

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-001499

RECEIVED
APR 01 2019
S.C. SUPREME COURT

WILLIAM O. DICKERSON PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

APPENDIX
VOLUME 21 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..... ^s	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
CEDEDRIK 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

- State's Ex. 173 shows a skin avulsion where the skin is pulled away on the fingers of the right hand. R. 3883.
- State's Ex. 335 shows twenty lacerations to the forehead and the bridge of the nose. There were multiple fractures to frontal skull and nose. The photo also showed fifteen abrasions to the lower face around the cheeks and nose, a fractured nose, two missing teeth with recent bleeding into the sockets, swelling of the lips, eyes, and forehead. R. 3883-87.
- State's Ex. 181, taken after Dr. Schandl shaved Mr. Roper's head, shows multiple lacerations, abrasions, and punctures. R. 3887-89.
- State's Ex. 178, taken after Dr. Schandl shaved Mr. Roper's head, shows abrasions, contusions, and a puncture wound to the ear. R. 3889-91.
- State Ex. 177, shows lacerations and abrasions to the head, neck, and ear, fractures to the skull, Adam's apple, and hyoid bone, and a flattening of the brow ridge and nasal bone. R. 3891-92.
- State's Ex. 184 shows a burn to the scrotum. R. 3892-93.
- State's Ex. 141 shows the anal abscess. R. 3893-96.

The defense did not cross-examine Dr. Schandl. R. 3898.

At the evidentiary hearing, Mr. Bloom recalled these photographs were "horrendous." He included this issue in his memorandum to the Appellate Defense Division identifying issues for appeal. May 13, 2016 Hearing, pp. 195-96; Applicant's Ex. 15. Lead appellate counsel Dudek did not offer any reason for not including this issue in the appeal, although he acknowledged being "a little jaded" from seeing horrible photographs in capital cases throughout his career. December 8, 2015 Hearing, pp. 440, 442-44.

"Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions." *State v. Kornahrens*, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986) (citing *State v. Middleton*, 288 S.C. 21, 339 S.E.2d 692 (1986)). Use of horrendous photographs during the sentencing phase of a capital trial is "an area of growing

concern” for our Supreme Court that has strongly encourage[d] all solicitors to refrain from pushing the envelope.” *State v. Torres*, 390 S.C. 618, 624, 703 S.E.2d 226, 229 (2010). Here, the defense never challenged Dr. Schandl’s description of the injuries. Dr. Schandl was able to use diagrams to explain the jurors the nature and extent of Mr. Roper’s numerous injuries. These photographs, accordingly, did not establish any material facts or conditions and should have been excluded from evidence.

Trial counsel was deficient for not briefing the admissibility of these photographs during the direct appeal. Prejudice resulted because the photographs were so inflammatory to the jurors. Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002). This Court should order a new sentencing hearing.

5. Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel’s objection to the solicitor’s questioning of Dr. Phillips about whether William Dickerson “knew right from wrong” at the time of the killing.

During cross-examination and over trial counsel’s objection, the Solicitor asked Dr. Phillips whether Mr. Dickerson knew his conduct at the time of the crimes was wrong. R. 4243-46. Mr. Bloom testified this issue should have been included in Mr. Dickerson’s direct appeal. May 13, 2016 Hearing, p. 196; Applicant’s Ex. 15. Mr. Dudek acknowledged the Solicitor’s questioning of Dr. Phillips mixed the *McNaughton* standard with the standard for mitigation evidence in capital cases. December 8, 2015 Hearing, p. 444.

The *McNaughton* standard is codified S.C. Code Ann. § 17-24-10(1), which provides:

It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

If this standard is satisfied, the accused is adjudicated not guilty by reason of insanity and committed to the Department of Mental Health for therapeutic treatment. S.C. Code Ann. §§ 17-24-40 to 60. Our state's criminal procedures also provides:

A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(1). An accused adjudicated guilty but mentally ill "must be sentenced by the trial judge as provided by law for a defendant found guilty," and provided treatment in the Department of Corrections. S.C. Code Ann. § 17-24-70. If raised by an accused, the court submits these issues to the jurors for consideration of guilt and innocence. S.C. Code Ann. § 17-24-30. Our state's procedure expressly provides, "The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase." S.C. Code Ann. § 17-24-20(C).

In a capital trial, S.C. Code Ann. § 16-3-20(C)(b) requires the jurors to consider the following mitigating circumstances when such evidence is presented at trial:

- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (7) The age or mentality of the defendant at the time of the crime.

William Dickerson presented evidence supporting all three of these mitigation circumstances. Whether Mr. Dickerson "knew right from wrong" is not probative of any of these mitigating circumstances and should have been excluded. Rule 401 and 402, SCRE. Additionally, evidence should be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice," confuses of the issues, or misleads the jury." Rule 403, SCRE. It is well-settled that the trial court can limit expert testimony that is irrelevant or when the "limited probative value is substantially outweighed by the prejudicial effect the evidence could have on the jury. *State v. Irick*, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001).

Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See Strickland, Evitts, Smith, Sutherland, and Patrick, supra*. This Court should order a new sentencing hearing.

V. KIDNAPPING SENTENCE.

As seen, the trial judge sentenced Mr. Dickerson to thirty years imprisonment for kidnapping. South Carolina law prohibits sentencing for kidnapping when someone is also sentenced for murder pursuant to S.C. Code Ann. §16-3-20. *See also Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (see also numerous case cited therein); *State v. Stroman*, 281 S.C. 508, 514 316 S.E.2d 395, 400 (1984); *State v. Copeland*, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982); and *State v. Vick*, 384 S.C. 189, 202-203, 682 S.E.2d 275, 281-82 (Ct. App. 2009). The State conceded this sentence "should be set aside" in its Return to Mr. Dickerson's First Amended Application for Post-Conviction Relief dated November 16, 2012, at pp. 35-36. On November 19, 2012, Mr. Dickerson moved, pursuant to Rule 12(c), SCRCPP, for a partial judgment on the pleadings or, in the alternative, for partial summary judgment on this issue. At the hearing on this motion, the State argued the PCR court should delay entering that order until

the final disposition of this case. December 19, 2012 Hearing, pp. 4-14. This issue is still pending, and this Court should enter an order vacating the kidnapping sentence.

VI. CONCLUSION.

This Court should grant William Dickerson's application for post-conviction relief. Because of the *Batson* violation, this Court should order a new trial. In the alternative, this Court should order a new sentencing hearing.

Respectfully Submitted,

By 

E. Charles Grose, Jr.	Elizabeth A. Franklin-Best
The Grose Law Firm, LLC	Elizabeth Franklin-Best, P.C.
404 Main Street	900 Elmwood Avenue, Ste. 200
Greenwood, SC 29646	Columbia, South Carolina 29201
(864) 538-4466	(803) 765-1044
charles@groselawfirm.com	betsy@blumelaw.com

Attorneys for William O. Dickerson, Jr.

January 16, 2018.

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.

Phone: 864-538-4466 Fax: 864-538-4405

E-mail: charles@groslawfirm.com

Web: GroseLawFirm.com

July 9, 2018

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2210

Rê: *William O. Dickerson v. State of South Carolina*
Case Number: 2012-CP-10-3216

Dear Ms. Armstrong:

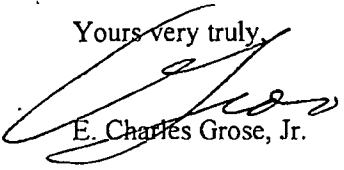
Enclosed for filing, please find Mr. Dickerson's Rule 59(e), SCRCF Motion & Re-Submission of Mr. Dickerson's Post-Hearing Brief.

By copy of this letter to Judge Cooper, I am providing him with a copy of the motion. By copy of this letter to Ms. Brown, I am serving the State of South Carolina.

Thank you for your attention to this matter.

