Okay.

8 MS. FRANKLIN: I wanted to ask for the Court's
9 assistance about these materials that have now appeared
10 today.

11 THE COURT: Okay.

12 MS. FRANKLIN: But then after that, we're finished
13 for today, unless --

14 THE COURT: Are you making -- well, are you
15 finished period or?

16 MS. FRANKLIN: No, Your Honor, in light of this
17 new material that we've gotten today, I think we have an
18 obligation to explore and see if there's any additional
19 information out there.

20 THE COURT: All right. Let's do this. Let's take
21 a lunch break, see if you can work out some agreement on
22 what documents. And then when we return, I will take up the
23 arguments one way or the other.

24 MS. FRANKLIN: Okay.

25 THE COURT: Is that all right?

1 MS. BROWN: Oh, yes, sir. I was just going to --

2 THE COURT: You weren't prepared to start today
3 anyway, were you?

4 MS. BROWN: Actually, I am. I do agree -- that's
5 what I was going to try to say because I thought it might
6 help the Court. I do agree with most of those. One is your
7 FBI subpoena and the documents which are from the FBI. One
8 is an affidavit from the clerk of court.

9 THE COURT: Which ones do you object to?

10 MS. BROWN: The only thing I object to are the
11 depositions, Your Honor.

12 THE COURT: The depositions?

13 MS. BROWN: Yes, sir.

14 MS. FRANKLIN: Which there was one custodial
15 deposition, but the other three were just regular
16 depositions in connection with --

17 MS. BROWN: I do recall --

18 MS. FRANKLIN: -- the things that we discussed.
19 It's something that's under the rule admissible.

20 MS. BROWN: The discovery -- the records
21 deposition by Mr -- of Mr. Durant, I believe in a December
22 deposition, I have no objection to. It's the other ones
23 that -- the other three, Rutledge Durant, Bruce Durant on
24 the merits and Solicitor Wilson because they were discovery
25 depositions before we had any of the documents.

1 THE COURT: Why can't those witnesses be called
2 instead of offering their deposition?

3 MS. FRANKLIN: Well, because of protective order.

4 THE COURT: The other protective order, I'm sorry.

5 MS. FRANKLIN: Well, I mean, Scarlett --

6 THE COURT: I understand.

7 MS. FRANKLIN: If we need to, we will, but I did
8 not expect that the attorney general's office would object
9 to these depositions. But if we need to call witnesses, we
10 certainly can.

11 MR. GROSE: What I was going to suggest, Judge, is
12 let us put stickers on all these so that the record reads a
13 little clearer. We can identify what it is, if it goes in
14 without objection, then that's the end of it. If there's an
15 objection, then we know exactly what we're talking about.

16 THE COURT: Okay.

17 MR. GROSE: We can mark them over lunch.

18 THE COURT: I see you at 2:30.

19 MR. GROSE: Thank you, Judge.

20 THE COURT: Give you a little time to work and a
21 little time to eat.

22 (Whereupon, a lunch recess was held.)

23 THE COURT: All right. Ms. Franklin, where are
24 we?

25 MS. FRANKLIN: Yes, Your Honor, may it please the

1 Court. I think at this time I had an opportunity to speak
2 to the attorney general's office about some of these
3 exhibits that we have marked. And I think we would like to
4 go ahead and move these into evidence at this time.

5 THE COURT: What numbers?

6 MS. FRANKLIN: Okay. Well, we already have
7 Plaintiff's Exhibit 1 and 2 in evidence, that is Dr.
8 O'Brien's CV and a copy of the report. We're moving in
9 exhibits -- I'm sorry, Plaintiff's Exhibit No. 3, which is
10 the ninth circuit privilege production that was ordered
11 released on November 30th, 2015.

12 THE COURT: Any objection?

13 MS. BROWN: No, sir, Your Honor.

14 MS. FRANKLIN: Plaintiff's Exhibit No. 4, which is
15 the ninth circuit privilege production dated December 10th,
16 2015.

17 THE COURT: Any objection?

18 MS. BROWN: No objection.

19 (WHEREUPON, Plaintiff's Exhibit Nos. 3
20 and 4 were admitted into evidence.)

21 MS. FRANKLIN: We are moving in a copy of an
22 affidavit from Clerk of Court in County of Charleston, Eddie
23 Hazelton, relating to the destruction of juror list by that
24 office.

25 THE COURT: Any objection?

1 MS. BROWN: No objection.

2 THE COURT: Without objection.

3 MS. FRANKLIN: Sorry, that was Exhibit No. 6. I
4 apologize..

5 THE COURT: Plaintiff's No. 5?

6 MS. FRANKLIN: I skipped over it. I'm sorry, Your
7 Honor.

8 (WHEREUPON, Plaintiff's Exhibit No. 6
9 was admitted into evidence.)

10 MS. FRANKLIN: Plaintiff's Exhibit No. 5, which
11 are the results of the subpoena that Your Honor issued to
12 the FBI on our behalf. These of the criminal histories of
13 those jurors.

14 THE COURT: Any objection?

15 MS. BROWN: No objection, Your Honor, but I would
16 like to have them sealed or something to secure the privacy
17 concerns compliant with your order for production.

18 MS. FRANKLIN: No objection to that, Your Honor.

19 THE COURT: All right. We'll seal those.

20 (WHEREUPON, Plaintiff's Exhibit No. 5
21 was admitted into evidence.)

22 MS. FRANKLIN: Plaintiff's Exhibit No. 7 are the
23 prosecution coordination commission materials. We
24 understand that this Court has argued that they're only
25 relevant up to 2009. We would proffer the additional

1 documents.

2 (WHEREUPON, Plaintiff's Exhibit No. 7
3 was admitted into evidence.)

4 THE COURT: None of them have a date, in other
5 words --

6 MS. FRANKLIN: Well, I will tell Your Honor that
7 we have marked as Plaintiff's Exhibit 17 the index that was
8 prepared by --

9 THE COURT: Okay.

10 MS. FRANKLIN: -- the prosecution coordination
11 commission.

12 THE COURT: Okay. And so -- and you're offering
13 everything up to -- well, everything on this log that's --

14 MS. FRANKLIN: Yes, Your Honor.

15 THE COURT: Okay.

16 MS. FRANKLIN: And we would proffer what Your
17 Honor has ordered is not relevant.

18 THE COURT: Okay. But that's on this log, also?

19 MS. FRANKLIN: Yes, Your Honor.

20 THE COURT: So which are and which aren't?

21 MS. FRANKLIN: I believe anything -- I believe --

22 THE COURT: Is there anything post-2009?

23 MS. FRANKLIN: Post-2009 --

24 THE COURT: May 2009, correct?

25 MS. FRANKLIN: That is my understanding, Your

1 Honor. So we are moving that --

2 THE COURT: What's the State's position?

3 MS. BROWN: Your Honor, I think that relevancy has
4 only been established for 1991 Batson presentation and 1997
5 Batson presentation where the solicitor, Ms. Wilson, and
6 Bruce Durant were registered and -- I'm sorry, I misspoke,
7 and 2004. I think those are the only ones that have been
8 found to be connected to the prosecutors at issue. We have
9 no objection to those three coming in. The others lack
10 relevancy.

11 MS. FRANKLIN: Your Honor, our position is that
12 contained in these deposition transcripts are testimonies of
13 Scarlett Wilson, Bruce Durant and Rutledge Durant testifying
14 that these materials are kept on a shared hard drive at the
15 Ninth Circuit Solicitor's Office.

16 THE COURT: All right. Even if they didn't attend
17 particular seminars, they would have been available to them?

18 MS. FRANKLIN: They would have been available to
19 them otherwise. Additionally, that Solicitor Wilson's chief
20 form of training her solicitors is through the use of these
21 materials. Again, as she testified to during her
22 deposition.

23 THE COURT: Yes, ma'am?

24 MS. BROWN: Your Honor, I have no recollection of
25 that. And, in fact, these materials were not released to

1 me, or that I know, or, certainly, not identified during the
2 deposition. That goes to my objection to the depositions.
3 They were discovery depositions, so we weren't able to point
4 to any materials and have them identified. They are
5 incomplete, Your Honor, and they support the assertions.

6 MS. FRANKLIN: Your Honor, during the depositions,
7 we asked about training their solicitors regarding Batson.
8 I mean, there's no question that this was an issue and we
9 got --

10 THE COURT: Well, let's put it this way.
11 Ms. Brown, if they were available that any solicitor on
12 their own could have gone to these particular documents --
13 and who knows, I know there's no evidence in the record, but
14 if they're available to them prior to that date, I think
15 they ought to be made a part of the record.

16 MS. BROWN: Well, Your Honor, I just don't know
17 what the -- what was referenced by desk book. That was
18 never --

19 THE COURT: I don't know either.

20 MS. BROWN: Yes, sir. That was my only concern.
21 I just don't know how to connect those documents with the
22 reference to a desk book.

23 THE COURT: Well, I don't know that that's
24 important.

25 MS. BROWN: Yes, sir.

1 THE COURT: I mean, I don't know that that's
2 relevant. I should slap my hand for using that word.

3 (Laughter.)

4 THE COURT: It seems to me that these are part of
5 the solicitor's vernacular, or whatever you want to call it,
6 that any solicitor -- and, frankly, a competent solicitor
7 should avail themselves of this information, then I think --
8 what bearing it has on the outcome of this case may be
9 difficult to see, but I'm not going to prevent them from
10 offering it and putting it into the record.

11 MS. BROWN: And that's just prior to 2009?

12 THE COURT: Uh-huh.

13 MS. BROWN: That sounds fair.

14 THE COURT: Okay. Not just those in which these
15 particular solicitors attended a CLE at the solicitor's
16 conference. I'm not going to limit it to that. All right.

17 MS. FRANKLIN: Thank you, Your Honor. And that
18 would be Plaintiff's Exhibit 7 and also 17.

19 (WHEREUPON, Plaintiff's Exhibit Nos. 7
20 and 17 were admitted into evidence.)

21 THE COURT: Now, this is the stack that was handed
22 up?

23 MS. FRANKLIN: I believe that Mr. Rapoport handed
24 up a stack --

25 MR. RAPOPORT: Yes, sir, Your Honor, I did. I ran

1 off the same request that they requested in 2013, but I can
2 attest to that stack as being the response to their request.

3 THE COURT: Okay.

4 MR. RAPOPORT: In addition to the additional ones
5 that I supplied today.

6 THE COURT: All right.

7 MS. BROWN: Is that the desk book?

8 MR. RAPOPORT: No, sir, that's not the desk book.
9 The desk book is a separate publication that's not even
10 included in any materials that are prior to 2009. The only
11 one that's included in this -- in this that I gave you was
12 from 2010. So none of those materials are included in our
13 desk book, which we consider to be exempt from FOIA --

14 THE COURT: We don't need to talk about it.

15 MR. RAPOPORT: Okay. I just wanted to inform Your
16 Honor.

17 THE COURT: Okay. Now, Mr. Franklin, you have
18 basically this stack of documents?

19 MS. FRANKLIN: I have documents from the desk
20 book.

21 THE COURT: I don't know anything about that.

22 MS. FRANKLIN: I was provided -- I do think I have
23 one area that I believe is from the desk book. I'm not
24 sure. I mean, I would really have to go through everything
25 that he's listed with everything that I have.

1 THE COURT: I'll just for the record exclude
2 documents that were contained in the Ninth Circuit
3 Solicitor's desk book.

4 MS. FRANKLIN: Now, we get to the items for which
5 there are some objections. We are seeking to admit into
6 evidence depositions taken -- and this is Plaintiff's
7 Exhibit No. 8, Bruce Durant, Plaintiff's Exhibit No. 9,
8 Scarlett Wilson, Plaintiff's Exhibit No. 10, which is also
9 Bruce Durant, and then Plaintiff's Exhibit 11, which is
10 Rutledge Durant. These were sworn depositions with
11 information that's relevant to these claims.

12 You know, right now, we know, at least, Scarlett
13 Wilson is under a protective order due to the Dillon Roof
14 case. You know, I suppose if we needed to, we could
15 subpoena Bruce Durant to come and testify or we would --

16 THE COURT: Well, are he and Rutledge Durant both
17 covered by that protective order?.

18 MS. FRANKLIN: I am unaware of what Bruce Durant's
19 status is. Rutledge Durant --

20 THE COURT: I thought it protected the whole
21 office?

22 MR. GROSE: I believe it protects him. I've got
23 it saved. I'll pull it up.

24 THE COURT: Doesn't it protect the whole office?

25 MR. GROSE: I will have it up on my screen in just

1 a second and I can confirm that for you, Judge.

2 MS. FRANKLIN: I will tell you that Rutledge
3 Durant had a much more minor role in this litigation and is
4 not competent to testify to all of the matters that were
5 testified to by Ms. Wilson and Mr. Durant.

6 MS. BROWN: Rutledge Durant is no longer with the
7 Ninth Circuit Solicitor's Office, so that won't be a
8 problem. And as far as I know, nobody's called the
9 solicitor -- the protective order doesn't say that you can't
10 do it, it just says that if something else happens.

11 THE COURT: Well, frankly, I would prefer to hear
12 from them. I mean, as -- as a fact finder, it's not, you
13 know, the normal to rely on depositions because you can't --
14 they may be taken for discovery purposes. They may be taken
15 for de bene esse purposes and you can't cross-examine a
16 deposition.

17 MS. FRANKLIN: Well, when we were there -- I mean
18 --

19 THE COURT: I'm sorry?

20 MS. FRANKLIN: Ms. Brown was present at these
21 depositions and she was there for purposes of interposing
22 objections.

23 THE COURT: Well, discovery depositions, she has
24 not the incentive to object as she may in de bene esse.

25 MS. FRANKLIN: Then I --

1 THE COURT: So who's got McGurgle and Newman?

2 MS. BROWN: Judge Nicholson.

3 THE COURT: Nicholson?

4 MR. GROSE: Yes, Your Honor. I'm looking at the
5 order of Judge Nicholson and Chief Justice Toal of
6 26-August-2015, and the paragraph that pertains to them is,
7 Furthermore, to ensure effective representation on behalf of
8 the State of South Carolina, ninth circuit Solicitors
9 Scarlett A. Wilson, Chief Deputy Solicitor Bruce Durant and
10 Assistant Solicitor Benjamin Simpson shall be excused from
11 appearing in all other matters pending in general sessions
12 court where they are prosecuting cases from January 1, 2016,
13 through the conclusion of the above captioned case. That's
14 the paragraph that pertains to that.

15 THE COURT: What's the name of the other case,
16 Judge Newman's case?

17 MS. BROWN: Michael Slager, I believe, Your Honor.

18 THE COURT: All right. Yeah, his victim was?

19 MS. FRANKLIN: Walter Scott.

20 THE COURT: Scott. It's usually referred to as
21 the Scott case. Are they protected under -- by Judge Newman
22 or do we know?

23 MR. GROSE: I don't know.

24 MS. BROWN: I do not know.

25 THE COURT: Okay. Well, I just -- I think we need

1 to try to get Durant and Wilson here if we have to go to
2 Charleston.

3 MS. FRANKLIN: Okay.

4 THE COURT: What's the State's position? Do you
5 object to the introduction of the -- I mean, if you agree to
6 it, we won't worry about it.

7 MS. BROWN: I have no objection to the records
8 deposition by Bruce Durant that identified the documents
9 released in discovery. I believe that was the December
10 deposition. The other three were discovery depositions.
11 And Your Honor is quite right, we went into it without
12 developing the case, without having researched documents and
13 we didn't make the objections as we would under de bene
14 esse. So we do object, Your Honor.

15 THE COURT: Well, we may have to continue this.
16 But subject, as maybe Judge Gergel --

17 MS. FRANKLIN: Well, we will --

18 THE COURT: It's more likely that you will get to
19 the truth of the matter.

20 MS. FRANKLIN: Okay. All right. So we will set
21 these aside for now.

22 MR. GROSE: The top one I think is the end.

23 MS. FRANKLIN: So --

24 THE COURT: What number is that?

25 MS. FRANKLIN: I'm sorry. This is Plaintiff's

1 Exhibit No. 8.

2 THE COURT: Okay.

3 MS. FRANKLIN: To which the State does not have an
4 objection.

5 (WHEREUPON, Plaintiff's Exhibit No. 8
6 was admitted into the record.)

7 THE COURT: I mean, I don't mind calling Judge
8 Nicholson and Judge Gergel if it becomes a problem.

9 MS. FRANKLIN: We will explore this, Your Honor,
10 and see what we can do to get their testimony. I did not
11 think that the attorney general would really object to this,
12 but we will certainly go ahead and --

13 THE COURT: Okay.

14 MS. FRANKLIN: We have no problem doing that.

15 THE COURT: Let's move on.

16 MS. FRANKLIN: Okay. So we're not entering into
17 evidence then what we had marked as Plaintiff's Exhibits 9,
18 10 and 11.

19 Now, as for Plaintiff's Exhibit No. 12. So the
20 next of this series are the transcripts --

21 THE COURT: Is it applicant's?

22 MS. FRANKLIN: I'm sorry, yes, Applicant's 12, 13,
23 14 and 15. These are the transcripts that Ms. Brown
24 produced for the first time today, which she used to
25 cross-examine our expert. Now, I haven't had an opportunity

1 to look at these closely. My co-counsel has made a review
2 of them. It appears that two of these cases, at least, may
3 be relevant for inclusion in this study. So we --

4 THE COURT: Wait a minute. Hold on. Hold on.
5 You said 12, 13, 14 and 15 were not included in the study?

6 MS. FRANKLIN: These were not included in the
7 study. Ms. Brown produced them. We had undertaken what we
8 thought were sufficient --

9 THE COURT: Are they on the subpoena list?

10 MS. FRANKLIN: The subpoena list for the
11 Charleston County Solicitor --

12 THE COURT: Yeah.

13 MS. FRANKLIN: Charleston County Attorney's
14 Office.

15 THE COURT: Right.

16 MS. FRANKLIN: Pull the subpoena --

17 THE COURT: Look on Page 14 of the report, isn't
18 that --

19 MR. GROSE: It is.

20 THE COURT: Yeah, I granted all of those. And
21 there are 14 cases listed. Look at Page 14 of the report.

22 MS. FRANKLIN: So we subpoenaed --

23 THE COURT: Just tell me about 12, 13, 14 and 15.

24 MS. FRANKLIN: Okay. So 12 was on the list of
25 names that we subpoenaed and did not receive.

1 THE COURT: All right. What case is that?

2 MS. FRANKLIN: That is State v. Ronald Coulter.
3 There was a codefendant Ivory Crocker.

4 THE COURT: Wait a minute. Ronald -- oh, there he
5 is. He was number one on the list.

6 MS. FRANKLIN: He was number one on the list.

7 THE COURT: Okay.

8 MS. FRANKLIN: So Ms. Brown has produced that
9 today.

10 THE COURT: Okay.

11 MS. FRANKLIN: Plaintiff's Exhibit 13 is Mr. Jamal
12 Brown, which is number nine on our list of cases.

13 THE COURT: Okay.

14 MS. FRANKLIN: Mr. Ethan Mack --

15 THE COURT: Twelve.

16 MS. FRANKLIN: This has a different -- a different
17 case number on it. I'm not sure if this is going to be
18 relevant. There were a couple of different cases that
19 Mr. Mack was involved in.

20 THE COURT: Well, the one on the list is from
21 2010.

22 MS. FRANKLIN: And so is this other one -- so is
23 this other one. When I spoke with the South Carolina
24 Supreme Court about obtaining this transcript, it appeared
25 that he had been convicted of some particular crimes that he

1 subsequently started trial on another set of charges to
2 which he pleaded mid-trial. And I believe that that was the
3 case where there was an additional jury strike, but which
4 was not appealed because I think that second sentence ran
5 concurrent with this other stuff. So, you know, I saw this
6 for the first time today. It's going to necessitate some
7 investigation to see whether or not this is relevant or not.
8 That's the most information I can give on that.

9 THE COURT: How about 15?

10 MS. FRANKLIN: So that's 14. Then Plaintiff's
11 Exhibit 15 is Michael Geter, which --

12 THE COURT: Number five.

13 MS. FRANKLIN: -- again, list of cases number
14 five, which we now have this.

15 THE COURT: And those are all of the appellate
16 record -- from the appellate record?

17 MS. FRANKLIN: They appear to be. These came from
18 Ms. Brown today and I have not seen them before today.

19 THE COURT: So if we go back to the study results
20 on Page 8, none of these are listed; correct?

21 MS. FRANKLIN: That is correct. Again, we tried
22 to obtain all of this information. We were unable to do so,
23 so they could not be included in the study. And now today,
24 we're seeing these documents, which may or may not -- I
25 mean, we're still not convinced that -- I mean, there may be

1 two of these that we can include in the study, but we're
2 going to -- what we wanted to ask Your Honor was to have you
3 direct the attorney general's office to help us figure out
4 what else is out there that we haven't received that we've
5 been looking for.

6 THE COURT: Well, assuming that they have some
7 relevance, you propose to go back to your expert and have
8 them --

9 MS. FRANKLIN: (The witness nodded head.)

10 THE COURT: -- recalculate them in your study, is
11 that the --

12 MS. FRANKLIN: I think we have --

13 THE COURT: -- object?

14 MS. FRANKLIN: I think we have to, yes, Your
15 Honor, with two, maybe three, possibly four cases, which
16 would be -- obviously, it's a significantly less undertaking
17 than what has already occurred.

18 THE COURT: Ms. Brown?

19 MS. BROWN: Yes, Your Honor. The word produced
20 was used a couple of times today. I've never been asked for
21 these. The subpoena is to Ms. Wilson and it was the Ninth
22 Circuit Judicial Solicitor's Office and there were no
23 requests for transcripts. And usually, the solicitor's
24 office doesn't have transcripts anyway. These are all
25 documents from -- I think most of them are from the PRC,

1 there may be a direct appeal in there, but those are
2 appellate court documents. That's how I found them. I did
3 it for impeachment purposes or, at least, to show they're
4 saying things aren't available when they were. I mean, you
5 can find it. You know, no problem with authenticity,
6 they're in the court system. I do object to stopping the
7 proceedings and letting them have additional discovery and
8 redoing their statistics after a full cross-examination.

9 THE COURT: Ms. Franklin, if these documents were
10 available to Ms. Brown, why wouldn't they be available to
11 you?

12 MS. FRANKLIN: Well, that's a very good question.
13 You know, all I can tell you in searching for these
14 documents, I went to the South Carolina Supreme Court and
15 worked with their librarians. I contacted the South
16 Carolina Court of Appeals to secure these documents. You
17 know, I think maybe Ms. Brown has them because she's with
18 the attorney general's office and they have an appellate
19 division. I went to --

20 THE COURT: There's no indication that there's any
21 effort to conceal these documents, is there?

22 MS. FRANKLIN: I don't know that there's any
23 effort to conceal them, but I do think that it's quite clear
24 what we were trying to secure, that we had litigation,
25 including the Charleston County Attorney's Office, and that.

1 MS. FRANKLIN: Well, Your Honor, it was because I
2 had gone to the South Carolina Supreme Court. I had gone to
3 the Court of Appeals. I had no reason to believe that the
4 attorney general's office had them, they just didn't want to
5 turn them over. They just didn't want to provide them.

6 THE COURT: Well, there's no indication of that.

7 MS. FRANKLIN: Okay.

8 THE COURT: Ms. Brown, I take her word that she
9 just --

10 MS. FRANKLIN: Uh-huh.

11 THE COURT: -- went looking for them and found
12 them. She's just a better digger.

13 MS. FRANKLIN: Okay. All right.

14 THE COURT: I'll -- I think they may bear some
15 relevance on this case, therefore, I will admit them.

16 (WHEREUPON, Plaintiff's Exhibit Nos. 12
17 through 15 were admitted into evidence.)

18 MS. FRANKLIN: Your Honor, we would like to ask if
19 the attorney -- if you would order that the attorney
20 general's office, if they have any additional information
21 that would bear on these cases that they produce them.

22 THE COURT: That shouldn't be necessary. I'm
23 going on -- throughout this proceeding going on the basis
24 that everybody is acting in good faith.

25 MS. FRANKLIN: Okay.

1 THE COURT: So I don't know an order like that is
2 necessary.

3 MS. BROWN: No, sir, but I would offer, I think
4 appellate defense may have more documents for the direct
5 appeal stuff than we would, especially if there are
6 documents --

7 THE COURT: Well, you just outlined where she's
8 headed next.

9 MS. BROWN: Well, that's fine. But we do still
10 disagree with stopping to allow them additional discovery.

11 THE COURT: I understand. I understand.

12 MS. FRANKLIN: And then lastly, Your Honor,
13 Plaintiff's Exhibit 16, this is a flash drive that contains
14 all of the raw data that the experts used in analyzing -- in
15 conducting this study.

16 MS. BROWN: I don't have any objection. I
17 understand it's just court documents, they're
18 self-authenticating transcripts, strike sheets --

19 THE COURT: It's in the record. You can look at
20 it.

21 MS. BROWN: I do not have the capability of
22 looking at that in court today.

23 THE COURT: I don't mean in court today.

24 MS. BROWN: Yes, sir, but I would be happy to look
25 at it. I would like to look at it, but I do --

1 THE COURT: We're not starting until 9:30 in the
2 morning.

3 MS. BROWN: Can I set up shop here?

4 THE COURT: No, but I will be glad to take
5 them -- Crystal might get mad at us, but take them out so
6 that you can --

7 MS. BROWN: That will be wonderful. I would
8 appreciate it.

9 MS. FRANKLIN: And that is it for the introduction
10 of the exhibits.

11 THE COURT: Okay.

12 (WHEREUPON, Plaintiff's Exhibit No. 16
13 was admitted into evidence.)

14 THE COURT: All right. How about the rest of the
15 afternoon? You're resting?

16 MS. FRANKLIN: Let me -- if I may consult with
17 cocounsel briefly?

18 (Pause.)

19 MS. FRANKLIN: Yes, sir, we've concluded
20 everything that we had planned to do today. We're not
21 intending to rest our case at this point, but as far as
22 today is concerned, I believe we're finished. Then I think
23 all that is on deck tomorrow is the testimony of Jeff Bloom.

24 THE COURT: I don't know.

25 MS. BROWN: Your Honor, I'm in a difficult

1 position. I don't know how I can present my case until they
2 present theirs because I am responding. I'm defending
3 against the allegations. And I would be at a great
4 disadvantage to go forward and attempt to create a response
5 for a possible allegation.

6 THE COURT: All right. You're referring to the
7 admission of these last four documents?

8 MS. BROWN: And anything else that they wanted to
9 present. I don't know that we have a ruling yet about
10 additional statistics. I'm objecting to them suspending
11 their case in order to redo their statistics. I think that
12 would bear on -- because that would probably bear on the
13 scope of what I would present what happened at trial.

14 THE COURT: All right.

15 MS. FRANKLIN: In response to that, Your Honor, I
16 mean, we've tried over the course of the past three years to
17 secure documents that were relevant to our claim. Today,
18 we've got new documents. So this is the first time I've
19 seen some of these documents.

20 THE COURT: All right. I understand.

21 MS. FRANKLIN: We would just like some additional
22 time.

23 THE COURT: My clerk has gone on a mission.

24 (Pause.)

25 THE COURT: That protective order?

1 MR. RAPOPORT: Yes, sir.

2 THE COURT: Okay. You can get it to us by e-mail
3 is the easiest way.

4 THE COURT: Ms. Brown, is there anything you think
5 you can put on the record prior to whatever additional
6 information they may come up with as a result of the
7 introduction of these four case files?

8 MS. BROWN: Your Honor, I called and asked Mr.
9 Bloom, trial counsel, to come in and give part of this. He
10 has already given some testimony before and we're bringing
11 him back and I might have to bring him back a third time. I
12 just -- but I could present some of that.

13 THE COURT: Well, I'm just trying to make -- we
14 set aside two days, I'm just trying to make the best of it.

15 THE COURT: All right. Ms. Franklin, I'm going to
16 hold you to a pretty tight schedule here. When do you think
17 you will be able to -- are you sure Dr. O'Brien has already
18 caught a plane -- oh, I'm sorry, there she is.

19 You're sort of partially hidden.

20 Why don't you consult with her and give me a
21 schedule. We're only talking about four cases.

22 (Pause.)

23 MS. FRANKLIN: Dr. O'Brien says it will take a few
24 weeks. The coders -- they have part-time coders, students
25 or graduates, I should say. But once we get the information

1 and once it gets coded, the analysis itself will not take
2 long. And we're still not sure exactly whether this is just
3 two cases or whether it might be four. It's kind of based
4 on that and then based on my other schedule. I've got a
5 couple of cases due in the fourth circuit coming up
6 mid-April. I mean, I think if we could get these documents
7 pretty quickly, could we shoot for mid-May?

8 THE COURT: Well, we have a -- I have a ninth
9 circuit nonjury term the week of May the 9th. It will be in
10 Charleston or, at least, it's scheduled in Charleston.

11 MS. FRANKLIN: I'm sorry, Dr. O'Brien is
12 consulting her calender.

13 THE COURT: That's fine.

14 MR. GROSE: At this point, I should probably tell
15 you, and I don't know how things are going to pan out, but
16 Solicitor Stumbo has me on notice for a jury trial that
17 week. It may or may not -- you know how it goes, but I
18 don't want to -- I mean.

19 THE COURT: Well, I will tell you, it's a four-day
20 week. It's not a full week.

21 MR. GROSE: Well, this trial -- it's a homicide by
22 child abuse case that we're still conducting some
23 investigation on. I would imagine it would be, at least, a
24 three-day trial, so I don't know.

25 THE COURT: I don't either. I wish you would --

1 depending on this witness, run that by Mr. Stumbo.

2 MR. GROSE: I -- I just didn't want you to think I
3 wasn't telling you about it. What I will do is I will take
4 back the message that you would like to have that week
5 assuming that our expert is available.

6 MS. FRANKLIN: Well, Dr. O'Brien will be available
7 to the end of that week, say, like Friday.

8 THE COURT: Well, obviously, it presents a problem
9 because if we just give you Friday, when does the State have
10 --

11 MS. FRANKLIN: Thursday, Thursday and Friday?

12 THE COURT: If you could have her here on Thursday
13 so they could have Friday.

14 MS. FRANKLIN: I think that is --

15 MS. BROWN: Your Honor, for scheduling purposes,
16 if they're only calling one witness to close their case. I
17 probably can get all of my case in in one day.

18 THE COURT: Well, I'm sure Don Michael and the
19 clerk would appreciate that because this is a regular
20 nonjury week, so it's not a -- don't worry about
21 jurisdiction.

22 MS. BROWN: Is this the normal PCR week for you or
23 just standard docket?

24 THE COURT: I said we don't have to worry about
25 jurisdiction. I will cover that.

1 MS. BROWN: Oh, yes, sir. Actually, I was worried
2 about my office getting a little upset with me for taking
3 some more days out of a PCR term.

4 THE COURT: No, it's not a PCR term. It's a ninth
5 circuit civil nonjury week.

6 MS. BROWN: Okay.

7 THE COURT: So do we need the 12th and the 13th or
8 just the 13th?

9 MS. FRANKLIN: It's up to you, I'm prepared --

10 MS. BROWN: If they're going to call more than one
11 witness, that will probably -- it might be better to reserve
12 the two days and let them close their case out.

13 MS. FRANKLIN: I do think we should do that. So
14 May 12th?

15 THE COURT: My clerk just mentioned, you're going
16 to attempt to call Solicitor Wilson?

17 MR. GROSE: That is something we're going to have
18 to discuss, but that is definitely on the table, Your Honor.

19 THE COURT: Then we need the 12th and the 13th.
20 I'm not -- I don't think we need to reserve that whole week.
21 That just kicks Charleston County in the tail. But since
22 it's a Charleston County case, I probably will have more
23 flexibility.

24 MS. FRANKLIN: I would say that Dr. O'Brien has
25 got to be elsewhere on the first two days of that week.

1 THE COURT: Well, I'm not sure, but doesn't she
2 have a holiday on Tuesday? It's Confederate Memorial Day.
3 They don't have that in Michigan?

4 DR. O'BRIEN: It's just that I have to be out of
5 town on another matter.

6 THE COURT: We're talking about the 12th and the
7 13th.

8 DR. O'BRIEN: Yes, that's not a problem at all.

9 THE COURT: We will be resting on the 10th. All
10 right. I will work on the 12th and the 13th. If you need
11 any -- if you need me to call Judge Nicholson or Judge
12 Gergel, I will do so.

13 MS. BROWN: Okay.

14 THE COURT: Let's try to get these things lined
15 up, so, hopefully, we will finish in May.

16 MS. BROWN: Your Honor, since we're not going to
17 be doing anything tomorrow, can I just stay and look through
18 this disk real quick?

19 THE COURT: Oh, sure, you can stay here. The
20 deputies usually leave around 7:00.

21 Anything else to come before the Court today?

22 MS. FRANKLIN: I'm just trying to clarify that
23 we're not coming back tomorrow.

24 THE COURT: No, we're not coming back tomorrow.
25 We've got nothing to do tomorrow.

1 MS. FRANKLIN: Okay. Then we have nothing
2 further to do today.

3 THE COURT: All right. We'll stand adjourned
4 until, hopefully, May 12th.

5 MS. FRANKLIN: Thank you, Your Honor.

6 MS. BROWN: Thank you, sir.

7 END OF PROCEEDINGS

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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 SC Case No. 2012-CP-10-3216, at the Richland County
6 Courthouse, March 31, 2016.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 164 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 15th day of June, 2016.

15

16 Crystal Holmes, Official Court Reporter

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March 12, 2019

The Honorable S. Phillip Lenski
Judge, Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, S.C. 29201

RE: Stewart Buchanan, SCDC #69848 v. S.C. Department of Probation, Parole and Pardon Services

Dear Judge Lenski,

Please find enclosed for filing Appellant's *Motion to Supplement the Record on Appeal* and proof of service on all required parties to the case.

Thank you for considering this request.

Very truly yours,

John H. Blume
Counsel for Stewart Buchanan

cc. Tommy Evans, Jr.
Stewart Buchanan

complete record and allow for a more accurate and robust assessment of the prior proceedings in this case.

For the above stated reasons, Appellant requests permission to supplement the record with the documents received by the parole board and a transcript and audio of the parole hearing.

Respectfully submitted,

JOHN H. BLUME
Cornell Law School
159 Charles Evans Hughes Hall
Ithaca, NY 14853
(607) 255-1030
jb94@cornell.edu

March 12, 2019

O'Brien, B.

BARBARA O'BRIEN

Associate Professor of Law

Email: obrienb@law.msu.edu

648

Phone: (517) 432-6907

East Lansing, MI 48824-1300

EDUCATION

Ph.D. Psychology, University of Michigan

Major: Social Psychology

April 2007

J.D. University of Colorado School of Law

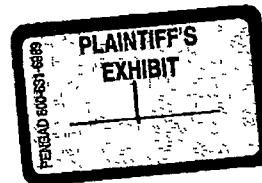
May 1996

A.B. Economics, Bowdoin College

Cum Laude

Major: Economics

May 1993



HONORS AND AWARDS

National Institute of Mental Health Prevention Training Grant Fellow, 2002-2005.

Walter M. Pillsbury Research Award, 2005.

Member and Associate Editor, *University of Colorado Law Review*, 1994-1996.

Order of the Coif, inducted May 1996.

PROFESSIONAL EXPERIENCE

Michigan State University College of Law, East Lansing, Michigan

January 2007 – June 2010, *Assistant Professor*

July 2010 – present, *Associate Professor*

July 2014 – present, *Associate Dean for Research*

University of Michigan, Ann Arbor, Michigan

Fall 2004 & Winter 2005, *Graduate Student Instructor*

Thomas M. Cooley School of Law, Lansing, Michigan

September, 2001- June, 2003, *Adjunct Clinical Professor of Law, Innocence Project*

Adjunct Professor of Law, Advanced Legal Research and Writing

United States District Court, Central District of Illinois, Urbana, Illinois

August 2000 - August 2001, *Judicial Clerk to the Honorable Harold A. Baker*

August 1998 - August 2000, *Judicial Clerk to the Honorable Michael P. McCuskey*

Office of the State Appellate Defender, Ottawa, Illinois

January 1997 - August 1998, *Assistant Defender*

August 2001 – July 2002, *Panel Attorney*

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- Barbara O'Brien, Catherine M. Grosso, George Woodworth, & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, forthcoming N.C. L. REV. (2016).
- Samuel R. Gross, Barbara O'Brien, Chen Hu, & Edward H. Kennedy, *The Rate of False Convictions among Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L. ACAD. SCI. 7230 (2014).
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- Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 525 (James R. Acker, Robert M. Bohm, & Charles S. Lanier, eds., 3d ed. 2014).
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MANUSCRIPTS IN PREPARATION

The Perils of Winnowing & the Constitutional Regulation of Police Investigation. Under review at L. & SOC'Y REV. (with Catherine M. Grosso)

Information Seeking in Jury Selection: How Stereotype Maintenance Processes Explain Stark Racial Disparities in North Carolina Death Penalty Proceedings. WORKING PAPER (with Catherine M. Grosso & Abijah Taylor).

GRANTS

2013-2015: National Science Foundation (NSF); *Information Seeking in Jury Selection: How Stereotype Maintenance Processes Explain Stark Racial Disparities in North Carolina Death Penalty Proceedings*. Principal Investigator (with Catherine M. Grosso); \$299,956.

2013. Z. Smith Reynolds Foundation. *Capital Jury Selection Research*. Principal Investigator (with Catherine M. Grosso); \$20,000.

2012. Center for Death Penalty Litigation. *Capital Jury Selection Research*. Principal Investigator (with Catherine M. Grosso); \$25,000.

2011. Proteus Action League. *Capital Jury Selection Research*. Principal Investigator (with Catherine M. Grosso); \$7,500.

2011. Butler Family Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$25,000.

2010. Winston-Salem Community Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$30,000.

2010. Butler Family Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$20,000.

2010. Proteus Action League. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$7,000.

2010. Anonymous funder. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$50,000.

2009. AJ Fletcher Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$10,000.

2009. Maverick Lloyd Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$25,000.

2009. Open Society Institute. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$200,000.

2009. Z. Smith Reynolds Foundation. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$109,000.

2009. Vital Projects Fund. *North Carolina Racial Justice Act Research*. Principal Investigator (with Catherine M. Grosso); \$50,000.

SELECTED PRESENTATIONS

- O'Brien, B. & Grosso, C.M. (2015 May). *Talking to Jurors: Using Conversation Analysis to Understand Bias in Jury Selection*. Presentation at Law and Society Annual Conference, Seattle, WA.
- Grosso, C.M. & O'Brien, B. (2015 May). *Transforming a Skewed Sample: A Critique of Lawyers' Shared View of Police Investigation*. Presentation at Law and Society Annual Conference, Seattle, WA.
- Lynch M., Grosso, C.M., O'Brien, B., & West, V (2014 February). *Finding Data: The Politics and Magic of Accessing Capital Punishment Data*. American Association for the Advancement of Science Annual Meeting.
- O'Brien, B. & Grosso, C.M. (2013 May). *Information Seeking in Jury Selection: How Stereotype Maintenance Processes Explain Stark Racial Disparities in North Carolina Death Penalty Proceedings*. Presentation at Law and Society Annual Conference, Boston, MA.
- O'Brien, B. & Grosso, C.M (2013 January). *Deconstruct and Reconstruct: Reexamining Bias in the Legal System; Searching for New Approaches*. AALS Crosscutting Program. AALS Annual Meeting, New Orleans, LA.
- Grosso, C.M. & O'Brien, B. (2012 November). *Unconvincing Protestations: The Persistent Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*. Selected under peer-review for presentation at the 2012 Conference on Empirical Legal Studies. Stanford University, Palo Alto, CA.
- O'Brien, B. & Grosso, C.M. (2012 September). *Information Seeking in Jury Selection: How Stereotype Maintenance Processes Explain Stark Racial Disparities in North Carolina Death Penalty Proceedings*. Law & Society Association Midwest Retreat. Madison, WI.
- Grosso, C. & O'Brien, B (2011 October). *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*. Batson at Twenty-Five: Perspectives on the Landmark, Reflections on its Legacy, University of Iowa Law Review Symposium. Iowa City, IA.
- O'Brien, B & Grosso, C. (2011 April). *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go where the McCleskey Court Wouldn't*. Moving Beyond "Racial Blindsight"? The Influence of Social Science Evidence after the North Carolina Racial Justice Act, Michigan State Law Review Symposium. East Lansing, MI.
- Grosso, C. & O'Brien, B. (2010, November). *The North Carolina Racial Justice Act Studies: Examining the Role of Race in Capital Punishment*. American Society of Criminologists Annual Meeting. San Francisco, CA.
- O'Brien, B. & Grosso, C. (2010, October). *The North Carolina Racial Justice Act: Why Isn't This a Dead Bang Winner? Persuasion and Ideology: Politically Divisive Cases in Appellate Courts*, Seventh Annual MSU Indigenous Law Conference. East Lansing, MI.
- O'Brien, B. & Grosso, C. (2010, September). *The North Carolina Racial Justice Act Studies: Examining the Role of Race in Capital Punishment*. Michigan State University Department of Psychology Brown Bag Presentation, East Lansing, MI.

- Grosso, C. & O'Brien, B. (2010, June). *The North Carolina Racial Justice Act Studies: Examining the Role of Race in Capital Punishment*. Law & Society Annual Meeting, Chicago, IL.
- Mostellor, R. & O'Brien, B. (2010, April). *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, Conference on the Future of the Adversarial System, Chapel Hill, NC.
- O'Brien, B. & Ellsworth, P.C. (2009, October). *Prosecutorial Blind Spots: Features of the Adversarial Criminal Justice System that Promote Confirmation Bias*. Society of Experimental Social Psychology, Annual Conference, Portland, ME.
- O'Brien, B. (2009, August). *Creeping Determinism and What Could Have Been: What the Psychology of Hindsight Bias and Counterfactual Reasoning Can Teach Us about Post-Conviction Brady Claims*. Big Ten Aspiring Scholars Conference, Urbana, IL.
- O'Brien, B. (2009, May). *A Recipe for Bias: An Empirical Look at the Interplay between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*. Law & Society Annual Meeting, Denver, CO.
- O'Brien, B. & Gross, S.R. (2007, November). *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*. Conference on Empirical Legal Studies, New York, NY.
- O'Brien, B. (2007, January). *Confirmation Bias in Criminal Investigations*. University of Michigan Decision Consortium, Ann Arbor, MI.
- O'Brien, B. & Ellsworth, P.C. (2006, October). *Confirmation Bias in Criminal Investigations*. Conference on Empirical Legal Studies, Austin, TX.
- O'Brien, B. & Ellsworth, P.C. (2005, June). *Psychological Underpinnings of False Convictions: Confirmation Bias in Criminal Investigations*. Law & Society Annual Meeting, Las Vegas, NV.
- O'Brien, B., & Oyserman, D. (May, 2004). *Promoting Law and Order and Preventing Injustice: How Self-Regulatory Focus Influences Attitudes toward the Criminal Justice System*. Society for Prevention Research, Quebec City, Montreal, Canada.
- O'Brien, B., & Oyserman, D. (May, 2004). *The Art of the Soft Sell: Understanding how Obvious and Subtle Framing of Self-Regulatory Goals Shifts Attitudes about the Criminal Justice System*. Midwestern Psychological Association, Chicago, IL.

MEDIA APPEARANCES & MENTIONS

- Research about PNAS article discussed in numerous newspapers and websites, including the New York Times, Christian Science Monitor, Huffington Post, Vox, and Forbes.
- Research about North Carolina Racial Justice Act Studies discussed in numerous newspapers and websites, including The Wall Street Journal, Huffington Post, and CQ Researcher.
- Newspaper Interview, *Fair Trial for Macon isn't Likely*, Kevin Grasha, Lansing State Journal, April 27, 2008.

O'Brien, B.

Research discussed in *Exoneration Using DNA Brings Change in Legal System*, Solomon Moore, New York Times, October 1, 2007.

Research discussed in *Study of Wrongful Convictions Raises Questions Beyond DNA*, Adam Liptak, New York Times, July 23, 2007.

Research discussed in *Innocents in Prison*, Stuart Taylor Jr., National Journal, August 6, 2007.



**Report on Jury Selection Study
STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

Barbara O'Brien & Catherine M. Grosso

Associate Professors of Law

March 8, 2016

Table of Contents

I.	Introduction	2
II.	Study Design	2
A.	Study Population	3
B.	Data Collection.....	3
C.	Overview of Database Development	3
i.	Development of Data Collection Instruments	3
D.	Steps for Ensuring Accuracy of Data.....	4
III.	Analysis and Results.....	5
IV.	Summary of Findings	7
Appendices		

I. Introduction

This report documents the design, methodology, analysis, and results for a study on the exercise of peremptory challenges during jury selection in trials of all defendants for which Solicitor Scarlett Wilson served as lead prosecutor and for which materials were available.¹ The study examined how the state exercised peremptory challenges in criminal cases to assess whether potential jurors' race played any role in those decisions. The primary investigators for the study are Barbara O'Brien and Catherine Grosso. Both are associate professors of law at Michigan State University College of Law.

II. Study Design

Our goal was to design and conduct a study that would rigorously analyze the role of race in the exercise of peremptory challenges in cases prosecuted by Solicitor Wilson. This study coded and analyzed race and strike information for all qualified venire members in the study. This report presents the methodology, analysis, and results.

Several earlier jury selection studies informed our study design. The most important among these included a study examining strike decisions over a 17-year period in 317 Philadelphia County, Pennsylvania, capital murder trials² and our study of the exercise of peremptory challenges during jury selection in trials of all defendants on death row in North Carolina as of July 1, 2010.³

¹ Attorneys for Mr. Dickerson reviewed the Clerk of Court records in Charleston County to identify the universe of jury trials in which Solicitor Scarlett Wilson served as lead attorney during her tenure at the Ninth Circuit Solicitor's Office. They identified 12 cases in addition to Mr. Dickerson's eligible for inclusion in the study. They then subpoenaed all available jury information for these trials from Solicitor Wilson. A copy of the subpoena/FOIA request is attached as Appendix A. Solicitor Wilson's attorneys informed Mr. Dickerson's attorneys that they could not locate the case file for State v. Ivory Coker and Ronald Coulter. Additionally, Mr. Wilson's attorney informed Mr. Dickerson's attorneys that they could not locate the jury lists for Michael Dunham or Jemol Brown. Bradley Lindsey committed suicide shortly after being incarcerated, and so there was no transcript of his case available. Additionally, Ethan Mack pleaded guilty during trial, and he was sentenced to a concurrent term of years for a sentence he was already serving. The Court of Appeals informed Mr. Dickerson's counsel that he did not appeal this case and thus there is no transcript of the voir dire in existence. These cases could not be included in the study. Jury information in Mr. Dickerson's case was obtained by separate litigation.

² David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).

³ Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2012).

A. Study Population

This study examined jury selection in 9 cases, for a total of 10 jury selection proceedings.⁴ For each proceeding we sought to include every venire member who faced peremptory challenges as part of jury selection. For the purposes of this report a “venire member” includes anyone who was subjected to voir dire questioning and not excused for cause, including alternates.

Each proceeding involved an average of 27.4 venire members eligible to be struck by the state, producing a database of 274 state strike decisions. (See Appendix B for the complete database.) Of these, 150 (54.7%) were women, and 124 (45.3%) were men. The venire members’ racial composition was as follows: white (193, 70.4%); black (78, 28.5%); Asian (1, 0.4%); and unknown (2, 0.7%).

B. Data Collection

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror lists, individual juror questionnaires, and attorneys’ or clerks’ notes. Each case file also includes an electronic copy of the jury selection transcript and the jury summons list, when available.

C. Overview of Database Development

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators. As set forth more fully below, staff attorneys received detailed training on each step of the coding and data entry process. A total of three staff attorneys worked on this project.

i. Development of Data Collection Instruments

Data collection instruments (DCIs) are forms that staff attorneys completed based on the primary documents and transcripts. We created two data collection instruments for coding data in this study: (1) South Carolina (County of Charleston) Defendant Level Data Collection Instrument, Jury Selection Study (6 November 2015) (“D-Level DCI”), and (2) South Carolina (County of Charleston) Venire Member Level Data Collection Instrument, Jury Selection Study (17 November 2015) (“VM-Level DCI”). (See Appendix C for both DCIs.)

⁴ Jalal Beyah’s case had two jury selection proceedings. After the jury was selected, the judge granted the defendant’s *Batson* motion and jury selection started anew. Beyah Trial Tr, 61. We have coded and analyzed both jury selection proceedings in this case. We consider Beyah’s case to be two proceedings.

The D-Level DCI collected information about the proceeding generally, including the number of peremptory challenges used by each side, and the name of the judge and attorneys involved in the proceeding.

Questions 1-7 of the VM-Level DCI documented basic procedural information specific to each venire member.

Question 5 of the VM-Level DCI required the staff attorney to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to strike that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. That juror would therefore be coded as not eligible to be struck by that party. This determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.

Questions 8-22 of the VM-Level DCI documented basic demographic information specific to each venire member.

Question 12 documents the race of the venire member. Staff attorneys completed this question using the race information provided in Charleston County summons lists for most of the 287 venire members (74.9%, 215/287).⁵ When that information was not available from the summons lists, staff attorneys relied on notes in the jury lists or questionnaires (13.6%, 39/287), or on information contained in the transcript (10.9%, 31/287). We are missing race information for 2 venire members (0.7%, 2/287).

D. Steps for Ensuring Accuracy of Data

We took several steps to minimize coding errors. We also developed systematic procedures to catch and correct errors in coding and data entry.

To ensure reliability, we instituted double coding procedures for all coding in this study. Under these procedures, two different staff attorneys separately coded strike information for each venire member to ensure accuracy and intercoder reliability. The first staff attorney identified all

⁵ The Clerk of Court informed Mr. Dickerson's attorneys that the office does not have the juror lists for the remaining cases because of records retention policies. See S.C. App. Ct. Rule 607(i).

potential jurors and assigned each juror a study identification number. This attorney completed the D-Level DCI and the VM-Level DCI. A second staff attorney used the list of jurors provided by the first to code a second VM-Level DCI for each juror. Other than the list of potential jurors created by the first staff attorney, the second staff attorney did not have access to the first staff attorney's codes. A staff attorney then compared and reviewed their codes for consistency and noted any discrepancy, which a primary investigator reviewed and resolved.

To minimize data entry errors, a primary investigator created a Microsoft Excel spreadsheet with data validation restrictions in place to allow us to transfer the data that staff attorneys coded on paper DCIs into a machine-readable format. The data entry fields accepted only valid responses in order to minimize errors. For instance, if an item on the DCI allowed for only three possible responses (0 = No, 1 = Yes, and 9 = Unknown), then entering anything other than 0, 1, or 9 would be rejected and the person entering the data would be prompted to re-enter an acceptable value for that question. Although this mechanism could not prevent all data entry errors (e.g., it could not catch a staff attorney's misspelling of a venire member's name), it provided one line of defense against human error.

We used several other methods to catch and correct other errors in coding or data entry. Using the SPSS statistical program, we could identify instances where inconsistencies in data indicated possible errors and established a process for review and, where appropriate, correction.⁶

III. Analysis and Results

This report presents unadjusted racial disparities in prosecutorial strikes. Throughout this section, we report the disparities observed as well as a measure of the likelihood that the finding would occur as a result of chance. This measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance. The *p*-values for the racial disparities observed in this study are consistently well below the standard scientific

⁶ For example, we could identify all instances in which it appeared that a party exercised fewer than the peremptory strikes usually allotted to determine whether there was an error or if the party failed to use all strikes.

benchmarks for reliability.⁷ (See Appendix D for a Codebook defining each variable used in the analyses.)

The database includes information about 287 venire members. Of those, 274 (95.5%) were eligible to be struck by the state. We analyzed prosecutorial strike patterns for only those venire members who were eligible to be struck by the state.

Among state strike-eligible venire members, the overwhelming majority were either white (193/274, 70.4%) or black (78/274, 28.5%); just 1 (0.4%) was of another race.⁸ As of the writing of this report, we are missing race information for 2 (0.7%, 2/274) venire members who were eligible to be struck by the state.

The analyses below compare strike decisions relating to 271 black or white state strike-eligible venire members. Table 1 presents the comparative strike rates for each of the 10 cases in the study. As a preliminary matter, Table 1, Line 7, shows the strike rates in Mr. Dickerson's case. The state struck 50% of eligible black venire members (4/8) and 4.6% of eligible white venire members (1/22). This is a difference of 45.5 percentage points in the strike rates (50.0 – 4.6) and a ratio between the strike rates of 10.9 (50.0/4.6). This disparity is statistically significant ($p < 0.02$). The numbers in Mr. Dickerson's case are consistent and stronger than the overall strike pattern reported below.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against other venire members. Across all strike-eligible venire members in the study, prosecutors struck 38.5% (30/78) of eligible black venire members, compared to only 5.7% (11/193) of eligible white venire members. This disparity reflects a difference of 32.8 percentage points in the strike rates (38.5 – 5.7) and a ratio between strike rates of 6.75 (38.5/5.7). This difference is statistically significant: $p < .001$. Put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral.⁹ (See Table 2.)

The average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members. The

⁷ Reference Guide on Statistics--David H. Kaye and David A. Freedman." National Research Council. *Reference Manual on Scientific Evidence: Third Edition*. Washington, DC: The National Academies Press, 2011, at 251-52.

⁸ For the sake of simplicity, the analysis we present below examines strikes against black potential jurors with those against white potential jurors.

⁹ Several different chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the p -values, and the results were consistent regardless of the test used.

analysis presented above (and in Table 2) examines strikes across all venire members in the study, pooled across cases. To assess whether the effect is robust, we also compared the strike rates calculated for each proceeding, so that each represents one data point. Of the 10 proceedings we analyzed, prosecutors struck an average of 36.1% of eligible black venire members, compared to only 4.9% of all other eligible venire members. This disparity reflects a difference of 31.2 percentage points in the strike rates (36.1 – 4.9) and a ratio between strike rates of 7.4 (36.1/4.9). This difference is statistically significant, $p < .001$. (See Table 3.)

IV. Summary of Findings

We have documented the strike decisions and race for 271 potential black or white jurors eligible to be struck by the state in 10 proceedings from 2004 to 2013. In every analysis that we performed, race was a significant factor in prosecutorial decisions to exercise peremptory challenges in jury selection in these proceedings. Regardless of how one looks at the data, a robust and substantial disparity in the exercise of prosecutorial strikes against black venire members compared to others persists.

A statistically significant disparity persists at a magnitude of more than six to one whether calculated by looking at all strike decisions pooled across cases (a disparity of 6.75 to 1, 38.5/5.7), or by comparing the mean strike rates for each case (a disparity of 7.4 to 1, 36.1/4.9).

The effect of race was statistically significant at the level of $p < .001$. Thus, for each of these analyses, the chances that we would see a disparity of that magnitude in a race-neutral jury selection system is less than one in one thousand. The robustness of our findings of racial disparities across a variety of analyses provides powerful evidence that race was a substantial factor in prosecutorial strike decisions in the 10 proceedings in Charleston County.

TABLE 1
Rates of State Strikes for Cases in Study

	Defendant	Year	Mean Strike Rate	
			Black Qualified Venire Members	White Qualified Venire Members
1.	Michael Barnes	2006	40.0% (2/5)	15.0% (3/20)
2.	Jalal F. Beyah (first jury selection)	2004	55.6% (5/9)	0% (0/18)
3.	Jalal F. Beyah (second jury selection)	2004	37.5% (3/8)	0% (0/19)
4.	Colin J. Broughton	2009	50.0% (4/8)	14.8% (4/27)
5.	Ryan P. Deleston	2013	33.3% (3/9)	0% (0/18)
6.	Dominic M. Derricotte	2008	37.5% (3/8)	0% (0/16)
7.	William O. Dickerson	2009	50.0% (4/8)	4.6% (1/22)
8.	Leemar T. Mack	2008	0% (0/2)	8.0% (2/25)
9.	Michael G. Shine	2007	27.3% (3/11)	0% (0/13)
10.	Brandon J. Simmons	2010	30.0% (3/10)	6.7% (1/15)
	Totals		38.5% (30/78)	5.7% (11/193)

TABLE 2
Prosecutorial Peremptory Strike Patterns
(Strikes against venire members aggregated across cases)

	A Black Venire Members	B White Venire Members	C Total
1. Passed	61.5% (48)	94.3% (182)	85.0% (230)
2. Struck	38.5% (30)	5.7% (11)	15.1% (41)
3. Total	100% (78)	100% (193)	100% (271)

*Chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 3
Average Rates of State Strikes
(Average of strike rates calculated in individual cases and number of proceedings averaged)

	A Average Strike Rate	B Number of Proceedings
1. Strike Rates Against Black Qualified Venire Members	36.1%	10
2. Strike Rates Against White Qualified Venire Members	4.9%	10

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

Appendix A

Dickerson

9

O'Brien & Grosso Report

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.

PI

E-mail: charles@groselawfirm.com

Web: GroseLawFirm.com

August 27, 2015

CERTIFIED MAIL - RETURN RECEIPT

The Honorable Scarlett A. Wilson
Solicitor for the Ninth Judicial Circuit
101 _____
Charleston, SC 29401

Re: *William O. Dickerson, v. State*
Case Number: 2012-CP-10-3216

Dear Solicitor Wilson:

Enclosed for service, please find a subpoena for certain records from various cases that are listed in the attachment to the subpoena. You may comply by providing the records by email or US Mail. I could also arrange for the records to be picked up at your office.

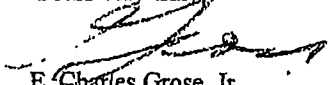
In addition to discovery under the South Carolina Rules of Civil Procedure, please consider this request to be a request for records pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10, *et. seq.*

By copy of this letter to Ms. Brown, I am providing notice of this subpoena to opposing counsel.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,


E. Charles Grose, Jr.

cc: Elizabeth A. Franklin-Best, Esquire (via email only)
Melody J. Brown, Esquire (via US Mail)

STATE OF SOUTH CAROLINA

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF CHARLESTON

William O. Dickerson, #6030, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

State of South Carolina, Defendant

Case Number: 2012-CP-10-3216

Pending in Charleston County

TO: The Honorable Scarlett A. Wilson, Solicitor of the Ninth Judicial Circuit

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

X YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects:

Please see the attachment.