With kindest regards, I am

Yours very truly,


E. Charles Grose, Jr.

cc: The Honorable G. Thomas Cooper
Elizabeth A. Franklin-Best, Esquire
Melody J. Brown, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

FOR THE NINTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

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

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

**ORDER DENYING APPLICANT'S MOTION
TO ALTER OR AMEND**

FILED
2018 JUL 25 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court on Applicant's Rule 59(e) Motion to Reconsider the Order of June 27, 2018, withdraw the Order of Dismissal, Grant Post-Conviction Relief, and Enter an Order vacating Mr. Dickerson's convictions and sentences. The Court denies this Motion for the following reasons.

As a threshold matter, this Court's Order of June 27, 2018 made "specific findings of fact, and stated expressly its conclusions of law, relating to each issue presented" pursuant to S.C. Code Ann. §17-27-90 (1976).

As to Applicant's claim that the Court delegated responsibility to the Attorney General's Office to prepare the Order, Applicant is incorrect. The Court requested Proposed Orders from both Applicant and Respondent. Applicant found the procedure objectionable and would only agree to the submission of Post-Hearing Briefs, to which Respondent and the Court agreed.

Although the Court inadvertently used the Attorney General's section heading indicating "Respondent's Position" on pages 3, 20, 57, 72, 78, and 84, the section headings are for the convenience of the reader, but should not have been titled as "Respondent's Position."

However, the claims that the Order is "taken from the State's brief" and "the Court adopt[ed] the State's Post Hearing Brief" is inaccurate. For example, the Order of Dismissal is



79 pages, Respondent's Brief is 91 pages. The Order of Dismissal is not "verbatim" and is not an "adoption of the State's Post Hearing Brief." The Court not only read and considered Applicant's Post Hearing Brief, but found it lacking the detail and coverage of issues required for an Order of Dismissal in a Death Penalty PCR.

Particularly, with regard to Respondent's Post Trial Brief, the Court Oder modified, deleted, or corrected numerous provisions.¹ In addition, Respondent's Post Hearing Brief contained a comprehensive Statement of Facts as adopted by the South Carolina Supreme Court, a procedural history of the PCR, and a list of PCR exhibits, none of which are available in Applicant's Post-Trial Brief.

After careful consideration of Applicant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRPC to Alter or Amend Judgment of this Court's Order entered on or about June 27, 2018. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

Therefore, Applicant's Rule 59(e) SCRPC Motion to Reconsider is DENIED.

IT IS SO ORDERED.


G. Thomas Cooper, Jr.
Presiding Judge

July 20, 2018

¹ All trial transcript or hearing transcript citations; page 1, lines 4-8; page 7, footnote 4; page 9, footnote 8; page 21, lines 4-11; page 22, line 6; page 24, lines 1, 2, and 13, footnote 18; page 24-25, footnote 19; page 27, lines 6-10 of footnote 21; page 28, lines 8-18 and footnote 22; page 29, lines 1-5 and footnotes 23 and 24; page 26, line 15; page 50, last sentence; page 76, lines 18-22; page 77, lines 1-15; page 82, lines 14-21.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

FOR THE NINTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

William O. Dickerson, #6030,)

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

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**AMENDED ORDER DENYING POST-
CONVICTION RELIEF**

FILED
2018 JUL 25 AM 11:36
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an Application for Post-Conviction Relief originally filed May 16, 2012, and amended March 5, 2015 and July 15, 2015. An evidentiary hearing was initially convened on December 7-8, 2015, with additional hearings held March 31, 2016; May 12-13, 2016; May 27, 2016; and, October 23, 2017.

A. The Underlying Prosecution and Direct Appeal History

Applicant William O. Dickerson (Applicant) was called to trial on April 23, 2009, in Charleston County on the charges of murder, criminal sexual conduct first degree, and kidnapping. The State sought the death penalty. The Honorable R. Markley Dennis presided over the jury trial. Applicant was represented by defense counsel Jeffrey Bloom, Esq., and Calvin Andrew (Drew) Carroll, Esq. The Ninth Circuit Solicitor, Scarlett Wilson, tried the case along with Chief Deputy Solicitor Bruce Durant and former Assistant Solicitor Rutledge Durant. On April 30, 2009, the jury convicted Applicant as charged. On May 4, 2009, the penalty phase began. On May 7, 2009, the jury found three aggravating circumstances: 1) criminal sexual conduct; 2) kidnapping; and 3) torture. The jury recommended death. The judge imposed a death sentence for murder, and thirty years on each of the other crimes. The judge also found "as an affirmative fact that the evidence

GL

in the case warrants the imposition of a death penalty and its imposition is not the result of prejudice, passion or any other arbitrary factor.”

Applicant appealed, filing his Final Brief of Appellant on March 17, 2011. Robert Dudek and Kathrine Hudgins, Esquires, from the South Carolina Commission on Indigent Defense appeared on brief as appellate counsel, as did trial counsel Bloom. *State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant’s appellate brief raised four issues, none of which overlap into the present proceeding, and each of which were addressed by the South Carolina Supreme Court:

1.

Whether the court erred by refusing to allow defense counsel to cross examine the pathologist, Dr. Schandl, about the fact the decedent tested positive for cocaine in his urine, since the pathologist testified on direct examination that the decedent’s blood tested negative for drugs and appellant had the right to correct the misleading perception the pathologist had given the jury and the omission in her testimony reflected on her credibility as a “neutral” expert witness?

2.

Whether the court erred by refusing to charge the jury on the lesser offense of accessory after the fact of murder since there was evidence appellant was only guilty of that offense since appellant’s brother admitted he beat the decedent inside decedent’s apartment, his brother’s wife decided the decedent should be killed, the decedent died inside his apartment, and appellant’s brother testified appellant helped remove the body to a vacant apartment next door?

3.

Whether the court erred by refusing to allow appellant’s first cousin, Johnette Watson, to whom appellant was like a brother, to testify that appellant’s execution would deeply hurt her, since appellant’s ability to maintain this positive relationship was admissible character evidence during the penalty phase?

4.

Whether the judge erred in qualifying a juror who would, if the state proved aggravating circumstances, automatically vote for the death penalty unless the defense presented evidence that convinced him that a death sentence was not warranted, improperly shifting the burden to the defendant to prove he should not be executed?

(Final Br. of Appellant, pp. 1-2); *Dickerson*, *supra* at 113-14, 716 S.E.2d at 902.

 2

The court heard oral argument on May 24, 2011, and subsequently issued an opinion affirming the convictions and sentence. *State v. Dickerson*, Opinion No. 27048 (S.C. Sup. Ct. filed October 3, 2011), *reported at* 395 S.C. 101, 716 S.E.2d 895 (2011). Applicant pursued rehearing, which was denied. He next filed a petition for writ of certiorari in the Supreme Court of the United States on February 15, 2012, pursuing the fourth issue from the direct appeal. After the State filed a Brief in Opposition, the Supreme Court denied the petition on April 23, 2012.

B. Statement of Facts as Established at Trial

The facts concerning Dickerson's capital conviction are included herein as presented by the South Carolina Supreme Court in its opinion affirming Dickerson's conviction and sentence.

Dickerson and Gerard Roper had been friends, even best friends, since childhood. On the morning of March 6, 2006, Roper went to his friend, Ben Drayton's, house to play video games. Around the same time, Dickerson went to his friend, Antonio Nelson's, house asking for a ride to his brother, Armon Dickerson's, house. Nelson was unable to give Dickerson a ride at that time and told him to come back later. When Dickerson returned later that afternoon, he was carrying a gun.