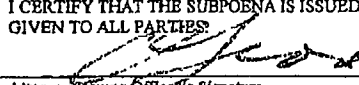
PLACE Charleston County Solicitor's Office	DATE AND TIME Friday September 11, 2015, at 2:00 PM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

	August 27, 2015	E. Charles Grose, Jr.
Attorney/Issuing Officer's Signature	Date	Print Name
Indicate if Attorney for Plaintiff or Defendant		
Attorney's Address and Telephone Number :		
404 Main Street, Greenwood SC, 29646, 864-538-4466, Attorney for the Applicant		

Clerk of Court/Issuing Officer's Signature	Date	Print Name
Pro Se Litigant's Name, Address and Telephone Number :		

SCCA 254 (05/2015)
Dickerson

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)
11
O'Brien & Grosso Report

PROOF OF SERVICE		
SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden

(B) If a subpoena.

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

SCCA 254 (05/2015)

Dickerson

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on pages 2 and 3)

12

O'Brien & Grosso Report

(11) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

Attachment

To: The Honorable Scarlett A. Wilson, Solicitor of the Ninth Judicial Circuit

For each of the cases listed below, you are instructed to produce the incident report, complete and accurate copies of the jury list(s) prepared by the Clerk of Court, your juror strike sheet, all information created or assembled about all potential jurors (regardless of whether it was prepared by you or by someone else and given to you), and your notes made during the roll call of jurors, juror qualification, voir dire, and jury selection.

List of Cases

1. *State v. Ivory Croker and Ronald Coulter*, 2002-GS-10-2441
2. *State v. Jalal Beyah*, 2001-GS-10-1733 (Tried 2004)
3. *State v. Bradley Lindsey*, 2004-GS-10-2619 (Tried 4/25/05)
4. *State v. Michael Dunham*, 2005-GS-10-8285 (Tried 2/13/06)
5. *State v. Michael Jeter*, 2005-GS-10-8240 (Tried 3/20/06)
6. *State v. Michael Shine*, 2007-GS-10-4275 (Tried 3/5/07)
7. *State v. Dominic Derricotte*, 2007-GS-10-3281, -84 (Tried 1/7/08)
8. *State v. Michael Barnes*, 2006-GS-10-2169 (Tried November 1, 2006)
9. *State v. Jemol Brown*, 2006-Gs-10-1271 (October 23, 2006)
10. *State v. Ryan Deleston* (Tried 10/7/13)
11. *State v. Brandon Simmons*, 2010-GS-10-4574 (Tried 12/13/10)
12. *State v. Ethan Mack*, 2010-GS-10-1823 (Tried 10/4/10)
13. *State v. Lemar Mack*, 2007-GS-10-8279- 81) (Tried 3/19/08)
14. *State v. Colin Broughton*, 2006-GS-08-2164-66, 2182-85, 218 and 2009-GS-08-1199 (Resolved September 29, 2009)

Appendix B

Please see electronic file.

Appendix C

Dickerson

16

O'Brien & Grosso Report

6453

SOUTH CAROLINA (COUNTY OF CHARLESTON)
JURY SELECTION STUDY
Defendant Level Data Collection Instrument
Version: 6 November 2015

Please fill in the blanks as legibly as possible in capital letters with a sharp dark pencil. For the questions that present multiple answer options, please circle the number of the single most appropriate answer unless otherwise instructed.

I. Identifying and Procedural Information

1. Defendant Study ID Number: V1001
2. Defendant's Name:

[V1002] Last

[V1003] First
[V1004] MI
3. Date of Offense V1007 / /
MM DD YEAR
4. Date of Indictment V1008 / /
MM DD YEAR
5. Date of Guilt Verdict or Plea V1009 / /
MM DD YEAR
6. Date Sentence Imposed V1010 / /
MM DD YEAR
7. Defendant's Date of Birth V1011 / /
MM DD YEAR
8. Defendant's Age at Date of Offense (circle one) V1012
0 = Under 17 2 = 18-29 4 = 60+
1 = 17 3 = 30-59 9 = Unknown
9. Defendant's Sex (circle one) V1013
0 = Female 1 = Male 9 = Unknown

10. Race/Ethnicity of Defendant (circle one)

V1014

- 1 = White/Caucasian 4 = Pacific Islander 7 = Other (specify) _____
 2 = Black/African American 5 = Latino/Hispanic 8 = Mixed (self-reported) _____
 3 = Asian/Asian American 6 = Native American 9 = Unknown

Source of information: _____

11. List all of the Charges in Indictment (circle one)

V2001

a.	f.
b.	g.
c.	h.
d.	i.
e.	j.

12. List all of the Charges of which Defendant was Convicted: (enter "none" if appropriate)

a.	f.
b.	g.
c.	h.
d.	i.
e.	j.

13. Does this case have more than one decedent victim? (circle one)

V1015

0 = No 1 = Yes

14. Number of Decedent Victim(s) (circle one)

V1016

1 = One 3 = Three 9 = Unknown
 2 = Two 4 = Four or more

15. Juror Decedent Victim One Race/Ethnicity (circle one)

V1021

1 = White/Caucasian	4 = Pacific Islander	7 = Other (specify) _____
2 = Black/African American	5 = Latino/Hispanic	8 = Mixed (self-reported) _____
3 = Asian/Asian American	6 = Native American	9 = Unknown