En route to Armon's house, however, Dickerson began calling Roper from his cell phone. After receiving no answer, Dickerson asked if they could make a stop at Drayton's house so he could "get some money." When they arrived at Drayton's home, Dickerson entered brandishing his weapon and asking for money. Roper told Dickerson "I got your money," begging "don't shoot me" and "please don't kill me." Dickerson nevertheless fired a shot at Roper but missed. He then struck Roper in the head with the gun, dragged him out of the house, and forced him into Nelson's car. Dickerson then took Roper to Armon's house.¹

Armon and Dickerson brought Roper inside and systematically tortured him over approximately thirty-six hours. It started with Dickerson continuing to hit Roper with the gun, knocking out some of his teeth. Armon then left to retrieve

¹ After dropping Dickerson and Roper off, Nelson left and did not return. There is no suggestion he knew of Dickerson's plans beforehand or had any involvement in the subsequent events.



Dickerson's car and some drugs, and blood covered the inside of the house when he returned. Dickerson then called another friend of his, Rashid Malik, and threatened him with death if he did not come to Armon's house.² When Malik arrived, Roper was still conscious but clothed only in his T-shirt, and Armon was attempting to clean up the blood covering the house. Malik then joined Armon and Dickerson.

Although Dickerson, Armon, and Malik all tortured Roper to varying degrees, Dickerson appeared to be the primary actor.³ Through this entire ordeal, Roper suffered the following at the hands of Dickerson alone: choking, being tied up and placed in a closet, being sodomized with a gun and a broomstick, having his scrotum burned, being hit with a heavy vase and a mirror, and generalized beating and cutting. At one point, Roper began asking that they just let him die.

All told, Roper received over 200 individual wounds to the outside of his body, including lacerations to his anus. He also received several internal injuries, including various broken bones in his face that caused it to appear misshapen, blunt force trauma to his neck resulting in the breaking of various structures, a broken tibia, broken fingers and wrist, brain swelling, and bleeding into the internal structures around his rectum as the result of objects being inserted into it. Although there is no definite timeline of events, Roper survived for eighteen to twenty-four hours after the sodomy occurred, and none of these wounds were inflicted post-mortem. No single wound was fatal. Instead, Roper died from the sum total of his injuries, apparently shortly after he was struck with the mirror and the vase on the morning of March 8.

As these events transpired, Dickerson made several phone calls to various people during which he discussed what he was doing to Roper. Many of them were to Dickerson's girlfriend, and she managed to record one of them containing his description of the sodomy and even Roper's own confirmation of what was happening. Dickerson also confirmed the sodomy, as well as the burning of Roper's scrotum, over the phone to another friend. In a later call to that same friend, he said

² Malik attempted to bring Dickerson's mother to Armon's house to calm Dickerson down. When Dickerson learned of this, he threatened to kill Malik's mother and cut the baby out of Malik's pregnant girlfriend.

³ Armon's girlfriend, Selena Rouse, was in and out of the house during that evening, along with her young son. At some point, Dickerson asked her whether he should let Roper live or die. However, there is no evidence that she actually participated in the torture.

that Roper was "gone." However, he told a different friend that Roper was all right but that Dickerson needed to run.

Dickerson and Armon wrapped Roper's semi-clothed body in a blanket and dumped it in the vacant townhouse next to Armon's. Dickerson then changed clothes and fled. Armon and Rouse attempted to clean Armon's house, but they abandoned it upon realizing their efforts would be futile. That same day, a woman who was planning to rent the vacant townhouse entered and discovered Roper's bloodied and mutilated body.

State v. Dickerson, supra at 107–09, 716 S.E.2d at 898–99 (footnotes in original).

C. PCR Procedural History

Applicant filed his application for post-conviction relief (PCR), on May 16, 2012. By Order dated July 31, 2012, the Supreme Court of the South Carolina vested the Honorable Edgar W. Dickson with exclusive jurisdiction over this capital post-conviction relief action.

By Order dated August 20, 2012, Judge Dickson appointed counsel Elizabeth Franklin-Best, Esquire, and E. Charles Grose, Jr., Esquire (Applicant's counsel). Throughout the course of this litigation, Respondent has been represented by Senior Assistant Deputy Attorney General Melody Brown, with appearances also made by Deputy Attorney General Donald Zelenka, Senior Assistant Attorney General Anthony Mabry, and Assistant Attorneys General Caroline Scrantom and Brendan McDonald (Respondent's Counsel).

Applicant, through counsel and pursuant to the terms of a scheduling order issued by Judge Dickson, filed an amended application on October 18, 2012. To this application, Respondent filed a Return on November 19, 2012.

For reasons unrelated to the specific issues raised, Judge Dickson recused himself from further participation in this case by Order dated June 2, 2014. Thereafter, the Supreme Court of the South Carolina vested the undersigned with exclusive jurisdiction over the present action in an Order issued June 20, 2014. Applicant's counsel filed a second amended application nearly nine



months later on March 5, 2015. A third and final amended application followed, being served upon Respondent on July 13, 2015, and filed July 15, 2015.

Respondent moved to strike or, in the alternative, to dismiss claims within that application not cognizable in PCR. Specifically, Respondent postured that the claim styled as a denial of "due process and equal protection" alleging that the Solicitor "committed prosecutorial misconduct by improperly striking qualified African-Americans from the jury venire" was a freestanding claim which alleged a *Batson* violation that was appropriate at the time of trial and on direct appeal, but not under the Uniform Post-Conviction Relief Act. See *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). Respondent filed this motion on October 1, 2015. Applicant responded in opposition and Respondent replied. In an order filed December 8, 2015, this Court denied Respondent's motion to strike or dismiss finding that "Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter."

The third amended application gives rise to the allegations pursued at the series of evidentiary hearings before this Court which have convened in both Charleston and Richland Counties: First, on December 7-8, 2015; Second, on March 31, 2016; Third, on May 12, 2016; Fourth, on May 27, 2016; Fifth, on October 23, 2017. Applicant has been present at each hearing and represented by Applicant's counsel.

During the course of these hearing installments, this Court received testimony from (in no particular order and in some cases on more than one occasion): developmental psychologist Dr. Richard Canfield, neuropsychologist Dr. Marlyne Israelian, Applicant's first chair trial counsel Jeffrey Bloom, Applicant's second chair trial counsel Drew Carroll, Applicant's appellate counsel Robert Dudek, law professor Barbara O'Brien from Michigan State University College of Law,



Ninth Circuit Solicitor Scarlett Wilson, and mathematics and statistics professor Dr. Robert Norton.

Following the fourth convening in May 2016, discovery recommenced with the issuance of a July 21, 2016, Order granting Applicant's mid-hearing Motion to Compel. Following this Order, the undersigned also formally ordered, at Respondent's request and without opposition by Applicant, that the evidentiary hearing be suspended until such time as both parties had a full and fair opportunity to complete the discovery ordered on July 21, 2016, and any additional discovery deemed necessary as a result.

During the suspension of the evidentiary hearing and while mid-hearing discovery was pursued by both parties, this Court reconvened on March 16, 2017, for a limited hearing on Respondent's Motion for Special Interrogatories and Concomitant Request to Produce regarding the jury selection claims. This Court denied Respondent's motion. Also at that hearing, Applicant moved to compel additional jury selection data from the *State v. Michael Slager*, C/A No. 2015-GS-10-03466 (Charleston County Court of General Sessions), which had been sealed by the Honorable Clifton Newman during the course of the *Slager* trial. Prior to the resolution of Applicant's related motion before Judge Newman to unseal the information sought by Applicant, this Court denied Applicant's Motion to Compel in an order issued June 1, 2017.