Source of information: _____

16. Decedent Victim One Sex (circle one)

V1022

0 = Female	1 = Male	9 = Unknown

17. Decedent Victim One Age (circle one)

V1023

0 = Infant (Under 2)	2 = Young Adult (18-29)	4 = Older Adult (60+)
1 = Child (2-17)	3 = Adult (30-59)	9 = Unknown

~~~~~ Begin Decedent Victim Two ~~~~~

18. Decedent Victim Two Name

\_\_\_\_\_  
LAST [V1024]

\_\_\_\_\_  
FIRST [V1025]

\_\_\_\_\_  
MI [V1026]

19. Decedent Victim Two Race/Ethnicity (circle one)

V1027

- |                            |                      |                           |
|----------------------------|----------------------|---------------------------|
| 1 = White/Caucasian        | 4 = Pacific Islander | 7 = Other (specify) _____ |
| 2 = Black/African American | 5 = Latino/Hispanic  | 8 = Mixed (self-reported) |
| 3 = Asian/Asian American   | 6 = Native American  | 9 = Unknown               |

Source of information: \_\_\_\_\_

20. Decedent Victim Two Sex (circle one)

V1028

- |            |          |             |
|------------|----------|-------------|
| 0 = Female | 1 = Male | 9 = Unknown |
|------------|----------|-------------|

21. Decedent Victim Two Age (circle one)

V1029

- |                      |                         |                       |
|----------------------|-------------------------|-----------------------|
| 0 = Infant (Under 2) | 2 = Young Adult (18-29) | 4 = Older Adult (60+) |
| 1 = Child (2-17)     | 3 = Adult (30-59)       | 9 = Unknown           |

## II. Jury Selection Data

22. How many peremptory strikes did the prosecution have in this case? V1011 \_\_\_/\_\_\_
23. How many peremptory strikes did the defense have in this case? V1012 \_\_\_/\_\_\_
24. Number of Jurors in the Venire V1005 \_\_\_/\_\_\_/\_\_\_  
*If unknown code 999.*
25. Number of Jurors Excused for Cause V1006 \_\_\_/\_\_\_  
*If unknown code 99.*
26. Number of Peremptory Challenges Used by the State V1007 \_\_\_/\_\_\_  
*If unknown code 99.*
27. Number of Peremptory Challenges Used by the Defense V1008 \_\_\_/\_\_\_  
*If unknown code 99.*
28. Number of Venire Members Not Reached During Voir Dire V1009 \_\_\_/\_\_\_  
*If unknown code 99.*
29. Which parties exhausted their peremptory challenges? (circle one) V1010
- 0 = Neither side exhausted peremptory challenges      3 = Both sides exhausted peremptory challenges
- 1 = Only the State exhausted peremptory challenges      9 = Unknown
- 2 = Only the defense exhausted peremptory challenges

Coder's Name

\_\_\_\_\_  
[V1030] Last

\_\_\_\_\_  
[V1031] First

\_\_\_\_\_  
[V1032] MI

Date Coded

V1033 \_\_\_/\_\_\_/\_\_\_  
MM DD YEAR

**SOUTH CAROLINA (COUNTY OF CHARLESTON)**  
**JURY SELECTION STUDY**  
**Venire Member Level Data Collection Instrument**  
Version: 17 November 2015

Please fill in the blanks as legibly as possible in capital letters with a sharp dark pencil. For the questions that present multiple answer options, please circle the number of the single most appropriate answer. Otherwise, follow the instructions provided.

**I. IDENTIFYING INFORMATION**

1. Venire Member's Study Identification Number V2002

2. Defendant's Name

LAST [V2003]

FIRST [V2004]

MI [V2005]

3. Venire Member's Name

LAST [V2011]

FIRST [V2012]

MI [V2013]

**II. CHALLENGES TO VENIRE MEMBER**

4. Excused for Cause (circle one) V2006

0 = No

1 = Yes

9 = Unknown

5. Peremptory strike eligibility<sup>1</sup> (circle one) V2007

1 = Both Defense & State

2 = State

3 = Defense

4 = Neither

9 = Unknown

6. Peremptory Challenge by State (circle one) V2008

0 = No

1 = Yes

9 = Unknown

<sup>1</sup> A venire member is "strike eligible" to a party when that party has the choice to either accept the juror or exercise a peremptory challenge against them. The State and Defense take turns going first in jury selection. Pay attention as to who went first and whether or not that party passed.

For instance, if the State goes first and strikes a juror before the Defense has a chance to strike or accept that juror, code that juror's strike eligibility as "State." If the Defense had gone first and used a strike, the juror's strike eligibility would be "Defense." If the State accepts a juror and the Defense then strikes or passes on them, code that juror's strike eligibility as "Both Defense and State." Likewise, if the Defense passes the juror to the State, that juror's strike eligibility is "Both Defense and State."

Availability of strikes also impacts eligibility. If one party has exhausted its strikes, the juror is not strike eligible to that party. Once both have exhausted, a juror would be strike eligible to neither.

7. Peremptory Challenge by Defense (circle one)

V2009

0 = No

1 = Yes

9 = Unknown

**III. VENIRE MEMBER CHARACTERISTICS**

8. What was this venire member's ultimate status? (circle one)

V2014

0 = Neither seated on the jury nor selected as alternate    2 = Selected as an alternate

1 = Seated on the jury

9 = Unknown

9. Number of seat to which venire member was called for questioning. *If unknown code 99.*

V2015 \_\_\_\_/\_\_\_\_

10. Venire Member's Gender (circle one)

V2016

0 = Female

1 = Male

9 = Unknown

11. Source of information for Gender (circle one)

V2017

1 = Indicated Explicitly

2 = Inferred from other  
information (e.g., name)

9 = Gender unknown

12. Venire Member's Race (circle one)

V2018

1 = White/Caucasian

5 = Latino/Hispanic

8 = Mixed (self-reported)

2 = Black/African American

6 = Native American

3 = Asian/Asian American

7 = Other (specify)

9 = Unknown

4 = Pacific Islander

13. Please indicate the source of information for race. Choose the lowest number that applies, even if a subsequent foil is also applicable (circle one)

V2045

1 = Juror summons list

2 = Noted by court or counsel in  
transcript and no dispute about  
characterization

3 = Noted on a jury chart or in  
counsel's notes and verified by  
another source.

8 = N/A because race is  
unknown

14. Please indicate proper age range (circle one)

V2019

1 = 19 or younger

2 = 20-35

3 = 36-50

4 = 51-75

5 = Over 75

9 = Unknown

15. Marital Status (circle one)

V2020

1 = Married

3 = Separated or divorced

5 = Living unmarried with a  
significant other

2 = Single

4 = Widowed

9 = Unknown

16. Children (circle one)

V2021

0 = Does not have children

1 = Has children

9 = Unknown

17. Belongs to a religious organization (circle one)

V2022

0 = No

1 = Yes

9 = Unknown

18. Education (circle highest level of education obtained)

V2023

1 = Attended grade school

4 = Attended college

6 = Attended graduate school

2 = Attended high school (9-12)

5 = College graduate

7 = Other

3 = High school graduate

9 = Unknown

(including GED)

19. Has served in military (circle one)

V2024

0 = No

1 = Yes

9 = Unknown

**Employment Information:** Use the code from Employment Code Appendix that provides the most detailed information. Use the more general code (i.e., 10, 20, etc.) only if more precise information is unavailable. If the venire member or spouse has more than one job, choose the one at which he or she spends the most time or otherwise indicates is primary.

20. Venire Member's Employment (enter code from list in Employment Code Appendix)  
*If unknown code 99.*

V2025 \_\_\_\_/\_\_\_\_

21. Spouse's Employment (enter code from list in Employment Code Appendix)  
*If unknown code 99. If not applicable, code 88.*

V2026 \_\_\_\_/\_\_\_\_

22. **Descriptive Characteristics:** Enter the code from the Descriptive Characteristics Appendix for whichever characteristics apply in the slots V2027 through V2036, as needed. Use the code that provides the most detailed information possible. Use the more general code (e.g., 100, 200) only if more precise information is unavailable.

V2027 \_\_\_\_

V2031 \_\_\_\_

V2035 \_\_\_\_

V2028 \_\_\_\_

V2032 \_\_\_\_

V2036 \_\_\_\_

V2029 \_\_\_\_

V2033 \_\_\_\_

8888 = No factors apply (enter in V2027, leave rest blank)

V2030 \_\_\_\_

V2034 \_\_\_\_

9999 = Responses unknown (enter in V2027, leave rest blank)

24. Venire Member Questioned for

V2037

1 = Both guilt and penalty phase

2 = Guilt phase only

3 = Penalty phase only

8 = Not capital



Coder's Name

\_\_\_\_\_  
LAST [V2038]

\_\_\_\_\_  
FIRST [V2039]

\_\_\_\_\_  
MI [V2040]

Date Coded    \_\_\_\_/\_\_\_\_/\_\_\_\_  
                  MM    DD    YEAR

V2041

## Appendix D

Dickerson

25

O'Brien & Grosso Report

6462

**South Carolina Jury Selection Study  
CODEBOOK  
(7 March 2016)**

|     | Variable Label         | Ques. No.       | Variable No. | Coding Instruction or Recoding Syntax                                                                                                                                                                                                               | Explanation                                                                                                                                               |
|-----|------------------------|-----------------|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.  | Age                    | 14              | 2019         | 1 = 19 or younger; 2 = 20-35; 3 = 36-50; 4 = 51-75; 5 = Over 75; 9 = unknown                                                                                                                                                                        | VM's age                                                                                                                                                  |
| 2.  | Black                  | 12              |              | RECODE V2018 (*Black/African American=1) (*White/Caucasian=0) (MISSING=SYSMIS) INTO Black.                                                                                                                                                          | Recodes V2018 into Black or all others.                                                                                                                   |
| 3.  | BlackEligibleState     | 5, 12           |              | IF (Black=1 & StateEligible=1) BlackEligibleState=1. IF (Black=9   StateEligible=9) BlackEligibleState=9. IF (Black=0 & (StateEligible=0   StateEligible=1)) BlackEligibleState=0. IF ((Black=0   Black=1) & StateEligible=0) BlackEligibleState=0. | VM is both black and eligible to be struck by state                                                                                                       |
| 4.  | BlackEligibleState_sum | 5, 12           |              | /BlackEligibleState_sum=SUM(BlackEligibleState)                                                                                                                                                                                                     | Sum of black VMs eligible to be struck by the state in that case.                                                                                         |
| 5.  | Children               | 16              | 2021         | 0 = no children, 1 = children, 9 = unknown                                                                                                                                                                                                          | VM has children                                                                                                                                           |
| 6.  | CoderFirst             | NA              | 2039         |                                                                                                                                                                                                                                                     | Coder's first name                                                                                                                                        |
| 7.  | CoderLast              | NA              | 2038         |                                                                                                                                                                                                                                                     | Coder's last name                                                                                                                                         |
| 8.  | CoderMiddle            | NA              | 2040         |                                                                                                                                                                                                                                                     | Coder's middle initial                                                                                                                                    |
| 9.  | StudyID                | 1 (D-level DCJ) | 1001         | Study Identification Number                                                                                                                                                                                                                         | Identification number assigned case.                                                                                                                      |
| 10. | DateCoded              | NA              | 2041         |                                                                                                                                                                                                                                                     | Date coded                                                                                                                                                |
| 11. | DefEligible            | 5               |              | RECODE V2007 (SYSMIS=9) (9=9) (4=0) (3=1) (1=1) (2=0) INTO DefEligible.                                                                                                                                                                             | Indicates whether VM was strike eligible to defense                                                                                                       |
| 12. | Descriptive1           | 23              | 2027         |                                                                                                                                                                                                                                                     | Descriptive information about individual VMs. Coders instructed to enter missing (9999) code unless more data become available. (Applies to Vs 2027-2036) |
| 13. | Descriptive2           | 23              | 2028         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 14. | Descriptive3           | 23              | 2029         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 15. | Descriptive4           | 23              | 2030         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 16. | Descriptive5           | 23              | 2031         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 17. | Descriptive6           | 23              | 2032         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 18. | Descriptive7           | 23              | 2033         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 19. | Descriptive8           | 23              | 2034         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 20. | Descriptive9           | 23              | 2035         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 21. | Descriptive10          | 23              | 2036         |                                                                                                                                                                                                                                                     |                                                                                                                                                           |
| 22. | DFirst                 | 3               | 2004         |                                                                                                                                                                                                                                                     | Defendant's first name                                                                                                                                    |
| 23. | DLast                  | 3               | 2003         |                                                                                                                                                                                                                                                     | Defendant's last name                                                                                                                                     |
| 24. | DMiddle                | 3               | 2005         |                                                                                                                                                                                                                                                     | Defendant's middle initial                                                                                                                                |
| 25. | Education              | 18              | 2023         | 1 = Attended grade school, 2 = Attended high school (9-12), 3 = High school graduate, 4 = Attended college, 5 = College graduate, 6 = Attended graduate school, 7 = Other, 9 = Unknown                                                              | Highest level of education VM achieved.                                                                                                                   |
| 26. | Employment             | 21              | 2025         |                                                                                                                                                                                                                                                     | Employment of VM. Coders instructed to enter missing (9999) code unless more data become available.                                                       |
| 27. | Excused                | 4               | 2006         | 0 = No; 1 = Yes; 9 = Unknown                                                                                                                                                                                                                        | VM excused for cause (for data cleaning purposes only)                                                                                                    |
| 28. | Gender                 | 10              | 2016         | 0 = Female, 1 = Male, 9 = Unknown                                                                                                                                                                                                                   | VM's gender                                                                                                                                               |
| 29. | GenderSource           | 11              | 2017         | 1 = Indicated explicitly, 2 = Inferred from other information (e.g., name), 9 = Gender unknown                                                                                                                                                      | Source of information for gender                                                                                                                          |
| 30. | Marital                | 15              | 2020         | 1 = Married, 2 = Single, 3 = Separated/divorced, 4 = Widowed, 5 = Living with significant other, 9 = Unknown                                                                                                                                        | VM's marital status                                                                                                                                       |
| 31. | Military               | 19              | 2024         | 0 = No; 1 = Yes; 9 = Unknown                                                                                                                                                                                                                        | VM has served in military                                                                                                                                 |
| 32. | N_Break                | NA              |              |                                                                                                                                                                                                                                                     | Calculated by SPSS to reflect the number of VMs in a case.                                                                                                |

|     | Variable Label         | Ques. No. | Variable No. | Coding Instruction or Recoding Syntax                                                                                                                                                                                                               | Explanation                                                                                                                                                                                                  |
|-----|------------------------|-----------|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 33. | QuestionedFor          | 24        | 2037         | 1 = Both guilty and penalty phase, 2 = Guilt phase only, 3 = Penalty phase only; 8 = Not Capital                                                                                                                                                    | Phase for which VM was questioned.                                                                                                                                                                           |
| 34. | Race                   | 12        | 2018         | 1 = White/Caucasian, 2 = Black/African American, 3 = Asian/Asian American, 4 = Pacific Islander, 5 = Latino/Hispanic, 6 = Native American, 7 = Other (specify), 8 = Mixed (self-reported), 9 = Unknown                                              | VM's race                                                                                                                                                                                                    |
| 35. | RateProsStruckBlacks   | 5, 6, 12  |              | COMPUTE RateProsStruckBlacks=StrikeBlack_sum / BlackEligibleState_sum.                                                                                                                                                                              | Rate state struck eligible black jurors: calculated by dividing sum of black VMs state struck by sum of black VMs eligible to be struck                                                                      |
| 36. | RateProsStruckWhites   | 5, 6, 12  |              | COMPUTE RateProsStruckWhites=StrikeWhite_sum / WhiteEligibleState_sum.                                                                                                                                                                              | Same as above but using sums for whites                                                                                                                                                                      |
| 37. | ReligiousOrg           | 17        | 2022         | 0 = No; 1 = Yes; 9 = Unknown                                                                                                                                                                                                                        | VM belongs to religious organization                                                                                                                                                                         |
| 38. | Seat                   | 9         | 2015         |                                                                                                                                                                                                                                                     | Number of seat to which VM was called for questioning. If unknown code 99.                                                                                                                                   |
| 39. | RaceSource             | 13        | 2045         | 1 = Juror summons list; 2 = Noted by court or counsel in transcript and no dispute about characterization; 3 = Noted on a jury chart or in counsel's notes and verified by another source; 8 = N/A because race is unknown                          | Indicates source of information for race. Coders instructed to choose lowest number that applied, even if a subsequent foil also applied (such as when multiple sources of race information were available). |
| 40. | StateEligible          | 17        |              | RECODE V2007 (SYSMIS=9) (9=9) (1=1) (2=1) (3=0) (4=0) INTO StateEligible                                                                                                                                                                            | Recodes StrikeEligible to indicate whether VM was strike eligible to state                                                                                                                                   |
| 41. | Status                 | 8         | 2014         | 0 = Neither seated on jury nor selected as alternate; 1 = Seated on jury; 2 = Selected as alternate; 9 = Unknown                                                                                                                                    | VM's ultimate status                                                                                                                                                                                         |
| 42. | StrikeBlack            | 6, 12     |              | IF (Black=1 & V2008=1) StrikeBlack=1.<br>IF (Black=9   V2008=9) StrikeBlack=9.<br>IF (Black=0 & (V2008=0   V2008=1)) StrikeBlack=0.<br>IF ((Black=0   Black=1) & V2008=0) StrikeBlack=0.                                                            | VM was both black and struck by the state.                                                                                                                                                                   |
| 43. | StrikeBlack_sum        | 6, 12     |              | AGGREGATE /OUTFILE=* MODE=ADDVARIABLES /BREAK=StudyID /StrikeBlack_sum=SUM(StrikeBlack) /N_BREAK=N.                                                                                                                                                 | Computes sum of black VMs state struck in that case.                                                                                                                                                         |
| 44. | StrikeState            | 6         | 2008         | 0 = No; 1 = Yes; 9 = Unknown                                                                                                                                                                                                                        | VM was struck by state.                                                                                                                                                                                      |
| 45. | StrikeWhite            | 6, 12     |              | IF (White=1 & V2008=1) StrikeWhite=1<br>IF (White=9   V2008=9) StrikeWhite=9.<br>IF (White=0 & (V2008=0   V2008=1)) StrikeWhite=0.<br>IF ((White=0   White=1) & V2008=0) StrikeWhite=0.                                                             | VM was both white and struck by state                                                                                                                                                                        |
| 46. | StrikeWhite_sum        | 6, 12     |              | /StrikeWhite_sum=SUM(StrikeWhite)                                                                                                                                                                                                                   | Sum of white VMs struck by state.                                                                                                                                                                            |
| 47. | VMFirst                | 3         | 2012         |                                                                                                                                                                                                                                                     | VM's first name.                                                                                                                                                                                             |
| 48. | VMLast                 | 3         | 2011         |                                                                                                                                                                                                                                                     | VM's last name.                                                                                                                                                                                              |
| 49. | VMMiddle               | 3         | 2013         |                                                                                                                                                                                                                                                     | VM's middle initial.                                                                                                                                                                                         |
| 50. | VMStudyID              | 1         | 2002         | Venue Member's Study Identification Number                                                                                                                                                                                                          | Unique identifier of VM                                                                                                                                                                                      |
| 51. | White                  | 12        |              | RECODE V2018 ('Black/African American'=0) ('White/Caucasian'=1) (MISSING=SYSMIS) INTO White.<br>VARIABLE LABELS White 'White'.                                                                                                                      | Recodes V2018 into White or all others.                                                                                                                                                                      |
| 52. | WhiteEligibleState     | 5, 12     |              | IF (White=1 & StateEligible=1) WhiteEligibleState=1. IF (White=9   StateEligible=9) WhiteEligibleState=9. IF (White=0 & (StateEligible=0   StateEligible=1)) WhiteEligibleState=0. IF ((White=0   White=1) & StateEligible=0) WhiteEligibleState=0. | VM is both white and eligible to be struck by the state.                                                                                                                                                     |
| 53. | WhiteEligibleState_sum | 5, 12     |              | AGGREGATE /OUTFILE=* MODE=ADDVARIABLES /BREAK=CSSStudyID /WhiteEligibleState_sum=SUM(WhiteEligibleState)                                                                                                                                            | Sum of white VMs eligible to be struck by the state in that case.                                                                                                                                            |

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

AFFIDAVIT



My name is Eddie Haselden, and I hereby affirm and state the following:

1) I am over the age of 18, and I am not a party to the litigation of *William Oliver Dickerson v. State of South Carolina*, 2012-GS-10-3216.

2) I am employed by the Charleston County Clerk of Court's Office, and my title is Chief Deputy Clerk of Court.

3) Pursuant to the retention policies of this office, the master juror lists for the following cases have been destroyed and are no longer in existence:

- A. *State v. Jalal Beyah*, 2001-GS-10-1733
- B. *State v. Bradley Lindsey*, 2004-GS-10-2619
- C. *State v. Michael Dunham*, 2005-GS-10-8285
- D. *State v. Michael Shine*, 2007-GS-10-4275
- E. *State v. Dominic Derricotte*, 2007-GS-10-3281
- F. *State v. Michael Barnes*, 2006-GS-10-2169
- G. *State v. Jemol Brown*, 2006-GS-10-1271
- H. *State v. Brandon Simmons*, 2010-GS-10-4574
- I. *State v. Ethan Mack*, 2010-GS-10-1823
- J. *State v. Lemar Mack*, 2007-GS-10-8279.

4) I have personal knowledge that the master juror lists for these cases are not in the custody or control of the Charleston County Clerk's Office because they have been destroyed.

FURTHER AFFIANT SAYETH NOT.

Eddie Haselden

Jessica M. H.  
My Commission Expires July 3, 2016

VOLUME I OF II

STATE OF SOUTH CAROLINA  
In The Court of Appeals



APPEAL FROM CHARLESTON COUNTY  
R. Markley Dennis, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RONALD COULTER,

APPELLANT

APPELLATE CASE NO. 2013-002379

RECORD ON APPEAL

RONALD COULTER  
#300410, Pro-se

Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

ALAN WILSON  
Attorney General

J. RUTLEDGE JOHNSON  
Assistant Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211

Attorneys for Respondent

PAGES 1-500

**INDEX**

|                                                                                                    |           |
|----------------------------------------------------------------------------------------------------|-----------|
| <b>INDEX.....</b>                                                                                  | <b>i</b>  |
| <b>INDICTMENT AND SENTENCING SHEET .....</b>                                                       | <b>1</b>  |
| <b>APPLICATION FOR POST-CONVICTION RELIEF .....</b>                                                | <b>4</b>  |
| <b>RESPONDENT'S RETURN TO APPLICATION FOR POST-CONVICTION<br/>RELIEF DATED JUNE 23, 2005 .....</b> | <b>18</b> |
| <b>APPELLANT'S BRIEF OF AMENDED ISSUES .....</b>                                                   | <b>24</b> |
| <b>FORM ORDER DENYING POST-CONVICTION RELIEF<br/>DATED JUNE 2, 2006.....</b>                       | <b>35</b> |
| <b>ORDER OF DISMISSAL DATED NOVEMBER 1, 2006 .....</b>                                             | <b>36</b> |
| <b>TRIAL TRANSCRIPT VOL. I DATED FEB. 23, 2004.....</b>                                            | <b>56</b> |
| <b>MOTION TO QUASH THE INDICTMENT.....</b>                                                         | <b>52</b> |
| <b>RULING BY THE COURT .....</b>                                                                   | <b>62</b> |
| <b>VOIR DIRE .....</b>                                                                             | <b>78</b> |
| <b>JACKSON V. DENNO</b>                                                                            |           |
| <b>ALAN RICHARD KRAMITZ</b>                                                                        |           |
| Direct Examination by Mr. Durant .....                                                             | 203       |
| Cross Examination by Mr. Smiley .....                                                              | 220       |
| Redirect Examination by Mr. Durant.....                                                            | 232       |
| <b>CYNTHIA MCCANTS</b>                                                                             |           |
| Direct Examination by Mr. Durant .....                                                             | 233       |
| Cross Examination by Mr. Smiley .....                                                              | 236       |
| <b>IVORY CROKER</b>                                                                                |           |
| Direct Examination by Mr. Smiley .....                                                             | 243       |
| Cross Examination by Mr. Durant .....                                                              | 259       |
| Redirect Examination by Mr. Smiley.....                                                            | 281       |

## NEAL V. BIGGERS

## ALAN RICHARD KRAMITZ

|                                         |     |
|-----------------------------------------|-----|
| Direct Examination by Mr. Durant .....  | 301 |
| Cross Examination by Ms. Shealy .....   | 312 |
| Cross Examination by Mr. Smiley .....   | 324 |
| Recross Examination by Ms. Shealy ..... | 338 |

## THOMAS SCOTT DECKARD

|                                        |     |
|----------------------------------------|-----|
| Direct Examination by Mr. Smiley ..... | 343 |
|----------------------------------------|-----|

|                                                    |     |
|----------------------------------------------------|-----|
| TRIAL TRANSCRIPT VOL. II DATED FEB. 24, 2004 ..... | 385 |
|----------------------------------------------------|-----|

|                         |     |
|-------------------------|-----|
| PRE-TRIAL MOTIONS ..... | 389 |
|-------------------------|-----|

|                               |     |
|-------------------------------|-----|
| JUDGE'S OPENING REMARKS ..... | 459 |
|-------------------------------|-----|

|                                       |     |
|---------------------------------------|-----|
| OPENING STATEMENT BY MS. WILSON ..... | 477 |
|---------------------------------------|-----|

|                                      |     |
|--------------------------------------|-----|
| OPENING STATEMENT BY MR. DAVIS ..... | 496 |
|--------------------------------------|-----|

|                                       |     |
|---------------------------------------|-----|
| OPENING STATEMENT BY MR. SMILEY ..... | 501 |
|---------------------------------------|-----|

## TESTIMONY

## ORLANDO WATKINS, JR.

|                                        |     |
|----------------------------------------|-----|
| Direct Examination by Ms. Wilson ..... | 507 |
| Cross Examination by Mr. Davis .....   | 529 |

## MARGARET CONWAY SHORT

|                                        |     |
|----------------------------------------|-----|
| Direct Examination by Mr. Durant ..... | 532 |
|----------------------------------------|-----|

## DAISY DENHAM

|                                        |     |
|----------------------------------------|-----|
| Direct Examination by Ms. Wilson ..... | 551 |
| Cross Examination by Mr. Davis .....   | 564 |

## CONNIE KNIGHT

|                                        |     |
|----------------------------------------|-----|
| Direct Examination by Ms. Wilson ..... | 571 |
|----------------------------------------|-----|

## LENORA THOMAS

|                                          |     |
|------------------------------------------|-----|
| Direct Examination by Ms. Wilson .....   | 592 |
| Cross Examination by Mr. Davis .....     | 609 |
| Cross Examination by Mr. Smiley .....    | 615 |
| Redirect Examination by Ms. Wilson ..... | 616 |



|                                                                                                                  |            |
|------------------------------------------------------------------------------------------------------------------|------------|
| <b>ANN MARIE ALBRIGHT</b>                                                                                        |            |
| Direct Examination by Ms. Wilson.....                                                                            | 618        |
| Cross Examination by Mr. Davis .....                                                                             | 628        |
| Cross Examination by Mr. Smiley.....                                                                             | 630        |
| <b>TRIAL TRANSCRIPT VOL. III DATED FEB. 25, 2004 .....</b>                                                       | <b>639</b> |
| <b>DEFENDANT CROKER'S GUILTY PLEA.....</b>                                                                       | <b>651</b> |
| <b>MOTION FOR MISTRIAL .....</b>                                                                                 | <b>686</b> |
| <b>DEFENDANT COULTER'S GUILTY PLEA .....</b>                                                                     | <b>719</b> |
| <b>SENTENCING .....</b>                                                                                          | <b>750</b> |
| <b>GUILTY PLEA TRANSCRIPT DATED FEB. 25, 2004.....</b>                                                           | <b>759</b> |
| <b>NOTICE OF APPEAL FROM DENIAL OF POST-CONVICTION RELIEF<br/>DATED NOVEMBER 8, 2006.....</b>                    | <b>795</b> |
| <b><u>JOHNSON</u> PETITION FOR WRIT OF CERTIORARI.....</b>                                                       | <b>796</b> |
| <b>APPELLANT'S <i>PRO SE</i> RESPONSE TO THE <u>JOHNSON</u> PETITION .....</b>                                   | <b>804</b> |
| <b>COURT OF APPEALS ORDER DENYING CERTIORARI<br/>DATED MAY 19, 2008.....</b>                                     | <b>821</b> |
| <b>REMITTTTUR ISSUED JUNE 4, 2008.....</b>                                                                       | <b>823</b> |
| <b>FEDERAL PETITION FOR WRIT OF HABEAS CORPUS<br/>FILED AUGUST 22, 2008 .....</b>                                | <b>824</b> |
| <b>RESPONDENT'S RETURN AND MEMORANDA OF LAW<br/>IN SUPPORT OF SUMMARY JUDGMENT DATED DECEMBER 31, 2008 .....</b> | <b>884</b> |
| <b>REPORT AND RECOMMEDATION DATED AUGUST 3, 2009 .....</b>                                                       | <b>906</b> |
| <b>ORDER GRANTING THE RESPONDENT'S MOTION<br/>FOR SUMMARY JUDGMENT DATED SEPTEMBER 17, 2009.....</b>             | <b>918</b> |
| <b>ORDER DENYING APPEALABILITY<br/>TO THE 4<sup>TH</sup> CIRCUIT COURT OF APPEALS.....</b>                       | <b>935</b> |
| <b>UNITED STATES SUPREME COURT ORDER DENYING CERTIORARI.....</b>                                                 | <b>938</b> |
| <b>STATE PETITION FOR WRIT OF HABEAS CORPUS FILED APRIL 11, 2013 .....</b>                                       | <b>939</b> |

|                                                                                          |     |
|------------------------------------------------------------------------------------------|-----|
| TRANSCRIPT OF STATE HABEAS HEARING HELD AUGUST 9, 2013 .....                             | 964 |
| ORDER DISMISSING APPELLANT'S STATE HABEAS PETITION<br>FILED AUGUST 22, 2013 .....        | 969 |
| APPELLANT'S MOTION TO ALTER OR AMEND<br>DATED SEPTEMBER 11, 2013 .....                   | 970 |
| ORDER DENYING THE APPELLANT'S MOTION<br>TO ALTER OR AMEND FILED SEPTEMBER 30, 2013 ..... | 972 |
| CERTIFICATE OF COUNSEL.....                                                              | 973 |

SAW 2002-01-00357

WITNESSES

JOHN BURNETT AND/OR

KEITH HAIR

RAMITZ, NCPD

DCA#: 2001015862

ARREST WARRANT NUMBER

H098010

January 16, 2002

ACTION OF GRAND JURY

MAY 14 2002 TRUE BILL

*Judy Carranough*  
representon of Grand Jury

VERDICT

on of Petit Jury

Date:

DOCKET NO. 2002-GS-10- 2443

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

MAY TERM 2002

THE STATE

v.

RONALD COULTER

Indictment for

KIDNAPPING

02-267

FILED

2002 NOV -6 AM 11:09

JULIE J. BOGGS  
CLERK OF COURT

BY

*AWD*

6471

2/

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

INDICTMENT FOR  
KIDNAPPING

At a Court of General Sessions, convened on May 13, 2002, the Grand Jurors of Charleston County present upon their oath:

That in Charleston County on or about April 21, 2001, Ronald Coulter unlawfully did seize, kidnap, abduct, confine, or carry away Edwina Sims, without the authority of law. This in violation of Section 16-3-910 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



CHIEF DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

STATE

VS.

Ronald Coulter

AKA:

Race:

DOB:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2002 -GS- 10 - 2443

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

H0980104.21.0116-3-9100101915☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO:

In violation of §16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☒ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Ernest Wilson  
SolicitorRonald Coulter  
Defendant[Signature]  
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed \_\_\_\_\_ years and/or to pay a fine of \$ \_\_\_\_\_; provided that upon the service of \_\_\_\_\_ days/months/years and/or payment of \$ \_\_\_\_\_; plus costs and assessments as applicable; the balance is suspended with probation for \_\_\_\_\_ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: \_\_\_\_\_☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

## SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ \_\_\_\_\_ plus 20% fee: \$ \_\_\_\_\_

Payment Terms:

☐ set by SCDPPPS

Recipient:

\*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BU) Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

|         |    |        |
|---------|----|--------|
|         | \$ |        |
|         | \$ |        |
| \$100   | \$ | 100.00 |
| \$100   | \$ |        |
| \$12    | \$ |        |
| \$500   | \$ |        |
| \$25    | \$ | 25.00  |
| \$100   | \$ |        |
| \$50    | \$ |        |
| \$40/ea | \$ |        |
|         | \$ | 3.75   |
|         | \$ | 128.75 |

PTUP

\_\_\_\_\_ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ \_\_\_\_\_ beginning

\$ \_\_\_\_\_ paid to Public Defender Fund

Other: \_\_\_\_\_

☐ Appointed PD or appointed other counsel, \$35.13 TP  
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

A. D. [Signature]  
011111212  
2-25-04

Clerk of Court/ Deputy Clerk

Court Reporter:

[Signature]  
Gayle [Signature]

White - Clerk Green - Corrections . Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

STATE OF SOUTH CAROLINA

County of CHARLESTON04-CP-10-2999  
IN THE COURT OF COMMON PLEASRONALD COULTER, #300410

Full name and prison number (if any) of Applicant

v.

State of South Carolina

HENRY D. MCMASTER, ATT'Y GEN;

APPLICATION FOR

POST-CONVICTION RELIEF

BY

CLERK OF COURT

2001 JUL 16 AM 11:08

FILED

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention BRO 4460  
BROAF 19210
2. Name and location of Court which imposed sentence CHARLESTON COUNTY  
GENERAL SESSIONS COURT; CHARLESTON SOUTH CAROLINA 29401-23
3. Name(s) of co-defendant(s) (if any) IVORY CROKER
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:  
(a) 2002-GS-10-2443, KIDNAPPING

- 5
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) FEBRUARY 25, 2004, (30) YEARS
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty YES
- (b) after a plea of not guilty \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
NO \_\_\_\_\_
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) MY COUNSEL FAILED TO EXPLAIN THE APPEAL PROCEDURE TO ME AND I WAS NOT AWARE OF THE APPEAL PROCEDURE.

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS
- (b) VIOLATION OF LAW, INVOLUNTARY AND UNKNOWNLY GUILTY
- (c) PLEA, VIOLATION OF SUBJECT MATTER JURISDICTION ALSO  
SEE ATTACHMENT (6 PAGES)
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) INDICTMENT INSUFFICIENT (DEFECTIVE) AND; COUNSEL
- (b) FAILURE TO WITHDRAW GUILTY PLEA BASED UPON NEWLY  
DISCOVERED EVIDENCE. COUNSEL FAILED TO ADEQUATELY
- (c) OBJECT TO THE SUFFICIENCY OF THE INDICTMENT  
PRESENTED, ALSO, SEE ATTACHMENT (6 PAGES)
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NONE
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NONE
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NONE
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
- i. NONE
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_



- iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. NONE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (d) the date of each such disposition:
  - i. NONE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. NONE
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?  
NONE

15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
    - i. NONE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings in which each ground was raised:
    - i. NONE
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) NONE
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? YES
  - (b) your trial, if any? YES
  - (c) your sentencing? YES
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
  - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NONE
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
    - i. RODNEY DAVIS, ESQUIRE PUBLIC DEFENDER OFFICE,  
5th FLOOR O.T. WALLACE OFFICE BLDG. 101 MEETING  
STREET CHARLESTON, S.C. 29401
    - ii. LOFTON & LOFTON, P.C. LIONEL S. LOFTON, ESQUIRE  
174 EAST BAY STREET SUITE 302 CHARLESTON, S.C.  
29401
    - iii. \_\_\_\_\_
  - (b) the proceedings at which each such attorney represented you:
    - i. LIONEL LOFTON, ESQUIRE (PRELIMINARY HEARING  
RODNEY DAVIS, ESQUIRE PUBLIC DEFENDER (TRIAL COUNSEL
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_

9

**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, RONALD COULTER, #300410, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Ronald Coulter

Applicant

SWORN or affirmed to and subscribed before me this

13<sup>th</sup> day of July, 2004.

Elizabeth A. Smith  
Notary Public

My Commission Expires: July 29, 2007

19. State clearly the relief you seek in filing this application:

MY CONVICTION VACATED.

20. Are you now under sentence from any other court that you have not challenged?

NONE

Revised 3/2003

STATE OF SOUTH CAROLINA )

County of CHARLESTON )

VERIFICATION

I, RONALD COULTER, #300410, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Ronald Coulter

SWORN to and subscribed before me this 13th  
day of July, 2007.

Elizabeth W. [Signature] (L.S.)  
Notary Public

My Commission Expires July 29, 2007

11

- GROUNDS RAISED -

Applicant ~~has~~<sup>has</sup> suffered a miscarriage of Justice and his conviction only stands due to denial of due process and equal protection in the state court, in multiple and gross violation of the United States Supreme court precedents and the United States constitution, that constitutes an outrage of mockery of Justice that the Federal courts who sworn to uphold the United States constitution should not tolerate.

The proper standard for attorney performance is that of reasonable effective assistance. Rosebee v. Leeks, 293 S.C. 531, 362 S.E. 2d 22 (1987). Citing Strickland v. Washington, 466 U.S. 668 (1984). See also Butler v. State, 286 S.C. 441, 334 S.E. 2d 813 (1985). Under this evidence, petitioner had no defense prepared at all and received ineffective assistance of counsel. Martinez v. State, Supra, Frett v. State, 298 S.C. 54, 378 S.E. 2d 249 (1988). Under these circumstances, he is entitled to relief. When it is clear that where even a single error on the part of defense counsel which affected the right of petitioner is shown to be the product of neglect ~~or~~<sup>or</sup> ignorance, a denial of effective assistance of counsel has been established. Sallie v. North Carolina, 587 F. 2d 636 (4th cir. 1978).

If the attorney makes a serious mistake which could effect the verdict, reversal is required even if the attorney was generally competent. Trombly v. Anderson, 439 F. supp. 1250, 1256 (1977). aff'd 584 F. 2d 807 (6th cir. 1978); Hyman v. Aiken, 824 F. 2d 1405 (4th cir. 1987).

Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.C. 1019, 82 L. Ed. 1461 (19) (must have understanding of charge if plea is to be an intelligent admission of guilty); Henderson v. Morgan, 426 U.S. 645, 647, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). Id. (quoting from McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166,

(1)

1171, 22 L. Ed. 2d 418 (1969). See also United v. States v. Punch, 709 F. 2d 889 (5th cir. 1983) (court paraphrasing of charges, without advising defendant of elements of knowingly and intentionally, resulted in plea being set aside). The applicant alleges that he did not plead guilty freely and voluntarily. The state submits this allegation has no merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969). Dover v. State, 304 S.C. 433, 405 S.E. 2d 391 (1991).

Pleading guilty under North Carolina v. Alford, 400 U.S. 25, 31 (1970). This was errors<sup>ec</sup> by trial counsel and the applicant had no intention of ever pleading guilty, but to stand trial before a Jury; a fact that applicant made known to trial counsel time and time again, trial counsel was ineffective in forcing and persuading applicant to even plead guilty under Alford, when trial counsel knew applicant was proclaiming innocence. Roscoe v. State, 546 S.E. 2d 417 (S. C. 2001). See also Al-Shabazz v. State, 527 S.E. 2d 742 (1999); Richardson v. State, 426 S.E. 2d 795 (1993). Without a shadow of a doubt, applicant's plea of guilty was involuntarily, unknowingly, unwillingly, and unintelligently, entered.

Equal protection of the Laws the fourteenth amendment forbids a state to deny any person within its Jurisdiction the equal protection of the Laws. The fifth amendment requires the Federal Government to obey the same equal protection standard as the state.

Ineffective assistance of counsel in violation of the fourteenth and sixth amendment of the United States constitution and article 1, section 3, and 14 of the South Carolina constitution. Under Strickland v. Washington, 466 U.S. 668 (1984).

13  
Where a state obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the state Unconstitutionally deprives the defendant of his Liberty, Cuyler, 446 U.S. at 343, 100 S.Ct. at 1175. The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. United States v. Cronin, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984).

A necessary result of the seriousness with which court treat pleas of guilty, however is that courts have a ~~responsibility~~<sup>Re</sup> responsibility to assure that defendants who plead guilty do so voluntarily and knowingly. Although applicant counsel need not be a fortune teller, he must be a reasonable competent Legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the past; the counsel's function of representing applicant is to assist him and owe him his Loyalty, and also a duty to avoid conflicts of interest. Furthermore applicant contends counsel function as his assistance should derive the overarching duty to advocate applicant in his case; and a more particular duty to consult with applicant on important decisions; also to keep him informed of important developments in course of the prosecution. Now its a fact that applicant asserts its his attorney's duty to make reasonable investigations and decisions that make particular investigations unnecessary. Ineffective assistance is based on Law and facts. Clearly Erroneous Rule, rule 52, F. P. civ. P. (see) Farmer v. Beto, 5th cir. 1971, 444 F. 2d 696; Busby v. Holman, 5th cir. 1966, 356 F. 2d 75.

The defendant would Like to challenge the sufficiency of the body of the indictment. Tate v. State, 549 S.E. 2d 601, 345 S.C. 577, S.C. 1981. Accused must be given sufficient notice of crime for which he is charge so that defendant may adequately prepare his defense, court may know what Judgment to pronounce, and acquittal or conviction may be effectively placed in bar to subsequent conviction. State v. Hiott, 276 S.E. 2d 163, 276 S.C. 72.

14 Guilty should never be found, except on a rationally support able state of near certitude. Evans-Smith v. Taylor, 19 F. 3d. 899, 906 (4th cir. 1994) (citations and emphasis omitted). The evidence in appellant's case fell short of that degree of substantiality required for fair and Logical inference of guilty. State v. Littlejohn, Supra.

The rule against hearsay prohibits the admission of evidence of an out-of court statement to prove the truth of the matter asserted at trial. Simpkins v. State, 303 S.C. 364, 401 S.E. 2d 142 (1991).

In Roscoe v. State, 345 S.C. 16, 20, 546 S.E. 2d 417, 419 (2001), this court held a defendant who enters a plea on the advise of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors the defendant would not have plea guilty but would have insisted on going to trial.

The defendant did not understand the ramifications of pleading guilty moreover, there is no evidence he knowingly voluntarily, and intelligently waived his right to a direct appeal of the proceedings. See e. g., Wilson v. State, 348 S.C. 215, 559 S.E. 2d 518 (2002) ("A defendant has the procedural right to one fair bite at the apple). That is, every defendant has a right to file and direct appeal and one PCR application. Applying these principles of Law, it is clear counsel's performance was deficient because defendant did not understand his right to a direct appeal. Petitioner was prejudiced by the deficient performance because, but for counsel's unprofessional errors, he would have insisted on going <sup>on with</sup> ~~to~~ trial.  
pc

was  
Conviction<sup>was</sup> obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea. Conviction was obtained by the unconstitutional failure of the prosecution to disclosed to the defendant evidence favorable to the defendant,



75  
denial of effective assistance of counsel. Brady v. Maryland, 373 U.S. 83 (1963), prohibits the state from withholding evidence that is material and exculpatory of an accused. Where a specific request for exculpatory evidence is made, reversal is required if the evidence might have affected the outcome of the trial. United States v. Agurs, 427 U.S. 97 (1976).

The court was in error when co-defendant change his statement after the State promises and threats to the witness in exchange for his testimony, <sup>this</sup> relates directly to the credibility of the witness, State v. Hinson, 293 S.C. 406, 361 S.E. 2d 120 (1987). State v. Osborne, 289 S.C. 142 345 S.E. 2d 353 Ct. app. for this reason the Supreme court has held that a prosecutor has a duty to disclose evidence of any such promises made by the state to a witness. Giglio v. U.S., 405 U.S. 150 (1972). This is especially true when the testimony of the witness is essential to the state's case. See Harber v. Wainwright, 776 F. 2d 1520, 1523 (11th cir. 1985).

If the co-defendant make false testimony at the state request, conviction must be set aside if false testimony could have affected the Judgment of the trial. Hernandez v. Estelle, 624 F. 2d 313 (5th cir. 1983). Especially if it was due to actions of the prosecutor, and the prosecutor withheld any promise to Ivory Croker, see Brady v. Maryland, 373 U.S. 83 S.Ct. 1194. Moore v. ILL, 408 U.S. 783 92 S.Ct. 2562. This is the duty of trial counsel to bring out these things by putting the state's case to the proper adversary test. An accused is entitled to be assisted by an attorney, whether appointed, who plays the role necessary to ensure the trial is fair, Avery v. Alabama, 60 S.Ct. 321, see also Strickland v. Washington, 104 S.Ct. 2052.

16

THE APPLICANT ALLEGES THAT HE IS BEING HELD IN CUSTODY UNLAWFULLY  
FOR THE FOLLOWING REASONS:

- (1) Counsel failed to adequately object to the sufficiency of the indictment presented.
- (2) Counsel failed to investigate an alibi ~~and~~<sup>as</sup> defense.
- (3) Counsel failed to object to the short intervention between the reception of discovery and the actual trial.
- (4) Counsel failed to explain the Law regarding the consequences of a guilty plea.
- (5) Counsel failed to adequately file a direct appeal.
- (6) Counsel failed to file motion to obtain exculpatory discovery material.
- (7) Counsel failed to object to trial court's Jurisdiction, subject matter Jurisdiction, to accept guilty plea.
- (8) Counsel failed to raise meritorious issues preserved for appeal.

FOR THESE REASONS, APPELLANT RESPECTFULLY ASKS THIS HONORABLE  
COURT TO VACATE ~~THE~~<sup>THE</sup> CONVICTION: . . .

THIS

17

MR. RONALD COULTER, #300410  
BROAD RIVER CORRECTIONAL INSTITUTION  
MURRAY UNIT, RM. B-138  
BROAD RIVER CORRECTIONAL INSTITUTION  
COLUMBIA, SC 29210

JULY 12, 2004

JULIE J. ARMSTRONG, CLERK OF COURT, P.C. & G.S.  
9th JUDICIAL CIRCUIT CHARLESTON COUNTY  
100 BROAD STREET, SUITE 106  
CHARLESTON, SOUTH CAROLINA 29401-2358

Dear Clerk,

Enclosed please find the original copy of an application  
for post-conviction relief action for filing with the court  
and ( 6 ) <sup>Pages</sup> ~~copies~~ of grounds raise attached. Please file the  
original and return a copy of same to me with file date stamped  
thereof.

THANK YOU FOR YOUR TIME, EFFORT AND CONSIDERATION IN THIS MATTER.

s/ Ronald Coulter

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS

2004-CP-10-2999

Ronald Coulter, # 300410, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed July 16, 2004, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2002 term of the Charleston County Grand Jury for kidnapping (2002-GS-10-2443). He was represented by Rodney Davis, Esquire. On February 25, 2004, the Applicant pled guilty to kidnapping. He was sentenced by the Honorable Deadra L. Jefferson to confinement for thirty years (30) years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Charleston County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

72

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Counsel failed to adequately object to the sufficiency of the indictments presented;"
2. "Counsel failed to investigate an alibi re defense;"
3. "Counsel failed to object to the short intervention between the reception of discovery and the actual trial;"
4. "Counsel failed to explain the Law regarding the consequences of a guilty plea;"
5. "Counsel failed to adequately file a direct appeal;"
6. "Counsel failed to file motion to obtain exculpatory discovery material;"
7. "Counsel failed to object to trial court's Jurisdiction, subject matter Jurisdiction, to accept guilty plea;" and
8. "Counsel failed to raise meritorious issues preserved for appeal.

III.

The Applicant asserts he received ineffective assistance of trial counsel for the reasons set forth above. Respondents submits the allegations are without merit. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). With respect to guilty plea counsel, the Applicant must show that there is a reasonable

21  
probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland test. However, the allegations of ineffective assistance of counsel probably raise questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve the issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER  
Attorney General

JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

By:   
ATTORNEYS FOR RESPONDENT

Office of the Attorney General  
P.O. Box 11549

22

Columbia, SC 29211  
Telephone: (803) 734-3737

June 23, 2005.

5



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

)  
 ) IN THE COURT OF COMMON PLEAS

**2004-CP-10-2999**

**Ronald Coulter,**

**Applicant,**

**VS**

**State of South Carolina,**

**Respondent.**

### AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and attachments in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

**Lea B. Kerrison, Esquire**  
**Young Clement Rivers, LLP**  
**P.O. Box 993**  
**Charleston, SC 29402**

**DATED this 23rd day of June, 2005.**

Brooke L. Gambill  
Brooke L. Gambill, Legal Assistant  
For Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

AMENDED ISSUES  
OF  
APPLICATION FOR  
POST-CONVICTION RELIEF

FILED  
2006 MAY 26 AM 9:42  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

CIVIL ACTION NUMBER: 04-CP-10-2999

Ronald Coulter, #300410

Petitioner,

vs.

State of South Carolina,

Respondent.

BRIEF OF AMENDED ISSUES

Ronald Coulter, #300410  
BRCI Murray #120  
4460 Broad River Road  
Columbia, SC 29210

TABLE OF CONTENTS

|                             |       |    |
|-----------------------------|-------|----|
| Statement of Amended Issues | ..... | 2  |
| Statement of the Case       | ..... | 2  |
| Statement of the Facts      | ..... | 3  |
| Argument #1                 | ..... | 4  |
| Argument #2                 | ..... | 6  |
| Argument #3                 | ..... | 9  |
| Conclusion                  | ..... | 10 |

STATEMENT OF AMENDED ISSUES

1. Plea was involuntary and unintelligent as a result of ineffective assistance of counsel. Counsel advised petitioner to accept the plea agreement, in part, because counsel was unwilling to continue trial proceedings in light of co-defendant's confession and plea agreement.
2. Plea was involuntary and unintelligent as a result of ineffective assistance of counsel. Counsel failed to inform petitioner of the laws in relation to the facts, while making a recommendation to accept plea agreement.
3. Plea was involuntary and unintelligent as a result of ineffective assistance of counsel. Counsel further advised petitioner that if the trial judge does not grant the Motion for Mistrial, the only available option is to accept the plea agreement.

STATEMENT OF THE CASE

On February 23, 2004, jury trial proceedings began for petitioner, Ronald Coulter, on the charges of kidnapping (2002-GS-10-2443), conspiracy (2002-GS-10-2444), and murder (2003-GS-10-4454). The petitioner was tried jointly, with co-defendant Ivory Coker (2002-GS-10-2440; 2002-GS-10-2441; and 2003-GS-10-4686), before the Honorable Judge Deadra Jefferson in the Charleston County Court of General Sessions.

On February 25, 2004, the petitioner pled guilty to kidnapping, as part of a negotiated plea agreement with the State. The petitioner was sentenced to thirty (30) years of confinement. The charges of conspiracy and murder were dismissed with prejudice.

A timely appeal was not perfected.

On July 16, 2004, the petitioner filed an application for Post-Conviction Relief.

On June 23, 2005, the State filed a Return requesting an evidentiary hearing to resolve the Post-Conviction Relief issues.

On July 25, 2005, a continuance was granted for the petitioner's Post-Conviction Relief evidentiary hearing.

This action follows:

STATEMENT OF THE FACTS

The petitioner was on trial with co-defendant Ivory Croker. On February 25, 2004, co-defendant Croker, in the midst of jury trial proceedings, pled guilty to misprision of a felony, as part of a negotiated plea agreement with the State. The State recommended that all charges against co-defendant Croker be dismissed and a sentence of probation for the misprision charge, both contingent upon the co-defendant's testimony against the petitioner, as a witness for the State. The Court accepted the co-defendant's plea and the terms of his plea agreement, as recommended by the State.

The petitioner was not present during co-defendant Croker's plea hearing. The petitioner was represented by Mr. Rodney Davis, of the Public Defender's Office (Charleston County). Mr. Davis was assisted by Ms. Jennifer Shealy, also with the Charleston County Public Defender's Office.

Immediately following the plea hearing for co-defendant Croker, the State entered into plea negotiations with the petitioner's appointed counsel; offering the petitioner thirty years for the charge of kidnapping, dismissing the charges related to conspiracy and murder, with prejudice.

Mr. Rodney Davis expressed an unwillingness, as well as an unpreparedness, in continuing the petitioner's trial proceeding, in light of co-defendant Croker's plea agreement. The petitioner, after being advised by Mr. Davis, pled guilty to kidnapping on February 25, 2004, as part of a negotiated plea agreement with the State.

ARGUMENT

1. PLEA WAS INVOLUNTARY AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL ADVISED PETITIONER TO ACCEPT THE PLEA AGREEMENT, IN PART, BECAUSE COUNSEL WAS UNWILLING TO CONTINUE TRIAL PROCEEDINGS IN LIGHT OF CO-DEFENDANT'S CONFESSION AND PLEA AGREEMENT.

DISCUSSION

On the third (3rd) day of the petitioner's jury trial proceeding, counsel informed the petitioner that: a) co-defendant was no longer on trial, as a result of a negotiated plea agreement; b) co-defendant provided a confession that incriminates the petitioner; c) co-defendant was going to testify against petitioner; d) counsel was unprepared to defend petitioner under the circumstances; and e) the best thing petitioner could do is plead guilty to the kidnapping charge, as offered by the State.

Evidence On Record; Transcript of Trial (tt.)

- \* Co-defendant's "conditional" plea agreement (tt., p.616, ln.5 - p.617, ln.25);
- \* Co-defendant's confession (tt., p.633, ln.22 - p.638, ln.6);
- \* Counsel's concern with his personal credibility (tt., p.647, ln.1-21);
- \* Counsel admits he cannot cross-examine upcoming witnesses (tt., p.648, ln.8-12);
- \* Counsel's confusion regarding co-defendant's plea agreement (tt., p.649, ln.6 - p.650, ln.20);
- \* Counsel admits concerns in preparing and presenting an effective defense (tt., p.656, ln.10-14);
- \* Court's response to counsel's unpreparedness (tt., p.657, ln.3 - p.659, ln.20);
- \* Court's assessment of case at critical point of trial, co-defendant's plea agreement (tt., p.658, ln.3-24);
- \* Co-counsel admits unwillingness to proceed, and inadequate advice to petitioner (tt., p.665, ln.3-18).

"An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." See Strickland v. Washington, 104 S.Ct. 2052, 2068.

"The right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.... The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." See Lee v. Illinois, 106 S.Ct. 2056, 2062; Stata v. Staten, 610 S.E.2d 823 (2005).

"And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.... Moreover, the decision of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." See Pointer v. Texas, 85 S.Ct. 1065, 1068 [footnotes omitted].

"The right of confrontation and cross-examination is a fundamental safeguard essential to a fair trial in criminal prosecution." See Pointer, supra, 85 S.Ct. at 1068.

Counsel's unwillingness to continue trial proceedings deprived the petitioner of the opportunity to confront and cross-examine the co-defendant, whose "presumptively unreliable" confession was the basis of counsel's recommendation to accept the plea agreement. On more than one occasion, the United States Supreme Court has stated that "prejudice ensues from the denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them...". See Smith v. Illinois, 88 S.Ct. 748, quoting Alford v. U.S., 51 S.Ct. 218.

"... The court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." See Strickland, supra, 104 S.Ct. at 2066.

Counsel's conduct, in not protecting the petitioner's right to confrontation and cross-examination, "undermined the proper functioning of the adversarial process", thereby, depriving the petitioner of "the fundamental right to a fair trial".

The petitioner declares that he never sought, or expected to enter into any plea negotiations, during the course of the trial. The petitioner pled guilty solely on the advice of counsel, as the petitioner was unaware of any other course of action. It was the petitioner's understanding, as explained by trial counsel, that the plea agreement was the only option, as counsel was unwilling to continue trial proceedings under the circumstances. The petitioner declares that he would have never pled guilty, except for counsel's deficient performance and incompetent advice.

2. PLEA WAS INVOLUNTARY AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL FAILED TO INFORM PETITIONER OF THE LAWS IN RELATION TO THE FACTS, WHILE MAKING A RECOMMENDATION TO ACCEPT PLEA AGREEMENT.

#### Discussion

Counsel's recommendation to accept the plea agreement was based on the following facts: a) co-defendant reached a plea agreement and was no longer on trial; b) co-defendant provided a confession that incriminated the petitioner in the commission of a felony; c) co-defendant was going to testify against the petitioner; and d) counsel was unwilling and unprepared to continue trial proceedings.

Counsel failed to inform petitioner of the laws regarding the constitutional right to confrontation and cross-examination. See the following:

Sixth Amendment, Fourteenth Amendment, United States Constitution;  
Article 1, Section 14, South Carolina Constitution;  
S.C. Code Ann. Section 17-23-60;  
Pointer v. Texas, 85 S.Ct. 1065; and  
Lee v. Illinois, 106 S.Ct. 2056.

"In California v. Green, 399 U.S. 149, 158 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,

'(1) insures that the witness will give his statement under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; (3) permits the jury that is to decide the defendant's



fate to observe the demeanor of the witnesss making his statement, thus aiding the jury in assessing his credibility' (footnote omitted)." See Lee v. Illinois, supra, 106 S.Ct. at 2062.

Counsel failed to inform petitioner that the law states that an accomplice's confession that incriminates a defendant is "presumptively unreliable" and must be subjected to the scrutiny of cross-examination. See the following:

Thompson v. State of South Carolina, 672 F.Supp. 896;  
State v. Dinkins, 529 S.E.2d 557; and  
Lee v. Illinois, 106 S.Ct. 2056.

#### Evidence On Record

\* Co-defendant's confession (tt., p.633, ln.22 - p.638, ln.6).

Counsel failed to inform petitioner that the law states that when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" is through cross-examination. See Smith v. Illinois, 88 S.Ct. 748.

#### Evidence On Record

\* Counsel acknowledged that the co-defendant's credibility is at issue (tt., p.648, ln.14-18).

Counsel failed to inform petitioner that Rule 607, S.C. Rules of Evidence allows for the defense to impeach the credibility of a witnesss.

Counsel failed to inform petitioner that Rule 608, S.C. Rules of Evidence allows for evidence of character, bias, prejudice, or motive to misrepresent, to be used to impeach a witness.

#### Evidence On Record

\* Co-defendant's "conditional" plea agreement (tt., p.616, ln.5 - p.617, ln.25);  
 \* Co-defendant's admitted recent drug abuse treatment (tt., p.613, ln.19 - p.614, ln.11).

Counsel failed to inform petitioner that Rule 609, S.C. Rules of Evidence

allows for evidence of a crime of dishonesty, or false statements, to be used to impeach the credibility of a witness, regardless of the punishment.

Evidence On Record

- \* Co-defendant's plea to misprision of a felony (tt., p.615, ln.12-19);
- \* Court's acceptance of co-defendant's plea (tt., p.633, ln.8-21).

Counsel failed to inform petitioner that Rule 611, S.C. Rules of Evidence allows for cross-examination of a witness, on any relevant issue, including credibility.

Counsel failed to inform petitioner that Rule 613, S.C. Rules of Evidence allows for cross-examination of a witness concerning prior statements made by the witness.

Evidence On Record

- \* Record of co-defendant's prior statement; State's exhibit #2 (tt., pp.166-172);
- \* Co-defendant's prior statement admitted (tt., p.243, ln.13-17).

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Powell v. Alabama, 53 S.Ct. 55, 64.

It is the responsibility of trial counsel to provide an understanding of the laws in relation to the facts of a criminal proceeding. See the following:

- McCarthy v. United States, 89 S.Ct. 1166;
- Walker v. Caldwell, 476 F.2d 213;

Gideon v. Wainwright, 83 S.Ct. 792; and  
Von Moltke v. Gillies, 68 S.Ct. 316.

Petitioner declares that he was prejudiced by the lack of understanding of the laws related to his right to confront and cross-examine adverse witnesses, such as the co-defendant. Petitioner declares that had counsel explained the laws as it pertained to the circumstances of the trial, at that critical stage (co-defendant's confession and plea agreement), the petitioner would not have pled guilty, but insisted that the trial continue.

3. PLEA WAS INVOLUNTARY AND UNINTELLIGENT AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL FURTHER ADVISED PETITIONER THAT IF THE TRIAL JUDGE DOES NOT GRANT THE MOTION FOR MISTRIAL, THE ONLY AVAILABLE OPTION IS TO ACCEPT THE PLEA AGREEMENT.

#### Discussion

##### Evidence On Record

- \* Court's opinion of Motion for Mistrial (tt., p.666, ln.9-18);
- \* Counsel's state of mind; unpreparedness (tt., p.666, ln.19-23; p.667, ln.15-21);
- \* Counsel's continued unwillingness to continue with trial proceedings (tt., p.669, ln.15 - p.670, ln.2);
- \* Solicitor's and Court's response to counsel's concerns (tt., p.670, ln.3-25).

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled" [quotes omitted]. See Strickland v. Washington, 104 S.Ct. 2052, 2063.

Counsel failed to provide any evaluation of petitioner's chances had the petitioner continued with the trial proceedings.