Applicant's 2017 discovery request⁴ was also related to Applicant's two prior mid-hearing requests to supplement and amend the data counsel provided their expert witness, Barbara O'Brien

⁴ Discovery on this particular issue commenced when Applicant served a FOIA request and subpoena upon Ninth Circuit Solicitor Scarlett Wilson seeking:

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



of the Michigan State University College of Law, in furtherance of Applicant's claim that the Ninth Circuit Solicitor impermissibly used race during capital jury selection ("the jury selection claims").⁵

In regard to the segmentation of the PCR evidentiary hearing, this was a result in almost exclusive part of matters related to the jury selection claims:

- Between the hearings on December 7-8, 2015, and March 31, 2016, Applicant was allowed time for its experts' completion of the statistical analysis intended for presentation in furtherance of the jury selection claims.⁶
- Applicant introduced expert Barbara O'Brien at the March 31, 2016, hearing. O'Brien presented a "Report on Jury Selection Study" in furtherance of the jury selection claims. The report was dated March 8, 2016. This hearing was suspended until May 12, 2016, at Applicant's request, to allow O'Brien time to amend her report to include raw data from public records (trial transcripts) presented by Respondent during its cross-examination of O'Brien.

made during the roll call of jurors, juror qualification, voir dire, and jury selection

for a list of fourteen specific General Sessions cases. (Aug. 27, 2015, Ltr. from Charles Grose to Sol. Scarlett Wilson; see Exhibit A-4 from May 12-13, 2016 PCR Hearing). This is not the discovery process authorized by S.C. Code Ann. § 17-27-150(B), nor is the Solicitor a proper representative party to the action from which discovery may be directly pursued. See Rule 5(a), SCRPC; *Langford v. McLeod*, 269 S.C. 466, 238 S.E.2d 161 (1977). Applicant had previously deposed the Solicitor and had served discovery requests upon Respondent, but had not made any request for data specific to the study conducted.

⁵ Respondent has maintained throughout this proceeding that the evidence admitted should only concern claims within the PCR application pertaining to ineffective assistance in the jury selection challenge and procedures leading up to and during Applicant's 2009 trial. This Court has previously limited the presentation of evidence to this proposed time frame in regards to Applicant's Motion to Compel prosecution training materials and in numerous presentations where Applicant has attempted to exceed that limitations, (Respondent maintaining objection to post-2009-trial materials; Court limiting question to 2009 trial and before).

⁶ The December 7-8, 2015, hearing was limited to issues pertaining to ineffective assistance of counsel in regards to an underlying allegation of lead poisoning, and various other strategy and record based claims. Applicant was not ready to present his statistical theories at the December 2015 hearing.



- At the May 12, 2016, hearing Applicant re-called Barbara O'Brien via Skype. She presented an "Amended Report on Jury Selection Study" dated May 5, 2016. Applicant also called Ninth Circuit Solicitor Scarlett Wilson to testify in furtherance of these allegations.⁷
- The hearing was then suspended order for Applicant to depose Respondent's expert witness who was retained in rebuttal to Applicant's second presentation of the jury selection allegations. That hearing occurred on May 27, 2016, when the State presented Dr. Robert Norton, who offered a critique of the report presented by Applicant's expert. Doctor Norton did not conduct, and the State did not present, an independent study. The State then rested. At this juncture, Applicant indicated he would obtain another amended report from its experts for the purposes of presenting a case-in-reply.

The evidentiary hearing re-convened before this Court on October 23, 2017, in Richland County. Applicant once again presented Barbara O'Brien, who addressed her "Second Amended Report on Jury Selection Study." This report was provided to Respondent and this Court on August 30, 2017, and dated August 29, 2017.

D. List of PCR Exhibits

The following exhibits have been introduced at each hearing installment and are before this Court in relation to the allegations enumerated above.

Exhibits Entered at the December 7-8, 2015, hearing in Richland County:

- A-1 June 2, 1988 Lab Report analyzing lead in Applicant's blood at 9 micrograms per deciliter when Applicant was age 11 yrs 9 months 9 days
- A-2 2003 Research Article from *Public Health Reports* containing map of the Charleston Peninsula and designating addresses with confirmed cases of childhood lead levels at or above level 10
- A-3 Copy of Dr. Canfield's PowerPoint Presentation
- A-4 CV of Dr. Marlyne Israelian, expert in developmental neuropsychology

⁷ Also at this hearing, Respondent called trial counsel Jeffrey Bloom in regards to the lead claims, as Mr. Bloom produced discoverable material to Respondent which was requested but not provided by Applicant during discovery.



- A-5 Map of Charleston Peninsula – Enlarged from Dr. Canfield’s presentation which ID’s houses with children who screened with lead levels above 10
- A-6 Street Map of Orrs Court – street where Dickerson lived for part of his youth
- A-7 May 12, 1988 MUSC Psychological Evaluation of Dickerson from Commitment
- A-8 Social History of William Dickerson Pertaining to Commitments
- A-9 Summary
- A-10 Dickerson’s Blood Test Results from same date as lead screening on June 2, 1988
- A-11 Psychological Evaluation for William Dickerson
- A-12 IQ Testing Protocol for Tests Administered to Dickerson in 1990
- A-13 Social Worker’s Report by Department of Youth Services (Type of Social History)
- A-14 Evaluation of Social Worker’s Report by Department of Youth Services
- A-15 Post-Trial Letter by Jeffrey Bloom dated July 22, 2009 to Robert Lominack expressing list of hearings and of potential appellate issues
- A-16 A Law Review Article by John Blume dated April 1, 2010
- R-1 Medical Report Pertaining to Dickerson’s Suffering a Gunshot Wound to the Head
- R-2 Collection of Letters from Dickerson
- R-3 *Jones v. Warden*, 753 F.3d 1171 (11th Cir. 2014)
- R-4 *K.C. v. Fulton Co. Sch. Dis.*, 2006 WL 1868348 (N.D. Ga. Atlantic Div. 2006)
- R-5 MUSC Psychological Evaluation for Dickerson
- R-6 WSH Hospital Records for Dickerson
- R-7 Trial Counsel’s Motions Seeking the Death Penalty be Declared Unconstitutional
- R-8 Appellate Counsel’s Notes Re: Formulating Appellate Issues

Exhibits Entered at the March 31, 2016, hearing in Richland County

- A-1 CV of Barbara O’Brien
- A-2 Michigan State University College of Law Report on Jury Selection Study
- A-3 Privileged Production Ordered 11/30/2015
- A-4 Privileged Production Ordered 12/10/2015
- A-5 Sealed Criminal History of Jurors from FBI

GZ 10

- A-6 Affidavit of Eddie Haselden from Charleston County Clerk's Office re: Destruction of Juror Lists
- A-7 Prosecution Coordination Commission Documents re: Trainings up to 2009; Additional Materials Proffered for Post-2009
- A-8 Deposition of Bruce DuRant
- A-9 (Proffer Only) Deposition of Scarlett Wilson
- A-10 (Proffer Only) Deposition of Bruce DuRant 3/26/2013
- A-11 (Proffer Only) Deposition of Rutledge DuRant 3/25/2013
- A-12 Transcript Excerpt Used in Respondent's Cross-Examination: Ronald Coulter
- A-13 Transcript Excerpt Used in Respondent's Cross-Examination: Jemol Brown
- A-14 Transcript Excerpt Used in Respondent's Cross-Examination: Ethan Mack
- A-15 Transcript Excerpt Used in Respondent's Cross-Examination: Michael Jeter
- A-16 Flash Drive Containing Underlying Data Utilized in (First) Jury Selection Study

Exhibits Entered at the May 12-13, 2016, hearing in Charleston County

- A-1 Michigan State University College of Law Report Amended Report on Jury Selection Study
- A-2 Standard Interrogatories Served January 2013 by Applicant Upon Respondent
- A-3 Request to Produce Served January 2013 by Applicant Upon Respondent
- A-4 Freedom of Information Act Request Sent to Ninth Circuit Solicitor
- A-5 Incident Report
- A-6 Incident Report
- A-7 Incident Report
- A-8 Incident Report
- A-9 Incident Report
- A-10 Incident Report
- A-11 Incident Report
- A-12 Incident Report
- A-13 Incident Report
- A-14 Incident Report