Counsel failed to provide any assessment of the relative advantages of pleading guilty.

Counsel's advice, as it related to the Motion for Mistrial, was not within the range of competence demanded of attorneys in criminal cases.

Petitioner was extremely prejudiced by counsel's failure to advocate the petitioner's cause at a critical stage of trial proceedings. The petitioner pled guilty solely on the advice of counsel, as the petitioner was unaware of any other course of action.

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." See Gustine v. State, 480 S.E.2d 444; Hill v. Lockhart, 106 S.Ct. 366.

Petitioner firmly believed that the State's case against him was weak, at best. Counsel failed to render "adequate legal assistance", thereby, depriving the petitioner of the right to effective assistance of counsel. The petitioner declares that he would have never pled guilty, except for counsel's deficient performance and incompetent advice.

#### CONCLUSION

In accordance with the standards established in Strickland v. Washington, 104 S.Ct. 2052 (1984), and the rulings of Hill v. Lockhart, 106 S.Ct. 366, and Thompson v. State, 531 S.E.2d 294, the petitioner asserts that he has demonstrated sufficient facts that prove that "counsel failed to render reasonably effective assistance under prevailing professional norms". The petitioner further asserts that he has also demonstrated, sufficiently, that counsel's "constitutionally ineffective performance affected the outcome of the plea process". In other words, the petitioner asserts that there is a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and continued with the jury trial proceedings.

Therefore, the petitioner respectfully asks that this Honorable Court grants relief in this Post-Conviction Relief action.

Ronald Carl  
5-25-06

AT  
SOL  
GS

STATE OF SOUTH CAROLINA )  
County of ☒ Charleston ☐ Berkeley )  
Ronald Coulter )  
Applicant / Petitioner )  
vs. )  
State of South Carolina, )  
Respondent. )

COURT OF COMMON PLEAS

Case No. 2004 - CP - 10-200

ORDER  
JULIE L. ARMSTRONG  
CLERK OF COURT  
JUN - 2 PM 2:40  
FILED

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

1. The application for post-conviction relief is hereby: ☒ denied ☐ granted under advisement; A formal order will be filed (see below - No.6)
2. Motion(s) was/were heard in this case and the court orders: The motion to dismiss and/or for summary judgment is hereby ☐ granted ☐ denied under advisement, based upon the ☐ statute of limitations and/or ☐ the successive nature of the application or ☐ other reason as follows:  
\_\_\_\_\_
3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:
  - ☐ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.
  - ☐ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or ☐ no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.
4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; Therefore, this case is dismissed ☐ with prejudice ☐ without prejudice.
5. Other: THE APPLICANT'S TESTIMONY WAS COMPLETELY LACKED CREDIBILITY. HE HAS DONE EXTENSIVE LEGAL RESEARCH, BUT DOES NOT HAVE THE CORRECT APPLICATION OF THE LAW TO THE PROCEEDINGS AND
6. The court further orders: REQUIREMENTS.
  - ☒ The ☒ Attorney General ☐ Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within 30 days.
  - ☐ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within \_\_\_\_\_ days.
  - ☐ The court does not request proposed orders.

IT IS SO ORDERED.

Date: 6/12/2006  
Charleston, S.C.

Court Reporter: Gayle Burns

Attorney for Plaintiff: Lea Kerrison

Attorney for Defendant: Colleen Dixon

William P. Crosby  
Presiding Judge

12  
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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

2004-CP-10-2999

Ronald Coulter, 300410,  
Applicant,  
v.  
State of South Carolina,  
Respondent.

ORDER OF DISMISSAL

BY \_\_\_\_\_

JULIE A. SHERROD  
CLERK OF COURT

2006 NOV -6 PM 2:41

FILED

PROCEDURAL HISTORY

WAL  
#1

This matter comes before the Court by way of an Application for Post-Conviction Relief filed July 16, 2004. The Respondent made its Return on June 23, 2005. An evidentiary hearing into the matter was convened on June 2, 2006, at the Charleston County Courthouse. The Applicant was present at the hearing and was represented by Lea Kerrison, Esquire. The Respondent was represented by Colleen Dixon of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Testifying on behalf of the State was Rodney Davis, Esquire and Scarlett Wilson of the Solicitor's Office. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Charleston County Clerk of Court, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the May 2002 term of the Charleston County Grand Jury for kidnapping (2002-GS-10-2443), conspiracy to commit kidnapping (2002-

COURT CLERK'S OFFICE  
RECEIVED  
ATTORNEY GENERAL'S OFFICE

GS-10-4454), and murder (2003-GS-10-4454). He was represented by Rodney Davis, Esquire. The Applicant proceeded to trial with his co-defendant on February 23, 2005. Two days into trial, on February 25, 2005, the co-defendant decided to plea guilty and testify for the State against the Applicant. The Applicant pled guilty later that day to kidnapping. The other charges were not pressed. He was sentenced by the Honorable Deadra L. Jefferson to confinement for thirty (30) years. The Applicant did not appeal his conviction or sentence.

In his application for PCR, the Applicant alleges:

1. Involuntary guilty plea;
2. Ineffective assistance of counsel:
  - a. Failure to adequately object to the sufficiency of the indictments presented;
  - b. Failure to investigate an alibi defense;
  - c. Failure to object to the short intervention between the reception of discovery and the actual trial;
  - d. Failure to explain the Law regarding the consequence of a guilty plea;
  - e. Failure to adequately file a direct appeal;
  - f. Failure to object to subject matter jurisdiction to accept guilty plea;
  - g. Failure to raise meritorious issues preserved for appeal;
3. Brady violation.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

During the hearing, the Applicant claimed that he had no knowledge of the crime and denied any involvement with the kidnapping and murder. He testified that his trial attorney, Rodney Davis, was unwilling and unprepared to go forward with a trial after the co-defendant plead<sup>ed</sup> guilty. He also testified that he was not informed of his right to cross-examine or impeach his co-defendant.

WAL #3 Trial counsel testified that he met with the Applicant numerous times and spent a large amount of time in preparation for the trial. Davis testified that he filed motions for continuance and mistrial after the co-defendant plead guilty. He further testified that, after the co-defendant pled guilty, the Applicant spent over an hour telling him about the planning and commission of the kidnapping. Davis advised the Applicant to plead to kidnapping, and informed the Applicant that it carried a maximum sentence of 30 years.

Davis noted that while specific rules of evidence and impeachment were not brought up in these conversations, the principles were discussed. The rules of confrontation and cross examination were discussed. Although trial counsel advised the Applicant of the advantages of pleading, he testified that it was ultimately the Applicant's decision to plead. Davis testified he would have gone forward with the trial had the Applicant elected to do so, and was in fact already preparing to do so in the event that his motions for continuance or mistrial were denied.

Solicitor Scarlett Wilson testified at the hearing that the co-defendant admitted to helping the Applicant put the victim's body in the trunk of a car, but denied knowledge of what occurred after the Applicant left with the body. The body of the victim was found two to three days after the plea of both the co-defendant and the Applicant. After his plea, the Applicant agreed to speak



with the State. Wilson further testified the Applicant admitted the kidnapping was planned. After a reexamination of the co-defendant based on the Applicant's statement, the co-defendant admitted that he helped dispose of the body after the Applicant had murdered the victim.

The Applicant was recalled after this testimony by the solicitor, and he claimed that both trial counsel Davis and Solicitor Wilson were lying about the confession regarding the extent of his involvement.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

Wait  
#4

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Applicant raised the following allegations in his PCR application and the subsequent evidentiary hearing:

**A. Involuntary Guilty Plea.**

The allegation that the guilty plea was involuntary is without merit. In PCR cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (1999). A PCR applicant who pleads guilty on the advice of counsel may collaterally attack the plea only through a claim of ineffective assistance of counsel: Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). This claim will therefore be addressed as ineffective assistance of counsel.

**B. Ineffective Assistance of Counsel.**

**1. Failure to adequately object to the sufficiency of the indictments presented.**

The Applicant claimed that trial counsel did not adequately object to the sufficiency of the indictments presented. However, the Applicant did not specifically address this allegation during the hearing. He has therefore waived this allegation and failed to meet his burden of proof regarding any alleged deficiency on the part of counsel or prejudice resulting therefrom.

Therefore, this allegation is denied and dismissed with prejudice.

**2. Failure to investigate an alibi defense.**

The Applicant claimed that trial counsel did not adequately investigate an alibi defense. However, the Applicant did not address this issue at his hearing, nor did he present any witnesses to support an alibi. He has therefore waived this allegation and failed to meet his burden of proof regarding any deficiency by counsel or prejudice resulting therefrom. Therefore, this allegation is denied and dismissed with prejudice.

**3. Failure to object to the short <sup>per se</sup> intervention between the receipt of discovery materials and the beginning of trial.**

The Applicant further claimed that trial counsel was not prepared for trial because he had not had enough time to review the discovery materials. The Applicant testified that Mr. Davis should have asked for a continuance before proceeding to trial. Trial counsel's testimony, however, indicates that the defense was prepared for trial. Mr. Davis further testified there was no need to file a continuance. This Court finds that trial counsel's testimony is credible.

To show prejudice stemming from the lack of a continuance motion, the Applicant would have to demonstrate that trial counsel could have been better prepared or discovered some evidence had he made a motion for a continuance. Given the absence of such evidence, the Applicant has failed to demonstrate he was prejudiced by counsel's failure to request a continuance. The Applicant has failed to meet his burden of proof to show that counsel was ineffective or that he was prejudiced by such deficiency. Therefore, this allegation is denied and dismissed with prejudice.

**4. Failure to explain the law regarding the consequence of a guilty plea.**

The Applicant claimed that trial counsel did not explain the law regarding the consequences of a guilty plea. Trial counsel testified at the hearing that he advised the Applicant

to plead guilty to kidnapping and fully explained the consequences and sentence possibilities. This Court finds that the trial counsel's testimony is credible. The Applicant has failed to meet his burden to show that counsel was ineffective or was prejudiced by such deficiency. Therefore, this allegation is expressly denied and dismissed with prejudice.

**5. Failure to adequately file a direct appeal.**

The Applicant claims that trial counsel did not adequately file a direct appeal. However, the Applicant did not specifically address this allegation during the hearing. He has therefore waived this allegation and failed to meet his burden of proof regarding any deficiency on the part of counsel or prejudice resulting therefrom. Therefore, this allegation is denied and dismissed with prejudice.

**6. Failure to object to subject matter jurisdiction to accept guilty plea.**

*Waive #7*  
The Applicant claims that trial counsel failed to object to the subject matter jurisdiction to accept the Applicant's guilty plea. However, the Applicant did not specifically address this allegation during the hearing. He has therefore waived this allegation and failed to meet his burden of proof regarding any deficiency on the part of counsel or prejudice resulting therefrom. Therefore, this allegation is denied and dismissed with prejudice.

**7. Failure to raise meritorious issues preserved for appeal.**

The Applicant claims that trial counsel did not raise meritorious issues preserved. However, the Applicant did not specifically address this allegation during the hearing. He has therefore waived this allegation and failed to meet his burden of proof regarding any deficiency on the part of counsel or prejudice resulting therefrom. Therefore, this allegation is denied and dismissed with prejudice.

**8. Counsel was not willing to proceed to trial after co-defendant plead guilty.**

AND IT IS SO ORDERED this 1<sup>st</sup> day of Nov., 2006.

*William P. Keesley*

William P. Keesley  
Presiding Judge  
Ninth Judicial Circuit

Edgefield, South Carolina.

ATTEST: A TRUE COPY.  
JULIE J. ARMSTRONG (SEAL)  
CLERK, C.P., O.S. & F.S.  
By *Julie J. Armstrong* (SEAL)  
DEPUTY CLERK

ERK

#10

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS  
DOCKET NO. 2002-GS-10-2243/44/40/41 &  
2003-GS-10-4454/4686

STATE OF SOUTH CAROLINA,

TRANSCRIPT OF PROCEEDINGS  
(Volume I, p. 1 - 340)

VS.

February 23, 2004  
Charleston, South Carolina

RONALD COULTER and  
IVORY COKER, a/k/a IVORY CROKER,

Defendants.

BEFORE:

THE HONORABLE DEADRA L. JEFFERSON, Judge, and a jury.

APPEARANCES:

SCARLETT WILSON, ESQ.  
DEPUTY SOLICITOR

- and -

D. BRUCE DURANT, ESQ.  
SENIOR ASSISTANT SOLICITOR  
ATTORNEYS FOR THE STATE

JAMES WATSON SMILEY, IV, ESQ.  
ATTORNEY FOR DEFENDANT CROKER

JENNIFER KNEECE SHEALY, ESQ.  
CHARLESTON COUNTY PUBLIC DEFENDER

- and -

RODNEY D. DAVIS, ESQ.  
ASSISTANT PUBLIC DEFENDER  
ATTORNEYS FOR THE DEFENDER COULTER

HEATHER GAYLE BURNS, RDR  
OFFICIAL COURT REPORTER  
9<sup>TH</sup> JUDICIAL CIRCUIT

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**MASTER INDEX**

|  | <b><u>DIRECT</u></b> | <b><u>CROSS</u></b> | <b><u>REDIRECT</u></b> | <b><u>RECROSS</u></b> |
|--|----------------------|---------------------|------------------------|-----------------------|
|--|----------------------|---------------------|------------------------|-----------------------|

**JACKSON VS. DENNO HEARING****Alan Richard Kramitz**

|               |     |     |     |  |
|---------------|-----|-----|-----|--|
| by Mr. Durant | 159 |     | 188 |  |
| by Mr. Smiley |     | 176 |     |  |

**Cynthia Mc Cants**

|               |     |     |  |  |
|---------------|-----|-----|--|--|
| by Mr. Durant | 189 |     |  |  |
| by Mr. Smiley |     | 192 |  |  |

**Ivory Croker**

|               |     |     |     |  |
|---------------|-----|-----|-----|--|
| by Mr. Smiley | 199 |     | 237 |  |
| by Mr. Durant |     | 215 |     |  |

**NEAL VS. BIGGERS HEARING****Alan Richard Kramitz**

|               |     |     |  |     |
|---------------|-----|-----|--|-----|
| by Mr. Durant | 257 |     |  |     |
| by Ms. Shealy |     | 268 |  | 294 |
| by Mr. Smiley |     | 280 |  |     |

**Thomas Scott Deckard**

|               |     |  |  |  |
|---------------|-----|--|--|--|
| by Mr. Smiley | 299 |  |  |  |
|---------------|-----|--|--|--|



**TRIAL TESTIMONY**

|                              | <b><u>Direct</u></b> | <b><u>Cross</u></b> | <b><u>Redirect</u></b> | <b><u>Recross</u></b> |
|------------------------------|----------------------|---------------------|------------------------|-----------------------|
| <b>O.J.</b>                  |                      |                     |                        |                       |
| by Ms. Wilson                | 463                  |                     |                        |                       |
| by Mr. Davis                 |                      | 485                 |                        |                       |
| <b>Margaret Conway Short</b> |                      |                     |                        |                       |
| by Mr. Durant                | 488                  |                     |                        |                       |
| <b>Daisy Denham</b>          |                      |                     |                        |                       |
| by Ms. Wilson                | 507                  |                     |                        |                       |
| by Mr. Davis                 |                      | 520                 |                        |                       |
| <b>Connie Knight</b>         |                      |                     |                        |                       |
| by Ms. Wilson                | 527                  |                     |                        |                       |
| <b>Lenora Thomas</b>         |                      |                     |                        |                       |
| by Ms. Wilson                | 548                  |                     | 572                    |                       |
| by Mr. Davis                 |                      | 565                 |                        |                       |
| by Mr. Smiley                |                      | 571                 |                        |                       |
| <b>Ann Marie Albright</b>    |                      |                     |                        |                       |
| by Ms. Wilson                | 574                  |                     |                        |                       |
| by Mr. Davis                 |                      | 584                 |                        |                       |
| by Mr. Smiley                |                      | 586                 |                        |                       |

**EXHIBITS**

|                      |                        | <b><u>For Ident.</u></b> | <b><u>In Evid.</u></b> |
|----------------------|------------------------|--------------------------|------------------------|
| State's 1            | Miranda rights form    | 162                      |                        |
| State's 2            | Mr. Croker's statement | 171                      |                        |
| State's 3            | Lineup form            | 258                      |                        |
| State's 4            | Photographic lineup    | 258                      |                        |
| State's 5            | Photographic lineup    | 264                      |                        |
| State's 6            | Lineup form            | 264                      |                        |
| State's 7            | Group of photographs   | 468                      | 483                    |
| State's 8            | Group of photographs   | 468                      | 483                    |
| State's 9            | Calendar               | 532                      | 535                    |
| Defendant Croker's 1 | Composite drawing      | 320                      |                        |
| Court's 1-A          | Letter from juror      |                          | 600                    |
| Court's 1-B          | Envelope               |                          | 601                    |

|                                       |                        |
|---------------------------------------|------------------------|
| <b>Pretrial Motions</b>               | <b>pages 345 - 411</b> |
| <b>Judge's Opening Remarks</b>        | <b>pages 411 - 431</b> |
| <b>State's Opening Statement</b>      | <b>pages 431 - 452</b> |
| <b>Mr. Davis' Opening Statement</b>   | <b>pages 452 - 456</b> |
| <b>Mr. Smiley's Opening Statement</b> | <b>pages 456 - 462</b> |
| <b>Defendant Croker's plea</b>        | <b>page 606</b>        |
| <b>Defendant Coulter's plea</b>       | <b>page 674</b>        |

INDEX

|  | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> |
|--|---------------|--------------|-----------------|----------------|
|--|---------------|--------------|-----------------|----------------|

JACKSON VS. DENNO HEARING**Alan Richard Kramitz**

|               |     |     |     |  |
|---------------|-----|-----|-----|--|
| by Mr. Durant | 159 |     | 188 |  |
| by Mr. Smiley |     | 176 |     |  |

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|               |     |     |  |  |
|---------------|-----|-----|--|--|
| by Mr. Durant | 189 |     |  |  |
| by Mr. Smiley |     | 192 |  |  |

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|               |     |     |     |  |
|---------------|-----|-----|-----|--|
| by Mr. Smiley | 199 |     | 237 |  |
| by Mr. Durant |     | 215 |     |  |

NEAL VS. BIGGERS HEARING**Alan Richard Kramitz**

|               |     |     |  |     |
|---------------|-----|-----|--|-----|
| by Mr. Durant | 257 |     |  |     |
| by Ms. Shealy |     | 268 |  | 294 |
| by Mr. Smiley |     | 280 |  |     |

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|               |     |  |  |  |
|---------------|-----|--|--|--|
| by Mr. Smiley | 299 |  |  |  |
|---------------|-----|--|--|--|

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| State's 2            | Mr. Croker's statement | 171                      |                        |
| State's 3            | Lineup form            | 258                      |                        |
| State's 4            | Photographic lineup    | 258                      |                        |
| State's 5            | Photographic lineup    | 264                      |                        |
| State's 6            | Lineup form            | 264                      |                        |
| Defendant Croker's 1 | Composite drawing      | 320                      |                        |

1 THE COURT: Are we ready  
2 with the motion to quash the  
3 indictment?

4 MR. DAVIS: Yes, your  
5 Honor.

6 THE COURT: The bailiffs  
7 assured me that the only members  
8 of the part of the gallery are  
9 not jurors in this case, jurors  
10 of the general panel.

11 All right. Let's  
12 proceed.

13 MR. DAVIS: Your Honor,  
14 may I approach?

15 THE COURT: Yes, sir.

16 MR. DAVIS: This is a memo  
17 I prepared, your Honor. It is  
18 for the motion. I'll cut to the  
19 heart of the argument, your  
20 Honor. The State in the  
21 indictment for murder against Mr.  
22 Coulter, my client, which is  
23 indictment 2003-GS-10-4454, in  
24 the body of the indictment that  
25 in Charleston County on or about

1 April twenty-first, 2001 while  
2 acting in concert with another  
3 and with malice aforethought  
4 Ronald Coulter did and kill and  
5 murder Edwina Simms with a manner  
6 and means unknown and that Edwina  
7 Simms did die in Charleston  
8 County as a proximate result  
9 thereof on April twenty-first,  
10 2001. And then they cite the  
11 code section for murder.

12 We begin our argument  
13 with the code section 17-19-30,  
14 listing allegations sufficient  
15 for the indictment for murder.  
16 That statute provides the manner  
17 in which the death of the  
18 deceased was caused must be  
19 alleged. That was not done in  
20 this indictment. It is defective  
21 for that reason and must be  
22 quashed.

23 The only cite contrary  
24 to that argument comes from a  
25 case, State V. Owens and in that

1 case they indicate that the  
2 manner or instrumentality of  
3 death may be listed or by manner  
4 or means unknown. That language  
5 comes directly from an 1867 case.

6 The 1867 case is  
7 distinguished from the current  
8 case in two respects. Factually,  
9 and I'll go into that in detail  
10 if the Court requires, but more  
11 appropriately procedurally.  
12 They're under pleading rules,  
13 rules of pleading in 1866 and  
14 1867 when the appeal was heard.

15 Now we have a specific  
16 statute dealing with that. The  
17 statute requires a listing of the  
18 manner or instrumentality of  
19 death. The State listed nothing.  
20 There are cases indicating,  
21 allowing an indictment listing  
22 alternative manners of death is  
23 sufficient. That's not the case  
24 here, because the State failed to  
25 allege a manner or



1 instrumentality of death this  
2 indictment has failed and must be  
3 quashed.

4 THE COURT: Thank you.

5 Mr. Smiley, would you  
6 also like to --

7 MR. SMILEY: First of all,  
8 your Honor, I'd like to join in  
9 the motion to quash and with the  
10 arguments that Mr. Davis made  
11 with respect to his client with  
12 respect to Mr. Ivory Croker whom  
13 I represent in this case. And  
14 I'm not going to be redundant,  
15 your Honor, so I certainly  
16 support the position that he is  
17 proposing and don't disagree in  
18 any manner.

19 The only thing I'd like  
20 to add to this is the two cases  
21 that are relied upon State V.  
22 Owens from 1987 and State V.  
23 Jenkins from 1867, and they're  
24 distinguished in this case and I  
25 think he mentioned it to the

1 Court, and in the decision 867  
2 case they had alternative means  
3 of death. They talk about the  
4 casting of stones and bricks. We  
5 knew the manner there. The  
6 manner there was distinguished in  
7 that they couldn't attach it to a  
8 particular defendant. And the  
9 1987 case there were several  
10 alternative means of death  
11 listed.

12 In both those cases  
13 there's a difference, too, your  
14 Honor. In the 1867 case they had  
15 a body. In the 1987 case they  
16 had lots of indicia to show the  
17 death. They had blood. They had  
18 some evidence at the scene, some  
19 forensic evidence. They had  
20 ransom notes. They had ransom  
21 money received. They had a  
22 partial confession. So the  
23 defendant in each of those cases  
24 had an argument, there was an  
25 argument that they knew what they

1 must answer.

2 In this case we have no  
3 clue on what we must answer as  
4 far as the murder indictment  
5 goes, your Honor, and cannot  
6 properly prepare our defense not  
7 knowing what they allege.

8 MS. WILSON: Your Honor,  
9 as to Mr. Smiley's additional  
10 arguments, I think that goes to a  
11 directed verdict motion more than  
12 any sort of motion to quash the  
13 indictment. I don't want to  
14 belabor this point.

15 The language from the  
16 indictment comes basically from  
17 State V. Owens. I'm sure the  
18 state Supreme Court was aware of  
19 the different methods of  
20 pleadings back in the eighteen  
21 hundreds and chose to still rely  
22 on that case and to inform the  
23 State as to how to proceed in a  
24 situation such as, such as this,  
25 and that's exactly what we did.

1 I think the indictment  
2 should stand and any matters  
3 regarding the evidence in this  
4 case could be taken up at the  
5 directed verdict stage.

6 MR. DAVIS: May it please  
7 the Court, your Honor.

8 THE COURT: Pardon me?

9 MR. DAVIS: May it please  
10 the Court, can I respond?

11 In '87, 1987 when the  
12 Court references the language  
13 from 1867, the, the difference is  
14 that in those cases there were,  
15 there was other language in the  
16 indictment. There were other  
17 options to choose from. It was  
18 not unknown by itself.

19 THE COURT: Well, that's  
20 not what the case says, though,  
21 does it?

22 MR. DAVIS: Pardon me?

23 THE COURT: The plain  
24 reading of the case doesn't say  
25 that. It doesn't make that, it

1 doesn't make that distinction  
2 when you read the case.  
3 MR. DAVIS: The plain  
4 reading of the indictment says.  
5 THE COURT: Well, that's  
6 not what the Supremes dealt with.  
7 I'm not going to try to add, add  
8 distinctions to an opinion that  
9 the Supreme Court wrote. They're  
10 very clear about what they meant.  
11 I don't think there's anything  
12 vague in the language of how that  
13 opinion is written and I've read  
14 it several times to see if that  
15 was in fact what they were  
16 saying, that where there are  
17 indictments that allege several  
18 options, that it is okay to  
19 allege means unknown. And that's  
20 not what the Supreme Court said.  
21 Thank you very much. I  
22 have considered the motion. I  
23 had the benefit of having the  
24 motion in advance and having done  
25 a great deal of research myself

1 on the issue, and have had the  
2 ability to read the indictments.

3 The indictments both  
4 allege that in Charleston County  
5 on or about April twenty-first,  
6 2001, and I'm not going to read  
7 both indictments. I'm just going  
8 read -- well, actually I think I  
9 have both. Before I say that,  
10 let me look.

11 Mr. Coulter's indictment  
12 alleges as follows: That in  
13 Charleston County on or about  
14 April twenty-first, 2001 while  
15 acting in concert with another  
16 and with malice aforethought,  
17 Ronald Coulter did kill and  
18 murder Edwina Simms with manner  
19 and means unknown and that Edwina  
20 Simms did die in Charleston  
21 County as a proximate result  
22 thereof on April twenty-first,  
23 2001, alleging a violation of  
24 section 16-3-10 of the South  
25 Carolina Code of Laws as amended.

1           The indictment for  
2           Mr. Croker alleges the same  
3           language with the exception, of  
4           course, of inserting his name  
5           instead of that of Mr. Coulter.

6           The defendants allege  
7           that the indictment does not  
8           satisfy code section 17-19-30  
9           because the indictments do not  
10          allege the manner of death. The  
11          Court would find that this  
12          argument is without merit. State  
13          versus Owens found at 293 South  
14          Carolina 161 and 359 Southeast  
15          2nd 275, which is a 1987 opinion,  
16          is clearly on point with the  
17          facts and circumstances as well  
18          as the arguments that have been  
19          made and were made in this Court,  
20          and our Supreme Court has been  
21          very clear that an indictment is  
22          sufficient if the offense is  
23          stated with sufficient certainty  
24          and particularity to enable the  
25          Court to know what judgment to

1 pronounce, the defendant to know  
2 what he is called upon to answer,  
3 and if an acquittal or conviction  
4 thereupon may be pleaded as a bar  
5 to any subsequent prosecution,  
6 stating, of course, State versus  
7 Hardee, H-a-r-d-e-e.

8 Allegations may state in  
9 the alternative the manner and  
10 instrumentality of death. Citing  
11 State versus King. Or may state  
12 that death was caused by means or  
13 instrumentality unknown. Citing  
14 State versus Jenkins.

15 Based on that precedent  
16 the Court would find that the  
17 motion is without merit and the  
18 motion to quash is denied.

19 Is there anything  
20 further for the record?

21 MS. WILSON: Nothing from  
22 the State, your Honor.

23 THE COURT: Anything  
24 further from the defense as  
25 regards the motion to quash?



1           MR. DAVIS: Your Honor,  
2           the only other matter I would  
3           make is the Court records in, in,  
4           its holding that the final issue  
5           is that this would bar -- that  
6           this indictment would be  
7           sufficient to bar subsequent  
8           prosecutions, while you're  
9           reading that I'm looking at my  
10          memo again.

11          THE COURT: Why do you  
12          need to reargue the motion?

13          MR. DAVIS: Yes.  
14          Regarding -- a memo regarding  
15          this motion. I would ask the  
16          Court to consider, and I didn't  
17          state this previously and I  
18          apologize. Consider also the  
19          fact that Simms -- the fact that  
20          if this case were to go forward  
21          and if the jury were to acquit as  
22          to this charge, without arguing  
23          the facts of the case which are  
24          not before the Court at this  
25          point, however if subsequently

1 Miss Simms were discovered  
2 deceased with specific injuries,  
3 then the State could argue  
4 they're not barred because the  
5 language of this indictment were  
6 so vague that they could allege a  
7 specific manner of death, and  
8 therefore allowing them to come  
9 forward again.

10 THE COURT: I think that  
11 it's sufficiently sufficient to  
12 bar that and I think that's an  
13 issue that would have to be dealt  
14 if -- dealt with if the matter  
15 would come up. I can't speculate  
16 about what may happen and might  
17 happen.

18 MR. DAVIS: Thank you,  
19 your Honor.

20 THE COURT: You're  
21 welcome.

22 MR. DAVIS: Nothing  
23 further other than that.

24 MR. SMILEY: Nothing  
25 further from Mr. Croker other

1           than just except to note our  
2           objection --

3                     THE COURT: Certainly.

4                     MR. SHILEY: -- of course  
5           and preserve it on the record.

6                     THE COURT: It is noted  
7           and preserved for the record.

8                     Now, what we're going to  
9           do is I'm going to have the  
10          bailiffs bring the panel up.  
11          Those of you who are seated in  
12          the gallery, I need you all to  
13          the best of your ability to  
14          occupy the very last bench  
15          because we have a large number of  
16          jurors and I need them to be  
17          seated in these first rows. If  
18          you all could accommodate me, I  
19          would greatly appreciate it.

20                    You need all of them?  
21          Wow. Okay.

22                    We may well need that  
23          last bench. I'm so sorry. If  
24          you all could just follow the  
25          instructions of the bailiff and

1 accommodate us, I would greatly  
2 appreciate it.

3 MS. WILSON: Out of an  
4 abundance of caution, may I  
5 approach?

6 THE COURT: Sure.

7 (Whereupon, there was an  
8 off-the-record bench conference.)

9 MR. SMILEY: After  
10 speaking with Judge Jefferson I  
11 wanted to put the following on  
12 the record. While I represent  
13 Mr. Ivory Croker and Mr. Davis  
14 represents Mr. Ronald Coulter,  
15 for purposes of judicial  
16 efficiency I will be joining in  
17 any motions made by Mr. Davis on  
18 behalf of his client unless I  
19 specifically state otherwise.

20 MR. DAVIS: And that will  
21 be reciprocal as well. I will be  
22 joining in any motions made by  
23 Mr. Smiley on behalf of  
24 Mr. Croker unless I specifically  
25 state otherwise.

1 (Whereupon, the jury  
2 panel enters the courtroom.)

3 THE COURT: Ladies and  
4 gentlemen of the panel, we  
5 appreciate your time and your  
6 patience. There are some matters  
7 of law that I needed to deal with  
8 before we got started and as I've  
9 already explained to you, many of  
10 those matters have to be done  
11 outside of your presence, because  
12 as the fact finders the Court has  
13 to make sure that you remain fair  
14 and impartial and that you are in  
15 no way influenced by anything  
16 that the Court may say or do in  
17 connection with the facts of this  
18 case.

19 Madam Solicitor. If you  
20 would call the case.

21 MS. WILSON: Thank you,  
22 your Honor. This is the State of  
23 South Carolina versus Ronald  
24 Coulter, indictment number  
25 2002-GS-10-2444, indictment for

1 conspiracy to commit kidnapping.

2 Indictment

3 2002-GS-10-2443, State versus  
4 Ronald Coulter, indictment for  
5 kidnapping.

6 Indictment

7 2003-GS-10-4454, State versus  
8 Ronald Coulter, indictment for  
9 murder.

10 Indictment

11 2003-GS-10-2441, the State versus  
12 Ivory Coker a/k/a Ivory Croker,  
13 indictment for conspiracy to  
14 commit kidnapping.

15 Indictment

16 2002-GS-10-2440, the State versus  
17 Ivory Coker a/k/a Ivory Croker,  
18 indictment for kidnapping.

19 Indictment

20 2003-GS-10-4686, the State versus  
21 Ivory Coker a/k/a Ivory Croker,  
22 indictment for murder.

23 THE COURT: Thank you.

24 Does Mr. Coulter wish to  
25 have a formal arraignment?

1                   MR. DAVIS: Yes, your  
2 Honor.

3                   THE COURT: Sir, if you  
4 would stand.

5                   Mr. Clerk, you may  
6 proceed.

7                   CLERK OF COURT: Yes, your  
8 Honor. Case number  
9 2002-GS-10-2444, State of South  
10 Carolina versus Ronald Coulter  
11 indictment for conspiracy to  
12 commit kidnapping. If you answer  
13 to that name please raise your  
14 right hand.

15                   (Whereupon, Ronald  
16 Coulter raises his right hand.)

17                   CLERK OF COURT: You may  
18 put it down.

19                   You stand indicted by  
20 the name Ronald Coulter. At a  
21 Court of General Sessions  
22 convened on May thirteenth, 2002  
23 the grand jurors of Charleston  
24 County present upon their oath  
25 that in Charleston County on or

1       about April twenty-first, 2001  
2       Ronald Coulter knowingly and  
3       unlawfully did combine, conspire,  
4       confederate, and agree and have  
5       tacit understanding with others  
6       to commit the kidnapping of  
7       Edwina Simms. This is in  
8       violation of section 16-17-410 of  
9       the South Carolina Code of Laws  
10      1976, as amended.

11               How say you? Are you  
12      guilty or not guilty?

13               DEFENDANT COULTER: Not  
14      guilty.

15               THE COURT: How will you  
16      be tried?

17               DEFENDANT COULTER: By a  
18      jury.

19               CLERK OF COURT: May they  
20      send you a true deliverance.

21               Are you ready for trial?

22               DEFENDANT COULTER: Yes.

23               CLERK OF COURT: Case  
24      number 2002-GS-10-2443, the State  
25      of South Carolina versus Ronald



1 Coulter, indictment for  
2 kidnapping. If you answer to  
3 that name, please raise your  