- A-15 Incident Report
- A-16 Incident Report
- A-17 SC Supreme Court Appendix to Review Assignment of PCR Judge
- A-18 Motion to Dismiss the Death Penalty Due to Unconstitutionality of State Proportionality Review Filed by Trial Counsel
- A-19 Motion to Bar Death Penalty Based on Race
- R-1 Data Compilation Utilized in Creation of Jury Selection Study
- R-2 Criminal Justice Information Services Security Policy Re: Inappropriate to Disseminate Rap Sheets and Criminal History of Jurors
- R-3 E-mails between Jeff Bloom and Dr. Herbert Needleman Re: Lead Poisoning Research and Pre-Trial Consult
- R-4 North Charleston Police Department Booking Report for Juror Stricken by State
- Court-1 Demonstrative Copies

Exhibits Entered at the May 27, 2016, hearing in Richland County

- R-1 CV of Dr. Robert Norton
- R-2 Emailed Opinion of Dr. Robert Norton
- R-3 Formal Critique by Dr. Robert Norton
- A-1 CV of Barbara O'Brien
- A-2 CV of Catherine Grosso
- A-3 (Proffer Only) Questions Applicant Sought Solicitor Wilson to Answer as Part of Applicant's Motion to Compel

Exhibits Entered at the October 23, 2017, hearing in Richland County

- A-1 Michigan State University College of Law Report Second Amended Report on Jury Selection Study
- A-2 Flash Drive Containing Underlying Data for Use in Preparation of A-1 above

Additional Documents Provided to Court Under Seal

Additional information may be sealed and/or before this Court for review, such as prosecution training materials provided under protective order by the South Carolina Commission



on Prosecution Coordination, whose motion to intervene was granted at one point in this proceeding.

E. Surviving PCR Allegations

In Applicant's Post-Hearing Brief of January 16, 2018, Applicant represented he would only proceed on the following allegations:

Concerning Jury Selection:

- 10/11(a)(2) Defense counsel rendered ineffective assistance of counsel by failing to advance a comparative juror analysis when he raised his Batson challenge.
- 10/11(a)(4) Defense counsel rendered ineffective assistance of counsel by failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike.
- 10/11(a)(5) Defense counsel rendered ineffective assistance of counsel by failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.
- 10/11(f) Applicant was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire

Concerning Ineffective Assistance Alleged During the Sentencing Phase:

- 10/11(b)(2) Trial counsel rendered ineffective assistance of counsel by failing to renew his objection when Cederick Davis, William Dickerson's former probation agent, testified that Mr. Dickerson stated he wished he had shot the cop.
- 10/11(b)(3) Trial counsel rendered ineffective assistance of counsel by failing to object to the State's closing argument that diluted the responsibility of the jurors in rendering a possible death verdict.
- 10/11(b)(4) Trial counsel rendered ineffective assistance of counsel when they failed to uncover and present evidence of Applicant's significant neurological deficits and when that evidence would have been highly mitigating.⁸

⁸ This claim of "significant neurological deficits" rests on the allegations pertaining to lead exposure.



Concerning Ineffective Assistance of Appellate Counsel:

- 10/11(c)(5) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objections to the admission of photographs [State's Trial Exhibits] 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336.
- 10/11(c)(7) Appellate counsel rendered ineffective assistance of counsel for failing to present, for appellate review, defense counsel's objection to the solicitor's questioning of Dr. Phillips about whether Mr. Dickerson "knew right from wrong" at the time of the killing.

Concerning Sentence Received:

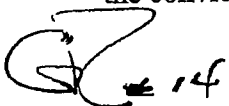
- 10/11(e) Applicant was improperly sentenced to both murder and kidnapping in violation of S.C. Code Ann. § 16-3-910⁹

These were the only issues briefed by Applicant in any capacity throughout the course of the litigation.

F. Abandoned PCR Allegations

Applicant has abandoned a number of claims appearing in its third amended PCR application. This Court specifically finds those claims waived and abandoned on the basis that they have been expressly waived by Applicant either on the record or in its Post-Hearing Brief. *See generally* S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."); *Marlar v. State*, 375 S.C. 407, 409, 653 S.E.2d 266, 266-67 (2007) (general language on failure to present evidence "should not be included in a PCR order unless there are allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented"); *see also Suber*

⁹ Applicant is correct that the kidnapping sentence should be vacated if the murder sentence is left undisturbed. However, as argued in Respondent's return to the first amended application, the conviction remains.



v. *State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (“the applicant bears the burden of establishing that he is entitled to relief”);

First, Applicant’s counsel abandoned several allegations at the December 7-8, 2015, evidentiary hearing. Referencing the third amended PCR application, Applicant’s counsel abandoned claims numbered 11(b)(1) and 11(b)(6)-(8) concerning the effective assistance of counsel during the sentencing phase of his capital trial. Applicant’s counsel also abandoned claims 11(c)(4) and 11(c)(6) concerning the effective assistance of counsel on direct appeal.

Second, Applicant’s counsel has abandoned the following claims alleged within its third amended PCR application and not included in the Post-Hearing Brief. Applicant has failed to present evidence and argument in furtherance of the following claims summarized below from the third amended application:

- 10/11(a)(1) Ineffective assistance of counsel during the guilt phase of trial: Counsel did not advance a consistent theory between the guilt-and-innocence and sentencing phases of trial
- 10/11(a)(3) Ineffective assistance of counsel during the guilt phase of trial: Counsel failed to secure jurors’ criminal records from SLED prior to the jury strike¹⁰
- 10/11(c)(1) Ineffective assistance of counsel on appeal: Appellate counsel did not appeal the outcome of trial counsel’s motion to dismiss the death penalty due to the unconstitutionality of South Carolina’s proportionality review¹¹

¹⁰ Applicant has only pressed the issue as to FBI records, not SLED records. These are different reports and different databases. (See Order of March 3, 2015, allowing applicant to obtain a subpoena for FBI data bases, p. 2 (noting differences)). Thus, the actual claim differs.

¹¹ Respondent notes that, as addressed in the return to the first amended application, the South Carolina Supreme Court expressly considered the proportionality of the sentence in its opinion affirming Applicant’s convictions. *State v. Dickerson*, 395 S.C. 101, 123-24, 716 S.E.2d 895, 907 (2011).

CF 15

- 10/11(c)(2) Appellate counsel did not appeal the outcome of trial counsel's motion to bar the death penalty based on race
- 10/11(c)(3) Appellate counsel did not appeal the outcome of trial counsel's *Batson* motion
- 10/11(d)(1-4) The death sentence was obtained in violation of the United States Constitution because South Carolina's capital sentencing scheme violates the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)¹²
 1. The statute does not perform the constitutionally mandated narrowing function
 2. South Carolina's sentencing system permits racial discrimination
 3. The State Supreme Court consistently fails to conduct meaningful proportionality review in capital cases
 4. The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose

G. General Standard of Review in PCR

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C.

Code Ann. § 17-27-20(a), which provides:

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

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;

¹² The South Carolina death penalty statute has long been held Constitutional and "indistinguishable from the statutory complex approved by the United States Supreme Court." *E.g. State v. Shaw*, 273 S.C. 194, 200-03, 255 S.E.2d 799, 802-04 (1979) (citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976)).

 rk

application for post-conviction relief absent a claim of ineffective assistance of counsel.”); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) (“At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel.”). Ineffective assistance of counsel claims constitute the general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State*, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding “A typical PCR claim of ineffective assistance of counsel falls into this category....”).

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel’s representation fell below an objective standard of reasonableness, and but for counsel’s error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland, supra*. Relief will not be granted on a showing of mere error—prejudice must also be shown. *Id.* The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel’s errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding “when ‘there is a reasonable probability that, absent [counsel’s] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded

 118

that the balance of aggravating and mitigating circumstances did not warrant death.” 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068). Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, “it is difficult to demonstrate that counsel was incompetent” as for the most part, deficient performance may be shown “only when ignored issues are clearly stronger than those presented” *Smith v. Robbins*, 528 U.S. at 288, 120 S.Ct. at 765 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). “To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, to effect a fair review of counsel’s performance, a reviewing court must “eliminate the distorting effects of hindsight” and attempt “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Butler v. State*, 286 S.C. 444–45, 334 S.E.2d 815 (1985).



H. Ineffective Assistance in Jury Selection

Introductory Summary

Applicant has primarily presented argument challenging Solicitor Wilson's use of peremptory strikes during Applicant's jury selection. The transcript of record shows trial counsel challenged three of the prosecution's four strikes during a *Batson* motion at the 2009 trial.

Because a *Batson* motion was made at the 2009 trial, the precise and only claim available is one of ineffective assistance of counsel. Applicant asserts defense counsel was ineffective by:

- failing to advance a comparative juror analysis when he raised his *Batson* challenge;
- failing to secure available criminal records of the jurors by requesting the trial court judge issue a subpoena to the FBI, Criminal Justice Information Services Division prior to the jury strike;
- failing to litigate the issue of defense counsel's access to the same juror information as was in the possession of the prosecution prior to the jury strike.

Applicant's further allegation that he "was denied his rights to due process and equal protection under the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution [when] [t]he Ninth Circuit Solicitor's Office improperly struck qualified African-Americans from the jury venire," is not cognizable as that is a direct appeal issue. Review of that claim is barred by the *Simmons* rule.

1. Defining the Claims and Appropriate Standard of Review

At trial, counsel pursued a *Batson*¹³ motion which is reflected on pages 2028 to 2031 of the Record on Appeal. As noted, Applicant makes three separate ineffective assistance of counsel

¹³ *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (hereinafter *Batson*).

claims pertaining to this motion: (A) that trial counsel failed to advance a comparative juror analysis in furtherance of his *Batson* motion; (B) trial counsel failed to subpoena to the FBI to secure the Criminal Justice Information Services Division (CJIS) records pertaining to the potential jurors; and (C) trial counsel failed to litigate that he did not have the same access to juror information, such as CJIS records, as the prosecution possessed prior to the jury strike. Applicant has also alleged a due process and equal protection violation premised on his assertion: "the Solicitor's Office committed prosecutorial misconduct by improperly striking qualified African-American jurors from the jury venire." This is not treated as freestanding claim based on this Court's previous ruling in regard to Respondent's motion to strike.

This Court denied Respondent's Motion to Strike the freestanding claim in its Order filed December 8, 2015, based on the fact that this Court construed the allegation as one of ineffective assistance of counsel: "Here, Petitioner is asserting his *Batson* claim as part of his ineffective assistance of counsel claim. Thus, Petitioner's *Batson* claim, in this Court's opinion, is not a freestanding claim and is a proper claim in this post-conviction relief matter." This affects the standard of review and this Court's review of the evidence. Respondent adheres to the Court's interpretation of the claim as one of ineffective assistance and will follow the review standards of ineffective assistance of counsel claims.

2. Defining the Available Evidence

This Court must examine what information was available to trial counsel at the time of Applicant's trial in order to make a determination on any ineffective assistance of counsel claim. *See, e.g., Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the

21

conduct from counsel's perspective at the time.”). Significant portions of the evidentiary basis argued in Applicant’s Post-Hearing Brief are not proper for this Court’s consideration as the information offered was not available to defense counsel at or before Applicant’s trial – in particular evidence related to cases tried by the Ninth Circuit Solicitor *after* Applicant’s May 2009 trial. To the extent Applicant expands the record to introduce argument concerning the use of preemptory strikes in *State v. Colin Broughton*, tried September 2009, and *State v. Ryan Deleston*, tried October 2013, that evidence will not be considered. Where the underlying occurrence of the evidence argued in favor of relief past Applicant’s trial date, that evidence cannot be considered for the purpose of any post-conviction relief determination on the issue of ineffective assistance and its consideration is consequently improper. *Strickland, supra*. See also Rules 401 and 402, SCORE.

Further, Applicant’s inclusion of a jury strike analysis in the 2004 *Jelal Beyah* trial, though prior to the 2009 trial, is still irrelevant to this Court’s consideration of the claims before it for several reasons. Apart from the well-established fact that discovery is not allowed in criminal proceedings and Applicant has not shown how trial counsel should be criticized for failing to obtain the additional information about any of these unrelated cases, Applicant has attempted to thrust great weight on the fact that an adverse ruling was made in one case, *Beyah*, in regard to one strike. Reliance on *Beyah* to establish some sort of pattern is suspect for its isolated nature. There is only this one instance where a trial court found the prosecutor’s explanation lacking. But the larger point is that the relevant consideration here is the *Batson* motion already in the record.

Trial counsel did pursue a *Batson* challenge and the solicitor’s response was fully set out and is supported by the record. Any reference to other unrelated cases will never affect, inform, or alter the record made at the 2009 trial as to the prosecution’s reasons for the strikes. Moreover,

QZ-22

Applicant's suggestion the responses were pretext is similarly moot, as the responses and consideration of the responses were made back in 2009. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859 (1991) ("Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."); *see also Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied*, No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating "the prosecution struck black venire members at nearly three times the rate of white venire members," even if accepted, are irrelevant where reasons for strikes on the record given "statistical disparity between black and non-black jurors goes to the first step of *Batson*," and "not purposeful discrimination at the third step").

Applicant's Post-Hearing Brief addresses and includes information included only *in camera* and under seal by this Court. "The Prosecutor's Handbook" and other prosecutorial training materials have been ruled work-product not available for production and/or privileged and held under seal. These documents have already been found to be irrelevant to a *Batson* motion analysis. This past October, our Court of Appeals decided this very issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh'g denied* (Dec. 14, 2017). The *Daise* opinion is directly on point and against Applicant's position.

Like Applicant, "Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission)¹⁴ to provide '[a]ll documents regarding jury selection, including but not limited to training documents, training agendas,

¹⁴ In Applicant's case, the Commission has been granted intervenor status as to this issue. (May 12-13, 2016, Tr. p. 146; *see id.* pp. 133-41).

manuals, policy statements or . . . advisements, correspondence with current or former prosecutors and circuit court judges.” *Id.* Daise’s capital counsel suggested the State had a “handbook on how to get around *Batson*” and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that “in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males.” *Id.* Our appellate court affirmed the circuit court’s finding the materials at issue “did not ‘include any abusive instructions or teaching materials, nor use of improper technique,’” and that the materials were “generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State’s preparations for trial.” *Id.* at 462-63, 807 S.E.2d at 720 (citing *e.g., Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (“[A]ttorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.”); *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) (noting Rule 5, SCRCrimP, exempts from discovery work product and internal prosecution documents which contain no impeachment or exculpatory evidence); Rule 5(a)(2), SCRCrimP (“Except as provided in [prior subsections], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....”)).¹⁵ The Court of Appeals specifically found that

¹⁵ Former defense counsel testified in these PCR proceedings that defense attorney presentations similarly have materials referencing case law that would outline holdings and what was acceptable or not acceptable – materials that are also similarly considered restricted and “property of the organization putting on the seminar....” (See May 12-13, 2016 PCR Hearing Tr. p. 153). Further, the concept of listing out cases and reviewing the explanation in given cases is fairly standard.

the circuit court did not err in quashing the subpoena for these documents after conducting an *in camera* review. *Id.* at 463, 807 S.E.2d at 721.