4 right hand.

5 (Whereupon, Ronald  
6 Coulter raises his right hand.)

7 CLERK OF COURT: You may  
8 put it down.

9 You stand indicted by  
10 the name Ronald Coulter. At a  
11 Court of General Sessions  
12 convened on May thirteenth, 2002  
13 the grand jurors of Charleston  
14 County present upon their oath  
15 that in Charleston County on or  
16 about April twenty-first, 2001  
17 Ronald Coulter unlawfully did  
18 seize, kidnap, abduct, confine,  
19 or carry away Edwina Simms  
20 without the authority of law.  
21 This is in violation of section  
22 16-3-910 of the South Carolina  
23 Code of Laws, 1976 as amended.

24 How say you? Are you  
25 guilty or not guilty?

1                   DEFENDANT COULTER: Not  
2 guilty.

3                   CLERK OF COURT: How will  
4 you be tried?

5                   DEFENDANT COULTER: By a  
6 jury.

7                   CLERK OF COURT: They may  
8 they send you a true deliverance.

9                   Are you ready for trial?

10                  DEFENDANT COULTER: Yes.

11                  CLERK OF COURT: Case  
12 number 2003-GS-10-4454, the State  
13 of South Carolina versus Ronald  
14 Coulter, indictment for murder.  
15 If you answer to that name,  
16 please raise your right hand.

17                   (Whereupon, Ronald  
18 Coulter raises his right hand.)

19                  CLERK OF COURT: You may  
20 put it down.

21                   You stand indicted by  
22 the name Ronald Coulter. At a  
23 Court of General Sessions  
24 convened on July eighth, 2003 the  
25 grand jurors of Charleston County

1 present upon their oath that in  
2 Charleston County on or about  
3 April twenty-first, 2001 while  
4 acting in concert with another  
5 and with malice aforethought,  
6 Ronald Coulter did kill and  
7 murder Edwina Simms by a manner  
8 or means unknown and that Edwina  
9 Simms did die in Charleston  
10 County as a proximate result  
11 thereof on April twenty-first,  
12 2001. This is in violation  
13 section 16-3-10 of the South  
14 Carolina Code of Laws 1976, as  
15 amended.

16 How say you? Are you  
17 guilty or not guilty?

18 DEFENDANT COULTER: Not  
19 guilty.

20 CLERK OF COURT: How will  
21 you be tried?

22 DEFENDANT COULTER: By a  
23 jury.

24 CLERK OF COURT: May they  
25 send you a true deliverance.

.1 Are you ready for trial?

2 DEFENDANT COULTER: Yes.

3 CLERK OF COURT: Thank  
4 you.

5 THE COURT: You may be  
6 seated.

7 Does Mr. Croker wish to  
8 have a formal arraignment?

9 MR. SMILEY: We waive  
10 formal arraignment, your Honor.

11 THE COURT: Thank you, Mr.  
12 Smiley.

13 Ladies and gentlemen,  
14 we're going to select a jury for  
15 the cases of the State versus  
16 Ronald Coulter and the State  
17 versus Ivory Coker a/k/a Ivory  
18 Croker.

19 The indictments are as  
20 follows: As to 2003-GS-10-4452,  
21 the State versus Ronald Coulter,  
22 an indictment for murder. That  
23 indictment alleges that in  
24 Charleston County on or about  
25 April twenty-first, 2001 while

1 acting in concert with another  
2 and with malice aforethought  
3 Ronald Coulter did kill and  
4 murder Edwina Simms by a manner  
5 or means unknown and that Edwina  
6 Simms did die in Charleston  
7 County as a proximate result  
8 thereon on April twenty-first,  
9 2001. Alleging a violation of  
10 code section 16-3-10 of the South  
11 Carolina Code of Laws as amended.

12 In indictment

13 2002-GS-10-2443, the State versus  
14 Ronald Coulter, an indictment for  
15 kidnapping. That indictment  
16 alleges that in Charleston County  
17 on or about April twenty-first,  
18 2001 Ronald Coulter unlawfully  
19 did seize, kidnap, abduct,  
20 confine, or carry away Edwina  
21 Simms without the authority of  
22 law, alleging a violation of code  
23 section 16-3-910 of the South  
24 Carolina Code of Laws as amended.

25 In indictment

1       Edwina Simms without the  
2       authority of law. Alleging a  
3       violation code section 16-3-910  
4       of the South Carolina Code of  
5       Laws as amended.

6                   In indictment  
7       2002-GS-10-2441, the State versus  
8       Ivory Coker a/k/a Ivory Croker,  
9       an indictment for conspiracy to  
10      commit kidnapping. And that  
11      indictment alleges that in  
12      Charleston County on or about  
13      April twenty-first, 2001 Ivory  
14      Coker a/k/a Ivory Croker  
15      knowingly and unlawfully did  
16      combine, conspire, confederate,  
17      and agree to have -- and have  
18      tacit understanding with others  
19      to commit the kidnapping of  
20      Edwina Simms. Alleging a  
21      violation of code section  
22      16-17-410 of the South Carolina  
23      Code of Laws as amended.

24                   And indictment  
25      2003-GS-10-4686, the State versus

1 Ivory Coker a/k/a Ivory Croker,  
2 an indictment for murder. And  
3 that indictment alleges that in  
4 Charleston County on or about  
5 April twenty-first, 2001 while  
6 acting in concert with another  
7 and with malice aforethought,  
8 Ivory Coker a/k/a Ivory Croker  
9 did kill and murder Edwina Simms  
10 by manner or means unknown and  
11 the Edwina Simms did die in  
12 Charleston County as a proximate  
13 result thereof on April  
14 twenty-first, 2001. Alleging a  
15 violation of code section 16-3-10  
16 of the South Carolina Code of  
17 Laws as amended.

18 Ladies and gentlemen, we  
19 are -- we are going to select a  
20 jury for these cases. We will  
21 follow the following procedure.  
22 There are certain questions that  
23 we ask as a part of the jury  
24 selection process. This is  
25 called the voir dire process.

1 Some of these questions may be  
2 intensely personal and if you do  
3 not want to answer these  
4 questions in the presence of your  
5 fellow jurors, I would ask that  
6 make me aware of it so that I  
7 might speak with you privately at  
8 the bench with the court reporter  
9 and with the attorneys.

10 It is absolutely  
11 essential that we have accurate  
12 information from you as a part of  
13 this selection process.

14 Is there any member of  
15 the jury panel that is related by  
16 blood or marriage to Ivory Coker  
17 a/k/a Ivory Croker, Ronald  
18 Coulter, or Edwina Simms?

19 If so, I would ask that  
20 you stand at this time.

21 (There is no response.)

22 Is there any member of  
23 the panel that has a close  
24 personal, social, or business  
25 relationship with Ivory Coker



1 impartial and render a fair and  
2 impartial decision in this case  
3 based solely on the evidence as  
4 it will be presented and on the  
5 law as the Court will charge? A  
6 yes or no answer.

7 A JUROR: No.

8 THE COURT: No is your  
9 answer? I can't hear you.

10 A JUROR: No, ma'am.

11 THE COURT: Thank you,  
12 sir. You may be seated. You  
13 will be excused from this case  
14 only. If you will remain with  
15 us.

16 The following are a list  
17 of potential witnesses in this  
18 case. I need you all to listen  
19 very carefully. The witness  
20 lists are fairly lengthy. Please  
21 do not allow your thoughts to  
22 wander because if you have any  
23 association with any of these  
24 persons, I need to know.

25 The list, this is the

1 following list of potential  
2 witnesses in this case:

3 Claudia Bruening,  
4 Sergeant Linda Jenkins, Mike  
5 Lyczany, Anderson Coulter, Helen  
6 Coulter, Cynthia Judge, Nancy  
7 Weatherspoon, Marlesha Heyward,  
8 Barbara Shannon, Carolyn Knight,  
9 Asia Fowler, Salvadore Rivas,  
10 Charles Miles, Pasquale Tirico,  
11 Eric Evan, David McCutcheon,  
12 Cynthia McCants of the Federal  
13 Bureau of Investigation, Jerry  
14 Jellico of the North Charleston  
15 Police Department, Margaret  
16 Short, Connie Knight, Daisy  
17 Denham, Lori Clark, Daniel Eitle,  
18 Elaine Finley, Joann Jamerson,  
19 Detective Hollie Connelly of the  
20 Charleston Police Department,  
21 James Hackler, Charles Hardin of  
22 the North Charleston Police  
23 Department, W. Taylor of the  
24 North Charleston Police  
25 Department, Michael Bush, Rosalee

1 Hackler, Lieutenant Ken Haggee of  
2 the North Charleston Police  
3 Department, Lenora Thomas, Lynne  
4 Fleming, Kathryn Sims, Susie  
5 Terrell, Edward Sims, Tim Sims,  
6 Rick Mills, Salvador Rivas,  
7 Daneesh Patel, Allen Kramitz,  
8 Scott Wyant of the North  
9 Charleston Police Department,  
10 Leila Gibson of the Guaranty  
11 Bank, George Nicholson of Bell  
12 South, Sally Berzell of Nextel,  
13 Michele Waring of Arch Wireless,  
14 Dominique Milton of Verizon,  
15 Detective Scott Deckard of the  
16 North Charleston Police  
17 Department, Orlando Watkins,  
18 Senior, Mora Sims, Larry Smoak of  
19 the Charleston County Sheriff's  
20 Office, Todd Greenway, [REDACTED] O.J.  
21 [REDACTED] O.J., Junior, Erica Mazyck,  
22 Penny Parrish, Corporal Robert  
23 Beck, Michael O'Brien Bush,  
24 Daniel Raymond Bruenig, Becky  
25 Lemay, Renee Blakey, Ann

1 Albright, Gena Harris, David  
2 Nave, Sherry Diggs, Michael  
3 Neubauer of the Federal Bureau of  
4 Investigation, Ed Gardner of the  
5 Charleston Police Department, and  
6 Detective Alan Williams of the  
7 North Charleston Police  
8 Department, Jerome Ballard, Becky  
9 Bergeron, Anderson Coulter, Helen  
10 Coulter, Sylvia Garcia, Gracie  
11 Horn, Cynthia Judge, Ray  
12 Marshall, Bernetha McCannick,  
13 Gwenn Croker, Pat Shay, Officer  
14 C. Joliff, Charleston Police  
15 Department, Susan Chewing,  
16 Charleston County Coroner, Anna  
17 Mack, Erica Mazyck, Mattie  
18 Hutchinson, Michelle Taylor,  
19 Beulah Palmer, Gwen Croker, Steve  
20 Gerber, Shirley Alexander,  
21 Clementine Ellis, Gloria Deveau,  
22 Alberta Hart, Don last name  
23 unknown, Detective Allen Kramitz,  
24 North Charleston Police  
25 Department, Charlie Hardin, North

1 Charleston Police Department,  
 2 Scott Deckard, North Charleston  
 3 Police Department, Michael  
 4 Poulos, North Charleston Police  
 5 Department, Scott Wyant, North  
 6 Charleston Police Department,  
 7 Detective Allen Williams, North  
 8 Charleston Police Department,  
 9 Holly Connolly, Charleston Police  
 10 Department, Officer Ed Gardner,  
 11 Charleston Police Department,  
 12 Mike Lyczany, Charleston Police  
 13 Department, Corporal Joliff,  
 14 Charleston Police Department,  
 15 Sergeant Choice, Charleston  
 16 Police Department, Larry Smoke,  
 17 Charleston County Sheriff's  
 18 Office, Todd Greenway, Charleston  
 19 County sheriff's Office, Cynthia  
 20 McCants, F. B. I., Asia Fowler,  
 21 Sylvia Garcia, Charlie Miles,  
 22 Captain Tillman, North  
 23 Charlestown Police Department,  
 24 Sergeant Daugherty, Charleston  
 25 County Detention Center, and

1 Doctor Edmund S. Higgins, M. D.

2 Is there any member of  
3 the panel that is related by  
4 blood or marriage to any of the  
5 people I've just listed, or does  
6 anyone have a close, personal,  
7 social, or business relationship  
8 with any of these people?

9 If so, I would ask that  
10 you stand at this time.

11 Sir, if you would tell  
12 me your name and your juror  
13 number and which witness.

14 A JUROR: Edward Fennell,  
15 juror number fifty-three.

16 THE COURT: Yes, sir.

17 A JUROR: I'm a reporter  
18 for the Post and Courier, your  
19 Honor, and over the years I have  
20 interviewed a number of police  
21 officers that you named Haggee,  
22 Jellico, Connelly.

23 THE COURT: Okay.

24 A JUROR: And that's my  
25 only relationship with them has

1       been, you know, on the job.

2               THE COURT: Sir, as a  
3       result these facts do you feel  
4       that you can remain fair and  
5       impartial and render a fair and  
6       impartial decision in this case  
7       based solely on the evidence as  
8       it will be presented and on the  
9       law as the Court will charge at  
10      the conclusion of the case?

11             A JUROR: I do.

12             THE COURT: Thank you,  
13      sir. You may be seated.

14             A JUROR: Your Honor.

15             THE COURT: Yes, sir. If  
16      you would tell me your name and  
17      juror number.

18             A JUROR: Michael Smith,  
19      one six seven.

20             THE COURT: Yes, sir.

21             A JUROR: I have worked  
22      previously with Susan Chewning in  
23      the past.

24             THE COURT: How long ago  
25      was that, sir?

1                   A JUROR: Two or three  
2 years now.

3                   THE COURT: Sir, as a  
4 result of this contact do you  
5 feel that you can remain fair and  
6 impartial and render a fair and  
7 impartial decision in this case  
8 based solely on the evidence as  
9 it will be presented and on the  
10 law as the Court will charge?

11                  A JUROR: Yes, ma'am.

12                  THE COURT: Thank you,  
13 sir. You may be seated.

14                         Yes, sir?

15                  A JUROR: James Littkey.  
16 Doctor Edmond Higgins is a  
17 colleague and I have referred  
18 patients to him. I worked with  
19 him a number of years ago.

20                  THE BAILIFF: Two oh  
21 eight.

22                  THE COURT: Number two oh  
23 eight. Yes, sir. You said in  
24 the past?

25                  A JUROR: In the past.



1 THE COURT: Sir, as a  
2 result -- -- how long ago?

3 A JUROR: It was probably  
4 five years ago.

5 THE COURT: As a result of  
6 this, contact do you feel that  
7 you can remain fair and impartial  
8 and render a fair and impartial  
9 decision in this case based  
10 solely on the evidence as it will  
11 be presented and on the law as  
12 the Court will charge?

13 A JUROR: Yes, ma'am.

14 THE COURT: Thank you,  
15 sir. You may be seated.

16 I would ask the  
17 attorneys and I apologize that I  
18 did not do this earlier. In our  
19 haste I neglected to do it. I  
20 would ask for the attorneys for  
21 Mr. Croker, if you would stand  
22 and introduce yourselves to the  
23 panel as well as --

24 Yes, sir?

25 A JUROR: What was the

1 doctor's name?

2 THE COURT: Doctor Edmond  
3 Higgins.

4 A JUROR: A psychiatrist?

5 THE COURT: Yes.

6 A JUROR: He is working  
7 with my wife.

8 THE COURT: Currently?

9 A JUROR: Yes.

10 THE COURT: And, sir,  
11 where is your wife employed?

12 A JUROR: She's a  
13 self-employed psychologist with  
14 Behavioral Associates. She's in  
15 the same practice that Higgins is  
16 in.

17 THE COURT: Okay, sir. As  
18 a result this contact do you feel  
19 that you can remain fair and  
20 impartial and render a fair and  
21 impartial decision in this case  
22 based solely on the evidence as  
23 it will be presented and on the  
24 law as the Court will charge?

25 A JUROR: I do.

1                   THE COURT: And, sir,  
2                   could you tell me your name and  
3                   your juror number.

4                   A JUROR: Mike Reineke,  
5                   one five zero.

6                   THE COURT: Thank you,  
7                   sir. You may be seated.

8                   Mr. Smiley.

9                   MR. SMILEY: My name is  
10                  Jim Smiley. I'm first chair or  
11                  the main person that will be  
12                  representing my client, Ivory  
13                  Crocker who is standing up, and  
14                  Miss Laura Knobloch, she will be  
15                  my second chair and assisting us  
16                  in this case.

17                  Both of us,  
18                  Miss Knobloch and myself, are in  
19                  private practice in the  
20                  Charleston County Bar. Primarily  
21                  we are in court on a daily basis.

22                  And just so everybody  
23                  gets a good look at my client who  
24                  I have the honor of representing,  
25                  Mr. Ivory Crocker.

1                   THE COURT: Miss Shealy  
2                   and Mr. Davis, if you would do  
3                   the same, and also tell us the  
4                   members of your office.

5                   MR. DAVIS: Thank you,  
6                   your Honor. Ladies and  
7                   gentlemen, I'm Rodney Davis. I'm  
8                   assisting in the case with  
9                   Miss Jennifer Kneece Shealy.

10                   I'll try to remember all  
11                   the members of our office.  
12                   Mr. Rhett Dunaway, Miss Martha  
13                   Dicus, Kelly Kassis, Douglas  
14                   Swift, Lori Proctor, Beatty  
15                   Butler, Maryann Renkin, Mary  
16                   Hancock, Harry Worth, Boyd Young,  
17                   Mark Moore, Danny Prenner, David  
18                   Holton, Ted Smith. We have two  
19                   new hires. Miss Janell Ferrara  
20                   and Miss Melissa Inzareello.  
21                   Forgive me for mispronouncing  
22                   that name. And we represent Mr.  
23                   Coulter.

24                   THE COURT: Ms. Wilson, if  
25                   you could do the same.

1 MS. WILSON: Thank you,  
2 your Honor. I'm Scarlett Wilson.  
3 I'm the Chief Deputy Solicitor  
4 here in the ninth circuit.

5 This is Bruce Durant.  
6 He's a senior prosecutor in our  
7 office and he'll be presenting  
8 the State's case.

9 Seated at our table also  
10 is Joann Gould, who's a paralegal  
11 with us. Cynthia McCants with  
12 the F. B. I. Allan Kramitz who  
13 used to be with the North  
14 Charleston Police Department.  
15 And also Terry Purcell who's our  
16 victim/witness coordinator.

17 As far as attorneys in  
18 our office, the solicitor in this  
19 circuit is Ralph Hoisington. We  
20 also have as attorneys Caroline  
21 Bernard, Mark Bourdon, Jennifer  
22 Birney, Sarah Todd, Damon Cook,  
23 Shaw Goodrich, Elizabeth Gordon,  
24 Amy Harrell, Ed Kniesley, Debbie  
25 Herring Lash, Henry Leventis,

1 Amie Meyers, Doug Novack, Bentley  
2 Price, Joy Sanders, Ravi Sanyal,  
3 Melissa Seabrook, Paul Thurmond,  
4 Abigail Walsh, and Berns Wetmore.

5 THE COURT: Thank you very  
6 much.

7 Has any member of the  
8 jury panel ever been represented  
9 by any of the attorneys involved  
10 in this case or by anyone with  
11 whom they practice law? If so, I  
12 would ask that you stand at this  
13 time.

14 (Whereupon, no juror  
15 stands.)

16 Is there any member of  
17 the panel that is related by  
18 blood or marriage to or have a  
19 close personal, social, or  
20 business relationship with any of  
21 the attorneys involved in this  
22 case or with anyone with whom  
23 they practice law? If so, please  
24 stand at this time.

25 Yes, sir.

1                   A JUROR: Richard Kerr,  
2                   two oh six.

3                   THE COURT: Yes, sir.

4                   A JUROR: Joann's husband  
5                   and I grew up together.

6                   THE COURT: Okay.

7                   A JUROR: And we are very  
8                   close friends, close buddies.

9                   THE COURT: You said very  
10                  close buddies? Then or now?

11                  A JUROR: Then and now.

12                  THE COURT: Sir, as a  
13                  result of this relationship, do  
14                  you feel that you can remain fair  
15                  and impartial and render a fair  
16                  and impartial decision in this  
17                  case based solely on the evidence  
18                  as it will be presented and on  
19                  the law as the Court will charge?

20                  A JUROR: I do.

21                  THE COURT: Thank you,  
22                  sir. You may be seated.

23                               Has any member of the  
24                  jury panel formed or expressed an  
25                  opinion about any issue or matter

1 involved in this case? If so,  
2 please stand at this time.

3 (Whereupon, no juror  
4 stands.)

5 Is there any member of  
6 the panel aware of any bias or  
7 prejudice toward either the State  
8 or the defense in this case? If  
9 so, please stand at this time.

10 (Whereupon, no juror  
11 stands.)

12 Is there any member of  
13 the jury panel who is a member of  
14 the Charleston County Grand Jury  
15 which issued the indictments in  
16 this case? If so, please stand  
17 at this time.

18 (Whereupon, no juror  
19 stands.)

20 Is there any member of  
21 the jury panel who is a member of  
22 or contributor to any group which  
23 has as its primary concern the  
24 promotion of law enforcement or  
25 of victims' rights?



1                   These groups would  
2           include but are not limited to:  
3           Mothers Against Drunk Driving,  
4           Students Against Drunk Driving,  
5           Citizens Against Violent Crime,  
6           People Against Rape, Persons  
7           Empowered to Save Teens, or any  
8           other community or  
9           neighborhood-type watch program?  
10          If so, please stand at this time.

11                   Yes, ma'am.

12                   A JUROR: I'm Madeline  
13          Frampton. I'm juror sixty.

14                   THE COURT: Yes, ma'am.

15                   A JUROR: I do contribute  
16          to Mothers Against Drunk Driving.

17                   THE COURT: Okay. Ma'am,  
18          as a result of that affiliation  
19          do you feel that you can remain  
20          fair and impartial and render a  
21          fair and impartial decision in  
22          this case based solely on the  
23          evidence as it will be presented  
24          and on the law as the Court will  
25          charge?

1                   A JUROR: Yes, ma'am.

2                   THE COURT: Thank you,  
3                   ma'am. You may be seated.

4                   Is there any member of  
5                   the panel that is now or was  
6                   formerly a member of any law  
7                   enforcement agency? If so,  
8                   please stand at this time.

9                   Yes, sir. If you would  
10                  tell me your name and your juror  
11                  number.

12                  A JUROR: My name is  
13                  Michael Reineke, number one five  
14                  oh. I work at the Navy Brig.

15                  THE COURT: Okay. Sir, as  
16                  a result of your employment do  
17                  you feel that you can remain fair  
18                  and impartial and render a fair  
19                  and impartial decision in this  
20                  case based solely on the evidence  
21                  as it will be presented and on  
22                  the law as the Court will charge?

23                  A JUROR: I do.

24                  THE COURT: Thank you,  
25                  sir. You may be seated.

1           Is there any member of  
2           the panel who has members of your  
3           family who are presently or were  
4           formerly employed by law  
5           enforcement agencies? If so,  
6           please stand at this time.

7           Yes, ma'am. If you  
8           would tell me your name and your  
9           juror number and the relationship  
10          and what agency.

11          A JUROR: Angela Prince,  
12          juror number one forty-six. My  
13          brother Andrew is a state  
14          constable, was formerly a reserve  
15          officer with the City of  
16          Charleston and was employed by  
17          the City of Charleston --

18          THE COURT: Okay.

19          A JUROR: -- as a  
20          dispatcher.

21          THE COURT: If you would  
22          remain standing for me.

23          Yes, ma'am.

24          A JUROR: Jennifer Wertz,  
25          number one ninety-one. My

1 brother-in-law is a Charleston  
2 County police officer.

3 THE COURT: Your  
4 brother-in-law --

5 A JUROR: Yes.

6 THE COURT: -- is a  
7 Charleston County police officer?

8 A JUROR: Yes.

9 THE COURT: As a result of  
10 these relationships, do you all  
11 feel that you can remain fair and  
12 impartial and render a fair and  
13 impartial decision in this case  
14 based solely on the evidence as  
15 it will be presented and on the  
16 law as the Court will charge?

17 A JUROR: Yes/

18 THE COURT: And number one  
19 forty-six?

20 A JUROR: Yes.

21 THE COURT: And number one  
22 ninety-one?

23 A JUROR: Yes.

24 THE COURT: You may be  
25 seated. Thank you.

1                   Is there any member of  
2                   the panel had an immediate family  
3                   member arrested for any charge  
4                   involving assault or violence?  
5                   If so, please stand at this time.

6                   Yes, sir. If you would  
7                   tell me your name and your juror  
8                   number.

9                   A JUROR: Frank Gadson,  
10                  juror number sixty-four.

11                  THE COURT: Yes, sir.

12                  A JUROR: My son was put  
13                  in jail for shooting a guy with a  
14                  shotgun.

15                  THE COURT: Is he  
16                  currently serving time?

17                  A JUROR: Yes, ma'am.

18                  THE COURT: Sir, as a  
19                  result of this experience, do you  
20                  feel that you can remain fair and  
21                  impartial and render a fair and  
22                  impartial decision in this case  
23                  based solely on the evidence as  
24                  it will be presented and on the  
25                  law as the Court will charge?

1 A JUROR: Yes, ma'am.

2 THE COURT: Sir, and I  
3 appreciate your candor. You, may  
4 be seated.

5 Is there any member of  
6 the panel or a member of your  
7 family ever been the victim of a  
8 violent crime? If so, I would  
9 ask that you stand at this time.

10 Yes, ma'am.

11 A JUROR: Madeline  
12 Frampton, juror number sixty, and  
13 my grandmother was murdered.

14 THE COURT: Okay. Ma'am,  
15 as a result of this experience --  
16 oh, I apologize. Yes, ma'am. If  
17 you could remain standing for me.

18 Yes, ma'am. Yes, ma'am.

19 A JUROR: Juror number  
20 twelve.

21 THE COURT: Number twelve?

22 A JUROR: Yes. Rita  
23 Austera. My niece was stabbed to  
24 death.

25 THE COURT: If you could

1 remain standing for me.

2 Yes, sir.

3 A JUROR: Doyle Burlison,  
4 juror number twenty-seven. My  
5 step-father's brother murdered  
6 his brother-in-law.

7 THE COURT: As a result of  
8 these experiences, do you all  
9 feel that you can remain fair and  
10 impartial and render a fair and  
11 impartial decision in this case  
12 based solely on the evidence as  
13 it will be presented and on the  
14 law as the Court will charge?

15 Number sixty?

16 A JUROR: Yes, ma'am.

17 THE COURT: You may be  
18 seated. Thank you.

19 Number twelve.

20 A JUROR: Yes, ma'am.

21 THE COURT: Thank you,  
22 ma'am. You may be seated.

23 And number twenty-seven?

24 A JUROR: Yes, your Honor.

25 THE COURT: Thank you,

1       sir. You may be seated. And  
2       again I appreciate your candor.  
3       I know how difficult that must  
4       have been to answer in the  
5       presence of your fellow jurors.

6               Does any member of the  
7       panel know of any reason  
8       whatsoever why he or she should  
9       not be serve -- should not serve  
10       as a juror in this case, with  
11       particular emphasis being placed  
12       on your ability to be fair and  
13       impartial to both the State and  
14       the defense? If you feel this  
15       question applies to you, I would  
16       ask that you stand at this time.

17               Well, ma'am, if you  
18       would tell me your name and your  
19       juror number, ma'am.

20               A JUROR: Carolyn Rueda,  
21       number one fifty-four. I don't  
22       believe in someone using drugs.

23               THE COURT: Yes, ma'am.  
24       Ma'am, that is not an issue in  
25       this case, but I will ask if you



1 can stand again for me, please.

2 Ma'am, as a result of  
3 those beliefs, do you feel that  
4 you can remain fair and impartial  
5 and render a fair and impartial  
6 decision in this case based  
7 solely on the evidence as it will  
8 be presented and on the law as  
9 the Court will charge?

10 A JUROR: Yes.

11 THE COURT: I can't hear  
12 you. I'm sorry.

13 A JUROR: Yes.

14 THE COURT: Thank you,  
15 ma'am. You may be seated.

16 Now, ladies and  
17 gentlemen, there's one additional  
18 question that I need to ask and  
19 it regards media coverage of this  
20 particular case. I'm going to  
21 ask, however, that if you stand  
22 in response to this question,  
23 please do not begin to  
24 extemporaneously tell me what you  
25 have read, seen, or listened to,

1 because I need to speak with each  
2 of you individually.

3 Is there any member of  
4 the panel that has read, listened  
5 to, or watched any news reports  
6 regarding the substance of this  
7 case? If so, I would ask that  
8 you stand at this time.

9 I'm going to ask each of  
10 you to make your way to aisle,  
11 whichever aisle is closest to  
12 you.

13 THE BAILIFF: One  
14 sixty-five, Mr. Smith.

15 (The following took  
16 place at the bench, in the  
17 presence of the attorneys.)

18 THE COURT: Yes, sir.  
19 Tell me your name and your juror  
20 number.

21 A JUROR: Donald Smith,  
22 one six five.

23 THE COURT: Yes, sir.  
24 Tell me what you read or listened  
25 to.

1           A JUROR: There was a big  
2           article in the Post and Courier  
3           yesterday or the day before. I  
4           did read that.

5           THE COURT: Sir, as a  
6           result of reading that article do  
7           you feel that you've formed a  
8           fixed opinion regarding the facts  
9           and circumstances of this case?

10          A JUROR: No.

11          THE COURT: Sir, do you  
12          feel that you can remain fair and  
13          impartial and render a fair and  
14          impartial decision in this case  
15          based solely on the evidence as  
16          it will be presented and on the  
17          law as the Court will charge?

18          A JUROR: Yes, your Honor.

19          THE COURT: Thank you,  
20          sir. You may take your seat.

21          THE BAILIFF: Eighty-two.

22          THE COURT: Wait one  
23          second.

24          MR. SHILEY: Maybe we can  
25          inquire about what he remembers

1 about that article.

2 THE COURT: The case law  
3 says I'm only required to ask if  
4 he has formed a fixed opinion as  
5 a result of what he's read and  
6 whether he can remain fair and  
7 impartial. And he read the paper  
8 yesterday and there was an  
9 article he said he read, which  
10 leads me to the conclusion that  
11 he read the entire article.

12 MS. SHEALY: Your Honor,  
13 just so our record is preserved,  
14 I would inquire into what he  
15 recalls.

16 THE COURT: The case law  
17 does not require going into that.  
18 The case law requires me to  
19 determine whether he's fair and  
20 impartial or has a fixed opinion  
21 regarding what he read or saw or  
22 listened to.

23 MR. SMILEY: If I can  
24 place something on the record at  
25 this point. If your Honor --

1       since they're the finders of the  
2       facts and they should only base  
3       their decision on what has  
4       occurred in the courtroom,  
5       reading that article was  
6       something that did not occur in  
7       the courtroom.

8               THE COURT: That's not  
9       what I asked. I asked if he has  
10       a fixed opinion. He has not  
11       formed a determination of guilt  
12       or innocence that he wouldn't  
13       have obtained otherwise,  
14       therefore I think he can be a  
15       fair and impartial juror based  
16       on information provided in this  
17       case.

18               State have any  
19       questions?

20               MS. WILSON: Your Honor,  
21       I think you handled the question  
22       correctly. Just because somebody  
23       read the article, you asked them  
24       specifically, Judge, if they can  
25       render a verdict based on the

1 evidence and then if they say  
2 they can, that's what the cases  
3 require, otherwise --

4 MR. SMILEY: This case is  
5 different. It is the headline of  
6 the paper the day before our  
7 trial.

8 THE COURT: That's no  
9 different than any other case in  
10 the media. I'll note your  
11 exception for the record.

12 There are -- based on my  
13 knowledge of the case law there  
14 are no cases that would require  
15 him to be excluded. You  
16 certainly can use a strike for  
17 that purpose if you deem it's  
18 proper.

19 MS. SHEALY: Your Honor,  
20 for the record, we would also  
21 join in the comments made by  
22 Mr. Smiley, but it's sort of a  
23 two-way analysis. One would be  
24 whether or not he should be  
25 struck and, second, whether or

1 not we intend to offer a strike  
2 against him, it would be our  
3 position we cannot without  
4 knowing what he recalls from the  
5 facts.

6 THE COURT: Well, the fact  
7 that he read the article, we all  
8 know the substance of it. The  
9 case is very clear. Actually I  
10 only have to ask if he's formed a  
11 fixed opinion. I don't have to  
12 ask him any more questions if his  
13 answer is no, so I think that I'm  
14 following the dictates of the  
15 Supreme Court and I'm not  
16 required to ask or inquire into  
17 it any further.

18 MR. SMILEY: If you will  
19 just note my exception in that  
20 regard.

21 THE COURT: Yes.

22 THE BAILIFF: Eighty-two,  
23 Mr. Harvey.

24 (The following took  
25 place at the bench, in the

1 presence of the attorneys.)

2 THE COURT: Hello, sir.  
3 How are you? Sir, can you tell  
4 me what you have seen or read in  
5 the newspapers?

6 A JUROR: I've seen the  
7 media, kept up with it in the  
8 newspapers and I've followed this  
9 case I guess from its onset.

10 THE COURT: So you've read  
11 all the articles?

12 A JUROR: Yes, I have.

13 THE COURT: Have you  
14 watched anything on the news?

15 A JUROR: Yes, I have.

16 THE COURT: And have you  
17 listened to anything on the  
18 radio?

19 A JUROR: No. Not the  
20 radio.

21 THE COURT: Okay. Sir, as  
22 a result of what you have  
23 observed, do you feel that you  
24 have formed a fixed opinion about  
25 the facts and circumstances of



1 this case?

2 A JUROR: I don't want to  
3 lie to you, Judge..

4 THE COURT: I just need  
5 you to be honest with me.

6 A JUROR: I think I have.

7 THE COURT: Okay. Then  
8 your answer would be that you  
9 can't remain fair and  
10 impartial --

11 A JUROR: That's what I'm  
12 saying.

13 THE COURT: -- about a  
14 decision in this case?

15 A JUROR: I'm concerned  
16 about that.

17 THE COURT: Okay. Then  
18 your answer would be that no, you  
19 can't remain fair and impartial?

20 A JUROR: Yes. I think I  
21 feel -- that's the way I feel.

22 THE COURT: Sir, I would  
23 then exclude you from this panel.  
24 I appreciate your candor.

25 A JUROR: Thank you.

1                   THE COURT:   Number  
2   eighty-two is excluded from this  
3   panel only.   And actually, come  
4   closer.   If I were to follow the  
5   defense's logic regarding a  
6   person simply reading an article  
7   that really is contrary to the  
8   case law, particularly the  
9   precedents that have been  
10   established by our courts,  
11   because if that were the logic  
12   and I would ask someone about  
13   reading or listening, even a  
14   question because they would be  
15   automatically excluded.  I didn't  
16   say that -- I meant to make that  
17   note when we were talking earlier  
18   and I just wanted to say that.

19                   MS. SHEALY:   May I respond  
20   to that?

21                   THE COURT:   No, ma'am.   It  
22   wasn't made to elicit a comment.

23                   Please call the next  
24   juror.

25                   THE BAILIFF:   Number forty

1 is the next juror.

2 (The following took  
3 place at the bench, in the  
4 presence of the attorneys.)

5 THE COURT: Yes, sir.

6 A JUROR: I watch the news  
7 once or twice a day, generally in  
8 the morning and again in the  
9 evening and --

10 THE COURT: Okay. And,  
11 sir, you have watched and read  
12 news reports regarding this case?

13 A JUROR: Yes, ma'am.

14 THE COURT: Sir, as a  
15 result of what you have read or  
16 watched, do you feel that you've  
17 formed a fixed opinion about the  
18 facts and circumstances of this  
19 case.

20 A JUROR: No, ma'am.

21 THE COURT: Sir, do you  
22 feel that you can remain fair and  
23 impartial and make fair and  
24 impartial decisions based solely  
25 on the evidence as it will be

1 presented and on the law as the  
2 Court will charge?

3 A JUROR: Yes.

4 THE COURT: Thank you,  
5 sir. You may return to your  
6 seat.

7 MS. SHEALY: Our continued  
8 objection.

9 THE COURT: It is noted  
10 for the record.

11 THE BAILIFF: Number  
12 forty-six, Mr. Donehue.

13 (The following took  
14 place at the bench, in the  
15 presence of the attorneys.)

16 THE COURT: How are you?

17 A JUROR: Very well, thank  
18 you.

19 THE COURT: Yes, sir. If  
20 you could tell me your name and  
21 your juror number, please.

22 A JUROR: My name is  
23 Douglas Donehue, number  
24 forty-six.

25 THE COURT: Yes, sir. If

1           you would you tell me what you  
2           have been exposed to.

3                   A JUROR:   Beg your pardon?

4                   THE COURT:   If you would  
5           tell me what you've been exposed  
6           to.   If you've read an article or  
7           watched the news.

8                   A JUROR:   I read the paper  
9           every day.   I'm a life-long  
10          newspaper man.

11                   THE COURT:   And have you  
12          watched any news reports  
13          regarding the case?

14                   A JUROR:   I don't pay that  
15          much attention to television.

16                   THE COURT:   Okay.   Sir, as  
17          a result of what you have read,  
18          do you feel that you have formed  
19          a fixed opinion about the facts  
20          and circumstances of this case?