An additional limitation to the evidence presented to this Court in Applicant's Post-Hearing Brief pertains to the criminal histories subpoenaed and maintained under seal in this action. (Mar. 3, 2015, "Order Granting Applicant's Request for Access to Criminal Histories of Jurors"). As testified to by the Solicitor in this case, CJIS information is not for dissemination once received by the State. The State introduced as Respondent's Exhibit 2 to the May 12-13 hearing in this matter the security policy and information sheet directing that these criminal histories not be physically duplicated or disseminated. This policy additionally instructs on how to specifically destroy these rap sheets once the timeframe for using them expires. (Resp. Ex. 2, May 12-13, 2016, PCR Hearing). Even though similar documents may be produced (as by the subpoena issued for purposes of this action), Applicant could not have access to that information at the time of trial. And, to the extent access to similar information has been granted by this Court for purposes of this litigation, such is to remain under seal, with replication and dissemination to inappropriate parties forbidden in accord with FBI policies.

The evidence that is relevant to this Court's review remains in the form of testimony presented at each installment of the PCR hearing to the extent it pertains to Applicant's trial counsel's performance, any alleged prejudice derived therefrom, and any evidence which was discoverable at or before the time of Applicant's May 2009 trial.

3. Defining the Specific Standard of Review

The outcome as to each ineffective assistance of counsel claim pursued by Applicant in the Post-Hearing Brief is resolved by reference to the *Strickland* deficiency-and-prejudice standard.

CL 25

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984). But it is not just a purported error that controls whether relief may be granted. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694, 104 S. Ct. at 2068. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, 466 U.S. at 691, 104 S. Ct. at 2066.

Batson procedure is certainly relevant to this Court's determination of whether trial counsel rendered deficient performance and any prejudice derived therefrom. It is unconstitutional for either the prosecution or defense to strike a venire person on the basis of race or gender. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419 (1994); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992); *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001). This prohibition derives from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Upon motion by either party, *Batson* provides a mechanism for the trial court to evaluate whether a party executed one or more of its peremptory challenges in a manner in violation of the Equal Protection Clause. "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *State v. Shuler*, 344 at 615, 545 S.E.2d at 810. South Carolina restated its application of *Batson*'s three-prong test in *State v. Inman*:

First, the [the party asserting the *Batson*] challenge must make a prima facie showing that the challenge was based on race [or gender]. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the [party opposing the *Batson*] challenge to provide a race [or gender] neutral

 26

explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the [party asserting] the challenge has proved purposeful discrimination.

409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (alterations in original) (quoting *State v. Giles*, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014)).

In order to make the initial prima facie showing, a movant is required to note that the strikes' proponent exercised peremptory challenges to remove venire members of a particular race or gender. *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. at 1712. The movant "is entitled to rely on the fact, as to which there can be no dispute that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* (quoting *Avery v. Georgia*, 345 U.S. 559, 563, 73 S.Ct. 891, 892 (1953)). The movant may point to particular circumstances in his opponent's jury strike which give rise to an inference of discrimination, such as demonstrating to the trial court that his opponent exercised a "pattern" of strikes against a particular race or gender. *Id.* at 96, 106 S. Ct. at 1723. The showing required in this jurisdiction is light: "...the trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing." *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014).

Further, establishing a pattern of discrimination does not require a showing that every potential juror of a specific race or gender was struck by a party. In finding a prima facie case has been made, the relevant inquiry is not whether it is more likely than not that the peremptory challenges, if unexplained, were based on an impermissible bias. *Johnson v. California*, 545 U.S. 162, 164, 125 S.Ct. 2410, 2413-14 (2005). "[A] prima facie case of discrimination can be made out by offering a wide variety of evidence, so long as the sum of the proffered facts gives 'rise to

 27

an inference of discriminatory purpose.” *Id.* at 169, 125 S.Ct. at 2416. “The [remainder of the] *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” *Id.* at 172, 125 S.Ct. at 2418. “In deciding whether the [movant] has made the requisite showing, the trial court should consider all relevant circumstances.” *Batson* at 96, 106 S.Ct. at 1723.

The neutral reason the motion’s opponent provides for each strike need not prove persuasive or plausible. *State v. Inman*, 409 S.C. at 26, 760 S.E.2d at 108 (citing *Purkett v. Elem*, 514 U.S. at 768, 115 S.Ct. at 1769). “The explanation must only be ‘clear and reasonably specific such that the [party asserting the *Batson* challenge] has a full and fair opportunity to demonstrate pretext in the reason given.” *Id.* (alterations in original). “In contrast, step three of the above analysis requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent.” *Id.* at 27, 760 S.E.2d at 108.

Applicant argues the Solicitor engaged in prosecutorial misconduct when using peremptory strikes in Applicant’s jury selection. However, “[f]or more than a century, th[e Supreme] Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.” *Miller-El v. Dretke*, 545 U.S. 231, 239, 125 S.Ct. 2317, 2324 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 111 S.Ct. 1364, 2348 (1991)).

The cognizable claim rests on the sufficiency of the *Batson* motion made at trial. Even if Applicant could show some error in counsel’s representation at trial, he must show *Strickland* prejudice. In the *Batson* context, *Strickland* prejudice is often impossible to show due to the nature of the equal protection error. See, for example, *Young v. Bowersox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting call to presume prejudice in *Batson* context); *Cabrera v. State*, 173 A.3d 1012,

1021–22 (Del. 2017) (“even if we assume a *Batson* violation, the Superior Court correctly held that Cabrera was not relieved of showing prejudice under *Strickland*.); see also *United States v. Lee*, 715 F.3d 215, 223 (8th Cir. 2013) (“Bias will not be presumed simply because some jurors were of a different race than the defendant.”). *Cf. Weaver v. Massachusetts*, 137 S. Ct. 1899, 1913 (2017) (even if an actual “structural error is raised in the context of an ineffective-assistance claim ... petitioner must show prejudice in order to obtain a new trial.”).

4. Even if Available for Review, the Freestanding Allegations
Lack Merit Based on the Record

Applicant cannot succeed in demonstrating that he is entitled to relief based on an ineffective assistance of counsel claim. Applicant makes a number of allegations against the Solicitor and questions her integrity and character.¹⁶ These accusations are unsupported by the record before this Court.

First, this Court must assign deference to the credibility determination which accompanies the trial court’s ruling regarding the Solicitor’s representations at the *Batson* hearing. “A trial court

¹⁶ Applicant asserts the Solicitor’s reasons for striking potential jurors “smacks of racial pretext” and repeatedly assigns nefarious cause to particular portions of the voir dire record. (Applicant’s Brief pp. 9-12 (Solicitor “just assumed” one juror “would have financial difficult given her status as a ‘single mother’ that is completely unsupported by the record.”) (“questioning [of a juror] was calculated to produce answers to serve as a basis for her disqualification”) (“Clearly this question was calculated to make [a juror] pause and generate equivocation that she then used to justify her strike of her.”) (“since Solicitor Wilson did not ask a single juror about convictions, yet seated some with convictions, it is clear that Solicitor Wilson is using convictions as pretext”)); (see also *id.* at 24 n.5 (“Why would number of children be relevant to a juror’s qualification to sit on a jury except to provide some information a solicitor could use to make a gender based discriminatory strike?”)).

Applicant deposed the Solicitor and called the Solicitor as a witness during the evidentiary hearing. Applicant had every opportunity to ask the Solicitor the basis for questions she asked during voir dire. Applicant likewise had every opportunity to ask the Solicitor the basis for her use of peremptory strikes at Applicant’s trial and to call the jurors about potential undisclosed histories. Applicant chose not to do so.

finding regarding the credibility of an attorney's explanation of the ground for a peremptory challenge is "entitled to 'great deference'" when reviewed. *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (citing *Felkner v. Jackson*, 562 U.S. 594, 598, 131 S.Ct. 1305 (2011), quoting *Batson*, 476 U.S., at 98, n. 21, 106 S.Ct. 1712)); see also *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 1208 (2008) (only in "exceptional circumstances" should a reviewing court overturn the trial court's "determinations of credibility and demeanor").