21                   A JUROR:   No.

22                   THE COURT:   Your answer is  
23          no?

24                   A JUROR:   No.

25                   THE COURT:   Sir, as a

1 result do you feel that you can  
2 remain fair and impartial and  
3 render a fair and impartial  
4 decision in this case --

5 A JUROR: Positively.

6 THE COURT: -- based  
7 solely on the evidence as it will  
8 be presented and on the law as  
9 the Court will charge?

10 A JUROR: Yes.

11 THE COURT: Thank you,  
12 sir. You may take your seat.

13 THE BAILIFF: Twenty-nine,  
14 Miss Burnison.

15 (The following took  
16 place at the bench, in the  
17 presence of the attorneys.)

18 THE COURT: Can you give  
19 me your juror number?

20 A JUROR: Twenty-nine.

21 THE COURT: Can you tell  
22 me what you have read or heard  
23 regarding this case?

24 A JUROR: There was an  
25 article I read in Sunday's paper.

1 THE COURT: Ma'am, as a  
2 result of reading the article on  
3 Sunday do you feel that you have  
4 formed a fixed opinion about the  
5 facts and circumstances in this  
6 case?

7 A JUROR: No.

8 THE COURT: Do you feel  
9 that you can remain fair and  
10 impartial and render a fair and  
11 impartial decision in this case  
12 based solely on the evidence as  
13 it will be presented and on the  
14 law as the Court will charge?

15 A JUROR: Yes.

16 THE COURT: Thank you,  
17 ma'am. You can return to your  
18 seat.

19 THE BAILIFF: Two oh  
20 seven, Candice Davis.

21 (The following took  
22 place at the bench, in the  
23 presence of the attorneys.)

24 THE COURT: Yes, ma'am.  
25 Can you tell me if you have read

1 or heard anything concerning this  
2 case?

3 A JUROR: I read the  
4 article in yesterday's paper.

5 THE COURT: And as a  
6 result of reading that article,  
7 have you formed a fixed opinion  
8 about the facts and circumstances  
9 of this case?

10 A JUROR: Yes, ma'am.

11 THE COURT: So I assume  
12 your answer then is you do not  
13 feel that you could be fair and  
14 impartial?

15 A JUROR: No. I don't  
16 think I would be.

17 THE COURT: I need you to  
18 remain with me, but I will excuse  
19 you from the trial of this case  
20 but I need you to remain.

21 Number two oh seven is  
22 excused from this panel only.

23 THE BAILIFF: Juror number  
24 twenty, Katherine Bible.

25 (The following took



1 place at the bench, in the  
2 presence of the attorneys.)

3 THE COURT: Ma'am, if you  
4 would tell me your name and your  
5 juror number, please.

6 A JUROR: My name is  
7 Katherine Bible, number twenty.

8 THE COURT: Miss Bible,  
9 could you tell me what you read?

10 A JUROR: Just the article  
11 in the paper yesterday and I  
12 don't recall the facts of the  
13 article, but I did skim it.

14 THE COURT: Have you  
15 watched or listened to any  
16 reports regarding the case?

17 A JUROR: No.

18 THE COURT: As a result of  
19 what you read, have you formed  
20 any fixed opinions regarding the  
21 facts of this case?

22 A JUROR: No.

23 THE COURT: And do you  
24 feel that you can remain fair and  
25 impartial and render a fair and

1       impartial decision in this case  
2       based solely on the evidence as  
3       it will be presented and on the  
4       law as the Court will charge?

5               A JUROR: Yes.

6               THE COURT: Thank you,  
7       ma'am. You may return to your  
8       seat.

9               THE BAILIFF: One  
10       fifty-four, Miss Rueda.

11               (The following took  
12       place at the bench, in the  
13       presence of the attorneys.)

14               THE COURT: Could you give  
15       me your name and your juror  
16       number, please.

17               A JUROR: One fifty-four,  
18       Carolina Rueda.

19               THE COURT: Yes, ma'am.

20               A JUROR: I saw it on  
21       T. V.

22               THE COURT: Okay. When  
23       was that?

24               A JUROR: From the time it  
25       happened.

1 THE COURT: So you've been  
2 following it on T. V.

3 A JUROR: Uh-huh.

4 THE COURT: Have you read  
5 anything in the newspapers?

6 A JUROR: Un-un.

7 THE COURT: Have you  
8 listened to anything on the  
9 radio?

10 A JUROR: Un-un.

11 THE COURT: As a result of  
12 what you've watched on T. V. do  
13 you feel that you've formed a  
14 fixed opinion on this case?

15 A JUROR: No.

16 THE COURT: No, you do not  
17 feel that you --

18 A JUROR: No.

19 THE COURT: Well, what is  
20 your answer? Was it yes or no?

21 A JUROR: No.

22 THE COURT: Okay. Do you  
23 feel you can remain fair and  
24 impartial in this case?

25 A JUROR: Uh-huh.

1           THE COURT: Do you feel  
2           that you can base a decision only  
3           on the facts and circumstances  
4           that are presented in this case  
5           and on the law as the Court will  
6           charge?

7           A JUROR: Yes.

8           THE COURT: Ma'am, could  
9           you clarify for me earlier when  
10          you said yes, then when I asked  
11          you again you told me no.

12          A JUROR: Based on the  
13          death penalty. I don't believe  
14          in the death penalty. That's it.

15          THE COURT: Okay. But  
16          you're now telling me that you  
17          can remain fair and impartial?

18          A JUROR: Uh-huh.

19          THE COURT: Thank you,  
20          ma'am. You may take your seat.

21                 I guess I was a little  
22          perplexed initially because she  
23          answered yes and then she  
24          answered no, but if you want to  
25          use a strike, you can. She

1 answered my questions  
2 appropriately.

3 THE BAILIFF: Seventy-nine  
4 Mr. Hammerstedt.

5 (The following took  
6 place at the bench, in the  
7 presence of the attorneys.)

8 THE COURT: Hello, sir.  
9 Could you give me your name and  
10 your juror number, please.

11 A JUROR: Juror number  
12 seventy-nine, Mark Hammerstedt.

13 THE COURT: Okay, sir.  
14 Tell me what you've heard about  
15 this case.

16 A JUROR: I watch the news  
17 and I read the paper every day  
18 and watch the news every evening  
19 on the television stations. I've  
20 seen numerous articles regarding  
21 this case.

22 THE COURT: As a result of  
23 what you have seen and read, do  
24 you feel that you have formed a  
25 fixed opinion about the facts and

1           circumstances of this case?

2           A JUROR: No, ma'am.

3           THE COURT: Do you feel  
4           that you can remain fair and  
5           impartial and render a fair and  
6           impartial decision in this case  
7           based solely on the evidence as  
8           it will be presented and on the  
9           law as the Court will charge?

10          A JUROR: Yes.

11          THE COURT: Thank you,  
12          sir. You may return to your  
13          seat.

14          THE BAILIFF: Seventy-two,  
15          Mr. Givens.

16                 (The following took  
17                 place at the bench, in the  
18                 presence of the attorneys.)

19          THE COURT: Sir, if you  
20          could give me your name and juror  
21          number, please.

22          A JUROR: Taharqa Givens,  
23          number seventy-two.

24          THE COURT: Sir, if you  
25          can tell me what you read.

1 A JUROR: Just read it the  
2 other day, the fact about them  
3 not being able to find the body.

4 THE COURT: Okay. Sir, as  
5 a result of what you have read,  
6 do you feel that you have formed  
7 a fixed opinion about this case?

8 A JUROR: No.

9 THE COURT: Sir, do you  
10 feel that you can remain fair and  
11 impartial and render a fair and  
12 impartial decision in this case  
13 based solely on the evidence as  
14 it will be presented and on the  
15 law as the Court will charge?

16 A JUROR: Yes.

17 THE COURT: Thank you.  
18 Okay, sir. Thank you. You may  
19 take your seat.

20 THE BAILIFF: One  
21 ninety-nine, Renee Young.

22 (The following took  
23 place at the bench, in the  
24 presence of the attorneys.)

25 THE COURT: Yes, ma'am.

1           Could you give me your name and  
2           juror number, please.

3                   A JUROR:   Renee Young,  
4           juror number one ninety-nine.

5                   THE COURT:   Yes, ma'am.

6                   A JUROR:   The reason why I  
7           did not want to say this in front  
8           of everyone, the question about  
9           the family or friend that was a  
10          victim of a violent crime, that  
11          sort of question, I had a very  
12          good friend that was murdered,  
13          so --

14                   THE COURT:   So that's why  
15          you came forward?

16                   A JUROR:   Yes.

17                   THE COURT:   Okay.   Have  
18          you seen any media reports about  
19          this case?

20                   A JUROR:   No.

21                   THE COURT:   Ma'am, as a  
22          result of your friend being  
23          murdered, do you feel that you  
24          can remain fair and impartial and  
25          render a fair and impartial



1 decision in this case based  
2 solely on the evidence as it will  
3 be presented and on the law as  
4 the Court will charge?

5 A JUROR: Yes.

6 THE COURT: Okay. You may  
7 take your seat.

8 THE BAILIFF: One twelve,  
9 Miss Lefter.

10 (The following took  
11 place at the bench, in the  
12 presence of the attorneys.)

13 THE COURT: Yes, ma'am.

14 A JUROR: I just wanted to  
15 mention -- this is going back to  
16 another question.

17 THE COURT: You're juror  
18 number one twelve. Right?

19 A JUROR: Yes.

20 THE COURT: Miss Lefter.  
21 I apologize.

22 A JUROR: I think I worked  
23 for his mom. Betsy Smiley, is  
24 that your mother?

25 MR. SMILEY: Yes, ma'am,

1 she is, for the record.

2 THE COURT: Ma'am, how  
3 long did you work with  
4 Mr. Smiley's mother?

5 A JUROR: Five years.  
6 She's retired now.

7 THE COURT: As a result of  
8 that, do you feel that you can  
9 remain fair and impartial and  
10 render a fair and impartial  
11 decision in this case based  
12 solely on the evidence as it will  
13 be presented and on the law as  
14 the Court will charge?

15 A JUROR: Yes.

16 THE COURT: Okay. Thank  
17 you, ma'am. You may take your  
18 seat. We appreciate your candor.

19 A JUROR: I'm sorry I  
20 didn't say that earlier.

21 MR. SMILEY: Well, they  
22 didn't ask the question.

23 THE COURT: Don't  
24 apologize. It's not a problem.

25 MR. DAVIS: Your Honor,

1           number sixty-four indicated that  
2           he had a family member that was  
3           incarcerated. I believe he is my  
4           client, his son.

5           THE COURT: I would  
6           imagine that would go to your  
7           benefit.

8           MR. DAVIS: But I needed  
9           to tell the Court.

10          THE COURT: Yeah. I think  
11          it's kind of neutralized.

12          Okay. I appreciate your  
13          bringing that to our attention.

14          For the record the  
15          strikes are ten, ten, and ten.  
16          Correct?

17          (Whereupon, all  
18          attorneys respond in the  
19          affirmative.)

20          THE COURT: You all have  
21          been sitting for approximately an  
22          hour. I'm going to give you a  
23          very brief recess, to go to the  
24          restroom if any of you need to,  
25          or to stretch or refresh

1 themselves. I'll give you the  
2 opportunity to do it. We'll take  
3 about five minutes.

4 Please return promptly  
5 to the courtroom. Please don't  
6 interact with anyone. We'll be  
7 at ease for five minutes.

8 (Whereupon, a recess was  
9 called at 12:56 p. m.)

10 (The Judge enters the  
11 courtroom at 1:08 p. m.)

12 THE COURT: But I have  
13 thought about it some more. I'm  
14 going to ask the jurors who did  
15 not specify what they read or  
16 listened, to tell us. There  
17 really is no case law on point,  
18 but I figure no harm, no foul.

19 Many of them said what  
20 they read or listened to and the  
21 other ones that I asked, I was  
22 going to have one sixty-five --  
23 actually what I didn't -- excuse  
24 I'm just going to have them line  
25 back up and tell me what they

1 watched or listened to. Then I'm  
2 not going to -- I don't think I  
3 have to reask every question.  
4 Just them.

5 MR. DAVIS: Perhaps you  
6 can ask if that has changed the  
7 previous response.

8 THE COURT: Any exception  
9 to handling it that way, if their  
10 opinions have changed since?

11 MR. SMILEY: No, ma'am.

12 MS. WILSON: No, ma'am.

13 THE COURT: No. What I'm  
14 saying is basically he's saying I  
15 would ask them has your answer to  
16 my question changed as a result  
17 of this new question. I really  
18 should have. I was just feeling  
19 compressed for time and just  
20 wanted to move things along.

21 Would the following  
22 jurors line up in the aisle for  
23 me, with the bailiffs.

24 Number one sixty-five,  
25 number forty, number forty-six,

1        number twenty-nine, number  
2        twenty, number one fifty-four,  
3        number seventy-two.

4                Number one sixty-five,  
5        if you would come forward.

6                (The following took  
7        place at the bench, in the  
8        presence of the attorneys.)

9                THE COURT: Sir, I  
10       apologize. We appreciate your  
11       patience. You indicated that you  
12       had read an article in  
13       yesterday's paper.

14               A JUROR: Yesterday or two  
15       days ago. In the last --

16               THE COURT: Can you tell  
17       me what you recall that you read.  
18       If you could talk low for me.

19               A JUROR: There was a  
20       young lady in the area from  
21       Virginia, I don't remember all  
22       the details, and one defendant  
23       that was accused was her  
24       boyfriend or something like that,  
25       and his friend. They're accused

1 of abducting her and the body has  
2 not been found. That's the gist  
3 of what I read.

4 THE COURT: Have you  
5 formed a fixed opinion as a  
6 result of what you've read?

7 A JUROR: No.

8 THE COURT: Do you feel  
9 you can remain fair and  
10 impartial?

11 A JUROR: Yes, I do.

12 THE COURT: Thank you,  
13 sir. You can take your seat.

14 MR. SMILEY: Your Honor,  
15 even though you didn't ask it, I  
16 wouldn't have any further  
17 questions as a result of your  
18 questions. I don't think I need  
19 to do that, but I think I've  
20 covered it as far as Mr. Croker  
21 is concerned.

22 THE COURT: I understand.

23 MR. SMILEY: You know what  
24 I'm saying.

25 THE COURT: Yes, sir.

1 That means you have no objection.

2 MR. SMILEY: Thank you,  
3 your Honor.

4 THE COURT: Number forty.

5 (The following took  
6 place at the bench, in the  
7 presence of the attorneys.)

8 THE COURT: Sir, I  
9 apologize that I asked you to  
10 come forward again. You  
11 indicated that you had read, that  
12 you read the daily news. Now did  
13 you read the daily news every day  
14 and you watched both news  
15 reports?

16 A JUROR: Yes, ma'am.

17 THE COURT: Can you tell  
18 me what you recall that you read  
19 or listened to?

20 A JUROR: I know that  
21 there -- obviously there's no  
22 body, and that there's a fair  
23 amount of enough evidence for it  
24 to come to court but beyond that,  
25 I mean, I skimmed it, the



1 newspaper articles, but that's  
2 kind of my recollection.

3 THE COURT: Okay, sir. Do  
4 you feel you formed a fixed  
5 opinion based upon what you  
6 watched and read?

7 A JUROR: The State's got  
8 a hard road with no body.

9 THE COURT: Well, my  
10 question is do you feel that you  
11 have formed a fixed opinion about  
12 the facts and circumstances of  
13 this case?

14 A JUROR: No, other than  
15 that.

16 THE COURT: Do you feel  
17 that you can remain fair and  
18 impartial and render a fair and  
19 impartial decision in this case  
20 based solely on the evidence as  
21 it will be presented and on the  
22 law as the Court will charge?

23 A JUROR: Yes, ma'am.

24 THE COURT: Okay. Thank  
25 you, sir. You may take your

1 seat.

2 MR. DURANT: What was his  
3 number?

4 THE COURT: Number forty.

5 (The following took  
6 place at the bench, in the  
7 presence of the attorneys.)

8 THE COURT: Number  
9 forty-six. Sir, we appreciate  
10 your indulgence. I just need to  
11 ask -- you're number forty-six.  
12 Correct?

13 A JUROR: That's right.

14 THE COURT: And, sir, your  
15 last name.

16 A JUROR: Donehue.

17 THE COURT: Okay.

18 Mr. Donehue, do you recall what  
19 you read regarding the facts and  
20 circumstances of this case?

21 A JUROR: I couldn't  
22 recite them to you, no.

23 THE COURT: Okay. And  
24 you've indicated that you don't  
25 watch T. V. very much. Is that

1 also correct?

2 A JUROR: Not very much.

3 THE COURT: Okay. You're  
4 in good company.

5 Sir, as a result of what  
6 you have read, have you formed a  
7 fixed opinion about the case?

8 A JUROR: No.

9 THE COURT: Can you  
10 continue to remain fair and  
11 impartial?

12 A JUROR: Of course.

13 THE COURT: I appreciate  
14 you indulging us further. Thank  
15 you, sir. You may take your  
16 seat.

17 Number twenty-nine.

18 (The following took  
19 place at the bench, in the  
20 presence of the attorneys.)

21 THE COURT: Ma'am, we  
22 appreciate your patience. We  
23 know it's been a long morning.  
24 You indicated that you had read  
25 the article in Sunday's paper.

1 Is that correct?

2 A JUROR: Uh-huh.

3 THE COURT: Can you tell  
4 me what you recall that you read?

5 A JUROR: There was no  
6 body found.

7 THE COURT: Okay. Other  
8 than that, do you feel  
9 anything --

10 A JUROR: I stopped  
11 reading after about two  
12 paragraphs.

13 THE COURT: Okay. As a  
14 result of what you read, do you  
15 feel you formed a fixed opinion  
16 about the case?

17 A JUROR: No, I haven't.

18 THE COURT: And do you  
19 feel you can remain fair and  
20 impartial?

21 A JUROR: Yes.

22 THE COURT: Thank you,  
23 ma'am. You may take your seat.  
24 Again we appreciate your  
25 indulging us.

1                   Number twenty.

2                   (The following took  
3 place at the bench, in the  
4 presence of the attorneys.)

5                   MR. DAVIS: What number  
6 was that last lady?

7                   THE COURT: Number  
8 twenty-nine.

9                   MR. DAVIS: Thank you.

10                  THE COURT: This is number  
11 twenty.

12                  Ma'am, if you could  
13 state your name for us again,  
14 please.

15                  A JUROR: Katherine Bible.

16                  THE COURT: And, Miss  
17 Bible, you indicated that you  
18 read the article in yesterday's  
19 paper. Well, you skimmed it is  
20 what you indicated. Is that  
21 correct?

22                  A JUROR: Yes. I do  
23 recall that the victim was from  
24 Virginia, that the two pictures  
25 in the paper were of the

1 gentlemen here today and the  
2 victim, but other than that I  
3 couldn't tell you the details.

4 THE COURT: Okay. Do you  
5 feel that you have formed a fixed  
6 opinion about the facts and  
7 circumstances of this case?

8 A JUROR: No.

9 THE COURT: And do you  
10 feel that you can remain fair and  
11 impartial and render a fair and  
12 impartial decision in this case  
13 based solely on the evidence as  
14 it will be presented and on the  
15 law as the Court will charge?

16 A JUROR: Yes.

17 THE COURT: Thank you,  
18 ma'am. You may take your seat.  
19 Again we appreciate your  
20 indulging us.

21 Number one fifty-four.

22 (The following took  
23 place at the bench, in the  
24 presence of the attorneys.)  
25

1 THE COURT: Ma'am, we  
2 appreciate your indulgence. Can  
3 you tell me what you recall  
4 reading or watching on T. V. or  
5 in the newspaper? You said that  
6 you saw it on T. V.

7 A JUROR: No. Radio.

8 THE COURT: Okay. If you  
9 can tell me what you recall.

10 A JUROR: That there two  
11 guys had killed the girl and they  
12 couldn't find a body.

13 THE COURT: As a result of  
14 what you heard, ma'am, do you  
15 feel you formed a fixed opinion  
16 about the facts and circumstances  
17 of this case?

18 A JUROR: No. I just  
19 wondered if -- I can't base it on  
20 that, but I don't believe in the  
21 death penalty.

22 THE COURT: Ma'am, do you  
23 feel you can remain fair and  
24 impartial in this case?

25 A JUROR: Uh-huh.

1                   THE COURT: And do you  
2 feel that you can remain fair and  
3 impartial and render a fair and  
4 impartial decision in this case  
5 based solely on the evidence as  
6 it will be presented and on the  
7 law as the Court will charge?

8                   A JUROR: Yes.

9                   THE COURT: Thank you,  
10 ma'am. You may take your seat  
11 again. I appreciate your  
12 indulgences.

13                   Number seventy-two.

14                   You don't have to bring  
15 your jacket. You can leave it  
16 there if you want. Oh, okay.  
17 Yeah. You got to wear the badge.

18                   (The following took  
19 place at the bench, in the  
20 presence of the attorneys.)

21                   THE COURT: Sir, I  
22 appreciate your indulgence. You  
23 indicated you had read about this  
24 case in the Post and Courier  
25 yesterday. Is that correct?



1 A JUROR: Yes.

2 THE COURT: Sir, do you  
3 recall what you read?

4 A JUROR: They just  
5 couldn't find the body. That's  
6 all I got to read.

7 THE COURT: Okay. As a  
8 result of what you read do you  
9 feel you formed a fixed opinion  
10 about this facts and  
11 circumstances of this case?

12 A JUROR: No, ma'am.

13 THE COURT: Do you feel  
14 that you could remain fair and  
15 impartial?

16 A JUROR: Yes, ma'am.

17 THE COURT: And do you  
18 feel that you can render a  
19 verdict based solely on the  
20 evidence and the law as the Court  
21 will charge?

22 A JUROR: Yes, ma'am.

23 THE COURT: Okay. Thank  
24 you, sir. You may take your  
25 seat.

1                   Ten, ten, ten. Is that  
2 correct? Ladies and gentlemen,  
3 you agree the strikes are ten,  
4 ten and ten. Is that correct?

5                   MS. WILSON: Yes, ma'am.

6                   (The following took  
7 place in open court.)

8                   THE COURT: Ladies and  
9 gentlemen, we appreciate your  
10 patience. We appreciate your  
11 bearing with us this morning.

12                   If your name is called  
13 please bring all of your  
14 belongings, come forward, and  
15 please stand directly in front of  
16 where the podium is situated,  
17 somewhere between counsel table  
18 and turn, facing the attorneys.

19                   We will try to go  
20 through this process as quickly  
21 as possible, and again we  
22 appreciate your patience bearing  
23 with us this morning.

24                   MS. WILSON: Judge, may I  
25 approach?

1 THE COURT: Yes.

2 (Whereupon, there was an  
3 off-the-record bench conference.)

4 THE COURT: Mr. Clerk, you  
5 may proceed.

6 CLERK OF COURT: Ladies  
7 and gentlemen, as I call your  
8 name please come forward to the  
9 podium, turn and face the  
10 parties.

11 Also please watch your  
12 step. There's an electrical cord  
13 on the floor.

14 Juror number two oh two,  
15 Clifton Carley.

16 What say you for the  
17 State?

18 MS. WILSON: I'm sorry.

19 CLERK OF COURT: That's  
20 okay.

21 MS. WILSON: Please  
22 present the juror.

23 CLERK OF COURT: What say  
24 you for the defendant Coulter?

25 MR. DAVIS: Please present

1 the juror.

2 CLERK OF COURT: What say  
3 you for defendant Croker?

4 MR. SMILEY: Please seat  
5 the juror.

6 CLERK OF COURT: Mr.  
7 Carley, please have a seat in the  
8 jury box. You've been selected  
9 as a juror in this case.

10 Juror number one  
11 thirty-one, Sandra Murrow.

12 What say you for the  
13 State?

14 MS. WILSON: Please  
15 present Miss Murrow.

16 CLERK OF COURT: What say  
17 you for defendant Coulter?

18 MR. DAVIS: Your Honor,  
19 please excuse the juror from this  
20 case.

21 CLERK OF COURT: Miss  
22 Murrow, please have a seat back  
23 in the audience. You've been  
24 excused from trial of this case.

25 Juror number one

1 twenty-seven, George Meise.

2 What say you for the  
3 State?

4 MS. WILSON: Your Honor,  
5 please present Mr. Meise.

6 CLERK OF COURT: What say  
7 you for the defendant Coulter?

8 MR. DAVIS: Please excuse  
9 this juror from the trial of this  
10 case.

11 CLERK OF COURT: Mr.  
12 Meise, please have a seat back in  
13 the audience. You've been  
14 excused from the trial of this  
15 case.

16 Juror number two oh six,  
17 Richard Kerr.

18 What say you for the  
19 State?

20 MS. WILSON: Your Honor,  
21 please present Mr. Kerr.

22 CLERK OF COURT: What say  
23 you for defendant Coulter?

24 MR. DAVIS: Please excuse  
25 the juror from this case.

1                   CLERK OF COURT: Mr. Kerr,  
2                   please have a seat back in the  
3                   audience. You've been excused  
4                   from the trial of this case.

5                   Juror number forty-six,  
6                   John Donehue.

7                   What say you for the  
8                   State?

9                   MS. WILSON: Please  
10                  present Mr. Donehue.

11                  CLERK OF COURT: What say  
12                  you for defendant Coulter?

13                  MR. DAVIS: Please present  
14                  this juror.

15                  CLERK OF COURT: What say  
16                  you for defendant Croker?

17                  MR. SMILEY: Please excuse  
18                  this juror from the trial of this  
19                  case.

20                  CLERK OF COURT: Mr.  
21                  Donehue, please have a seat back  
22                  in the audience. You've been  
23                  excused from the trial of this  
24                  case.

25                  Juror number two oh

1 four, John Parker Ford.

2 What say you for the  
3 State?

4 MS. WILSON: Please excuse  
5 Mr. Ford.

6 CLERK OF COURT: Mr. Ford,  
7 please have a seat back in the  
8 audience. You've been excused  
9 from the trial of this case.

10 Juror number one  
11 ninety-seven, Carolyn Wooddy.

12 What say you for the  
13 State?

14 MS. WILSON: Please  
15 present Miss Wooddy.

16 CLERK OF COURT: What say  
17 you for defendant Coulter?

18 MR. DAVIS: Please excuse  
19 the juror from this case.

20 CLERK OF COURT: Miss  
21 Wooddy, please have a seat back  
22 in the audience. You've been  
23 excused from the trial of this  
24 case.

25 Juror number one

1 ninety-nine, Renee Young.

2 What say you for the  
3 State?

4 MS. WILSON: Please  
5 present Miss Young.

6 CLERK OF COURT: What say  
7 you for defendant Coulter?

8 MR. DAVIS: Please present  
9 the juror.

10 CLERK OF COURT: What say  
11 you for defendant Croker?

12 MR. SMILEY: Please seat  
13 the juror.

14 CLERK OF COURT: Miss  
15 Young, please have a seat in the  
16 jury box. You've been selected  
17 as a juror in this case.

18 Juror number one oh  
19 five, William Kline.

20 What say you for the  
21 State?

22 MS. WILSON: Please  
23 present Mr. Kline.

24 CLERK OF COURT: What say  
25 you for defendant Coulter?



1           MR. DAVIS: Please present  
2           the juror.

3           CLERK OF COURT: What say  
4           you for defendant Croker?

5           MR. SMILEY: Please excuse  
6           the juror.

7           CLERK OF COURT: Mr. Kline  
8           , please have a seat back in the  
9           audience. You've been excused  
10          from trial of this case.

11          Juror number one  
12          ninety, Douglas Weeks.

13          What say you for the  
14          State?

15          MS. WILSON: Please  
16          present Mr. Weeks.

17          CLERK OF COURT: What say  
18          you for defendant Coulter?

19          MR. DAVIS: Please excuse  
20          this juror from this case.

21          CLERK OF COURT: Mr. Weeks  
22          , please have a seat back in the  
23          audience. You've been excused  
24          from the trial of this case.

25          Juror number eighteen,

1 Gladys Bell.

2 What say you for the  
3 State?

4 MS. WILSON: Please excuse  
5 Miss Bell.

6 CLERK OF COURT: Miss Bell  
7 , please have a seat back in the  
8 audience. You've been excused  
9 from the trial of this case.

10 Juror number  
11 fifty-three, Edward Fennell.

12 What say you for the  
13 State?

14 MS. WILSON: Please  
15 present Mr. Fennell.

16 CLERK OF COURT: What say  
17 you for defendant Coulter?

18 MR. DAVIS: Please present  
19 the juror.

20 CLERK OF COURT: What say  
21 you for defendant Croker?

22 MR. SMILEY: Please seat  
23 the juror.

24 CLERK OF COURT: Mr.  
25 Fennell, please have a seat in

1 the jury box. You've been  
2 selected as a juror in this case.

3 Juror number two twelve,  
4 David Yarborough.

5 What say you for the  
6 State?

7 MS. WILSON: Please excuse  
8 the juror.

9 CLERK OF COURT: Mr.  
10 Yarborough, please have a seat  
11 back in the audience. You've  
12 been excused from the trial of  
13 this case.

14 Juror number eighty-six,  
15 Jo Henderson.

16 What say you for the  
17 State?

18 MS. WILSON: Please  
19 present Miss Henderson.

20 CLERK OF COURT: What say  
21 you for defendant Coulter?

22 MR. DAVIS: Please present  
23 the juror.

24 CLERK OF COURT: What say  
25 you for defendant Croker?

1                   MR. SMILEY: Please excuse  
2 the juror.

3                   CLERK OF COURT: Miss  
4 Henderson, please have a seat  
5 back in the audience. You've  
6 been excused from the trial of  
7 this case.

8                   Juror number one fifty,  
9 Michael Reineke.

10                  What say you for the  
11 State?

12                  MS. WILSON: Please  
13 present Mr. Reineke.

14                  CLERK OF COURT: What say  
15 you for defendant Coulter?

16                  MR. DAVIS: Please present  
17 the juror.

18                  CLERK OF COURT: What say  
19 you for defendant Croker?

20                  MR. SMILEY: Please  
21 present the juror.

22                  CLERK OF COURT: Mr.  
23 Reineke, please have a seat in  
24 the jury box. You've been  
25 selected as a juror in this case.

1 Juror number one oh six,  
2 John Knox.

3 What say you for the  
4 State?

5 MS. WILSON: Please excuse  
6 Mr. Knox.

7 CLERK OF COURT: Mr. Knox,  
8 please have a seat back in the  
9 audience. You've been excused  
10 from the trial of this case.

11 Juror number two oh  
12 eight, James Lefkey.

13 What say you for the  
14 State?

15 MR. DAVIS: Please present  
16 the juror.

17 CLERK OF COURT: We're  
18 still on the State.

19 MS. WILSON: We agree.

20 CLERK OF COURT: So then I  
21 can ask, what say you for  
22 defendant Croker?

23 MR. SMILEY: I'll make it  
24 a consensus.

25 CLERK OF COURT: Mr.

1 Lefkey, please have a seat in the  
2 jury box. You've been selected  
3 as a juror in this case.

4 Juror number one  
5 forty-one, Sandra Pitzer.

6 What say you for the  
7 State?

8 MS. WILSON: Please seat  
9 Miss Pitzer.

10 CLERK OF COURT: What say  
11 you for defendant Coulter?

12 MR. DAVIS: Please present  
13 the juror.

14 CLERK OF COURT: What say  
15 you for defendant Croker?

16 MR. SMILEY: Please seat  
17 the juror.

18 CLERK OF COURT: Miss  
19 Pitzer, please have a seat in the  
20 jury box. You've been selected  
21 as a juror in this case.

22 Juror number nineteen,  
23 Anne Bergin.

24 What say you for the  
25 State?

1 MS. WILSON: Please  
2 present Miss Bergin.

3 CLERK OF COURT: What say  
4 you for defendant Coulter?

5 MR. DAVIS: Please excuse  
6 the juror from this case.

7 CLERK OF COURT: Miss  
8 Bergin, please have a seat back  
9 in the audience. You've been  
10 excused from the trial of this  
11 case.

12 Juror number twenty,  
13 Kathryn Bible.

14 What say you for the  
15 State?

16 MS. WILSON: Please  
17 present Miss Bible.

18 CLERK OF COURT: What say  
19 you for defendant Coulter?

20 MR. DAVIS: Please present  
21 the juror.

22 CLERK OF COURT: What say  
23 you for defendant Croker?

24 MR. SMILEY: Please excuse  
25 the juror.

1 CLERK OF COURT: Miss  
2 Bible, please have a seat back in  
3 the audience. You've been  
4 excused from the trial of this  
5 case.

6 Juror number one oh  
7 nine, Lashanna Lance.

8 What say you for the  
9 State?

10 MS. WILSON: Please excuse  
11 the juror.

12 CLERK OF COURT: Miss  
13 Lance, please have a seat back in  
14 the audience. You've been  
15 excused from the trial of this  
16 case.

17 Juror number one none,  
18 Jennifer Wertz.

19 What say you for the  
20 State?

21 MS. WILSON: Please  
22 present Miss Wertz.

23 CLERK OF COURT: What say  
24 you for defendant Coulter?

25 MR. DAVIS: Please present



1 the juror.

2 CLERK OF COURT: What say  
3 you for defendant Croker?

4 MR. SMILEY: Please excuse  
5 the juror.

6 CLERK OF COURT: Miss  
7 Wertz, please have a seat back in  
8 the audience. You've been  
9 excused as a juror from the trial  
10 in this case.

11 Juror number two oh  
12 five, David Hill.

13 What say you for the  
14 State?

15 MS. WILSON: Please  
16 present Mr. Hill.

17 CLERK OF COURT: What say  
18 you for defendant Coulter?

19 MR. DAVIS: Please present  
20 the juror.

21 CLERK OF COURT: What say  
22 you for defendant Croker?

23 MR. SMILEY: Please excuse  
24 the juror.

25 CLERK OF COURT: Mr. Hill,

1 please have a seat back in the  
2 audience. You've been excused  
3 from the trial of this case.

4 Juror number two oh  
5 three, Leonard Delsario.

6 What say you for the  
7 State?

8 MS. WILSON: Please  
9 present Doctor Delsario.

10 CLERK OF COURT: What say  
11 you for defendant Coulter?

12 MR. DAVIS: Please present  
13 the juror.

14 CLERK OF COURT: What say  
15 you for defendant Croker?

16 MR. SMILEY: Please seat  
17 the juror.

18 CLERK OF COURT: Mr.  
19 Delsario, please have a seat in  
20 the jury box. You've been  
21 selected as a juror in this case.

22 Juror number fifty-nine,  
23 John Foster.

24 What say you for the  
25 State?

1 MS. WILSON: Please  
2 present Mr. Foster.

3 CLERK OF COURT: What say  
4 you for defendant Coulter?

5 MR. DAVIS: Please present  
6 the juror.

7 CLERK OF COURT: What say  
8 you for defendant Croker?

9 MR. SMILEY: Please excuse  
10 the juror.

11 CLERK OF COURT: Mr.  
12 Foster, please have a seat back  
13 in the audience. You've been  
14 excused from the trial of this  
15 case.

16 Juror number one twelve,  
17 Joy Lefter.

18 What say you for the  
19 State?

20 MS. WILSON: Please excuse  
21 Miss Lefter.

22 CLERK OF COURT: Miss  
23 Lefter, please have a seat back  
24 in the audience. You've been  
25 excused from the trial of this

1 case.

2 Juror number one  
3 seventy-eight, Mary Terry.

4 What say you for the  
5 State?

6 MS. WILSON: Please  
7 present Miss Terry.

8 CLERK OF COURT: What say  
9 you for defendant Coulter?

10 MR. DAVIS: Please excuse  
11 the juror from the trial of this  
12 case.

13 CLERK OF COURT: Miss  
14 Terry, please have a seat back in  
15 the audience. You've been  
16 excused as a juror from the trial  
17 of this case.

18 Juror number  
19 seventy-two, Taharqa Givens.

20 What say you for the  
21 State?

22 MS. WILSON: Please excuse  
23 this juror.

24 CLERK OF COURT: Mr.  
25 Givens, please have a seat back

1 in the audience. You've been  
2 excused as a juror from the trial  
3 of this case.

4 Juror number one  
5 nineteen, Paul Mastrangelo.

6 What say you for the  
7 State?

8 MS. WILSON: Please  
9 present Mr. Mastrangelo.

10 CLERK OF COURT: What say  
11 you for defendant Coulter?

12 MR. DAVIS: Please present  
13 the juror.

14 CLERK OF COURT: What say  
15 you for defendant Croker?

16 MR. SMILEY: Please excuse  
17 the juror.

18 CLERK OF COURT: Mr.  
19 Mastrangelo, please have a seat  
20 back in the audience. You've  
21 been excused as a juror from the  
22 trial of this case.

23 MR. SMILEY: Mr. Clerk, if  
24 I could just check strikes. If I  
25 understand correctly, I've

1 exercised eight on behalf of  
2 Mr. Croker. Mr. Coulter has  
3 exercised seven. And the State  
4 has exercised seven. Is that  
5 correct?

6 CLERK OF COURT: Correct.  
7 Juror number one oh two,  
8 James Kerr.

9 What say you for the  
10 State?

11 MS. WILSON: Please  
12 present Mr. Kerr.

13 CLERK OF COURT: What say  
14 you for defendant Coulter?

15 MR. DAVIS: Please excuse  
16 the juror from this case.

17 CLERK OF COURT: Mr. Kerr,  
18 please have a seat back in the  
19 audience. You've been excused as  
20 a juror from the trial of this  
21 case.

22 It's now eight strikes  
23 for defendant Coulter.

24 Juror number two oh  
25 nine, Todd Peppin.

1                   What say you for the  
2       State?

3           MS. WILSON: Please  
4       present Mr. Peppin.

5           CLERK OF COURT: What say  
6       you for defendant Coulter?

7           MR. DAVIS: Please present  
8       this juror.

9           CLERK OF COURT: What say  
10      you for defendant Croker?

11          MR. SMILEY: Please seat  
12      the juror.

13          CLERK OF COURT: Mr.  
14      Peppin, please have a seat in the  
15      jury box. You've been selected  
16      as juror in this case.

17          Juror number one  
18      eighteen, Anna Martine.

19                What say you for the  
20      State?

21          MS. WILSON: Please  
22      present Miss Martine.

23          CLERK OF COURT: What say  
24      you for defendant Coulter?

25          MR. DAVIS: Please present

1       this juror.

2               CLERK OF COURT: What say  
3       you for defendant Croker?

4               MR. SHILEY: Please seat  
5       the juror.

6               CLERK OF COURT: Miss  
7       Martine, please have a seat in  
8       the jury box. You've been  
9       selected as a juror in the trial  
10      of this case.

11              Juror number seven, John  
12      Anderson.

13              What say you for the  
14      State?

15              MS. WILSON: Please  
16      present Mr. Anderson.

17              CLERK OF COURT: What say  
18      you for defendant Coulter?

19              MR. DAVIS: Please excuse  
20      this juror from this case.

21              CLERK OF COURT: Mr.  
22      Anderson, please have a seat back  
23      in the audience. You've been  
24      excused as a juror from the trial  
25      of this case.