Second, Applicant fails to mention the Solicitor's own testimony offered at the PCR hearing. That testimony plainly contradicts the rank speculation appearing in Applicant's brief:

Q. Have you ever trained any attorney to strike solely on the basis of race or gender?

A. No. Not solely or not in any way.

Q. And do you believe you should?

A. No, I don't think you should.

Q. And are you careful not to?

A. I am careful not to.

Q. Because it's not right?

A. Because I don't think it's right. I don't think it's right for the defendant. I don't think it's right for the juror who has a right to be a part of our system.

Q. It's not a legal maneuver, is it?

A. It is not.

Further, the Solicitor testified she did not go to any educational materials in the office and did not need to go such materials:

A. ... I knew that we didn't need to strike on the basis of race and we didn't need to strike on the basis of gender and we didn't. I didn't need to go to the desk book to learn that.

Q. Because that is actually a moral decision for you?

A. It is.

The credibility of that testimony is further corroborated by the trial record made at the time of the *Batson* motion and ruling finding the reasons for the strike were not race motivated. Applicant's speculation is also dispelled by defense counsel's responses at the original *Batson* hearing, and defense counsel's revisiting of the issue in light of the record as reflected in his PCR testimony. There is no cause to conclude the factually supported reasons were pretext.

Third, a comparative juror analysis does not demonstrate that the Solicitor acted in the manner speculated to in Applicant's brief. In particular, Applicant's allegation Juror 209 had a criminal history which was not disclosed for a proper comparative analysis does nothing to show a false statement was made during the *Batson* proceedings. The record¹⁷ Applicant references shows Juror 209's name was used as an alias; there are different dates of birth between the record individual and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); and, employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Further, this Court declines to assign an improper motive to a prosecutor based on reliance upon a report that is later determined to be incorrect or incomplete. This is not a matter of evolving reasons which smack of pretext. *See generally Foster v. Chatman*, 136 S. Ct. 1737, 1751 (2016) ("... the prosecution's principal reasons for the strike shifted over time, suggesting that those

¹⁷ The face of the record cautions that the information, in addition to being restricted, is not conclusive: "... The FBI cannot guarantee that this record concerns the person in whom you are interested."

 31

reasons may be pretextual"). The basis for the strikes have been a part of the public record since the 2009 trial. This is not a record showing the reasons at trial have been contradicted by the facts of trial. *Id.*, 136 S. Ct. at 1751 ("...in evaluating the strike of Garrett, we are not faced with a single isolated misrepresentation" but several instances where the reasons were in tension with the record of voir dire responses). The trial court ruling on this underlying issue is founded in fact and includes a finding of credibility equally supported in fact. Applicant wholly fails in his burden of proof.

Applicant has relied upon *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), throughout this proceeding. That case examined a Texas prosecutor's use of ten peremptory strikes, all against African-Americans, resulting in exclusion of "91% of the eligible African-American venire members" for trial. *Id.*, at 241, 125 S.Ct. at 2325. The facts also showed the prosecution's use of "a procedure known in Texas as the jury shuffle" where either side could "literally reshuffle the cards bearing panel members" names, thus rearranging the order in which members of a venire panel are seated and reached for questioning." *Id.* at 253, 125 S.Ct. at 2332-33. In that case, the prosecution repeatedly shuffled the cards each time a series of African-Americans were seated at the front-end of a venire panel. *Id.* at 254, 125 S.Ct. at 2333. No such practice exists in South Carolina. Thus, a key basis for the United States Supreme Court's in *Miller-El* is completely missing from the process in this State and this record. But even so, the case is critical for marginalizing bare statistics -- a key portion of Applicant's argument to this Court. The Supreme Court expressly rejected that the 91% statistic presented during the collateral proceeding held any significant weight and forwarded a comparison of juror to juror upon known facts. *Id.*, at 241, 125 S. Ct. at 2325 ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed

to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.").

Applicant's counsel presented a statistical analysis in furtherance of this single claim: Solicitor Wilson engaged in misconduct by committing a *Batson* violation. The best evidence lies in the trial record. Solicitor Wilson placed her reasons for exercising each strike on the record. She also testified in the PCR proceedings that she believed in upholding the integrity of the judicial system and of her own moral code, and would not exercise peremptory strikes based on race or gender. And, as noted, Applicant failed to confront or challenge the Solicitor as to any purported inconsistency in her reasons, and none is readily apparent. The record reflects the actual reasons for her use of strikes, and they were:

First Challenged Strike

(1) Juror 10 for Selection Purposes (Juror #101): "a CNA" and single mother who would be missing work, or having work conflicts, by serving on the jury, and said at one point during *voir dire* that she couldn't vote for death.

Defense counsel's notes confirm the juror's information to the judge that she "need[ed] to be @ work 1pm" and also "backs up" when considering whether she could impose death.

Second Challenged Strike

(2) Juror 11 for Selection Purposes (Juror #92): "She has a number of charges for prostitution, a charge for shoplifting, a concealed weapon...." The trial judge inquired of the Solicitor whether another juror has any record, to which the Solicitor replied: "Not that many or not for those things."

The FBI records apparently did not return any convictions for Juror #92. However, Respondent introduced at the May 2016 hearing, certified copies of the arrests.

Third Challenged Strike

(3) Juror 16 for Selection Purposes (Juror #315): "... she first said that she could never give the death penalty, then she said that she could, she didn't answer the question on her questionnaire and she seemed to struggle with ..." The trial judge noted "I recall that she was inconsistent and I find that to be a race-neutral and gender-neutral reason."

"A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes." *Davis v. Ayala*, 135 S. Ct. at 2201. In addition to the trial court's conclusion, this Court also has defense counsel's testimony at the PCR hearing and the record in both proceedings – trial and PCR. There is no inconsistency or factual error to indicate pretext. Nevertheless, Applicant presses arguments that the reasons "smack[] of racial pretext." None of his arguments support that conclusion.

Arguments Made for the First Time in PCR

Initially, Respondent notes Applicant does not challenge the prosecution's strike of Juror #315. At the beginning of his argument, any "pattern" evidence within the strikes here is diminished. He does, however, make new arguments for comparative juror analysis regarding Juror # 101 and Juror #92. His arguments suffer from lack of evidence and lack of specificity in the analysis.

Applicant argues Juror #101 "was unequivocal in her responses that" work would pose no problem. He does not contest that defense counsel's note indicated at least one concern about being at work at a particular time, 1:00 pm. He does not contest that the juror's information



reflected she was single. He argues though, that Juror #101 was not asked questions about being a "single mother with two children and that she would be missing work throughout the week..."

Applicant fails to consider the information in this pointed exchange:

Q. I believe that you mentioned to one of the bailiffs that you have to work tonight?

A. Yes, I do.

Q. Do you always work nights?

A. I do -- well, it just depends.

Q. So for the next few weeks you aren't scheduled nights, or you are or ---

A. I am scheduled for nights. In fact, I picked up overtime before knowing ---

Q. What does that mean, you picked up overtime?

A. I have, like for the next couple of weeks I'm going to be working and I think I only have one day off.

Q. What are your hours for the next few weeks?

A. All night shift.

Q. Is that 5:00 to 5:00 or 7:00 to 7:00?

A. I work 7:00 p.m. to 7:00 a.m.

Q. Okay. Do you think that would cause you a hardship, serving on the jury if after you got off work at 7:00 a.m. that you had to come into court at 9:00 or so and spend the day in court with us?

A. It probably would as far as me getting sleep. I'd need to let my supervisor know to reassign the schedule.

Q. So you could get off of work for the next couple of weeks

A. Exactly.

Q. --- if need be?

A. Yes.

Q. Okay. So if the Judge told you that it wouldn't be appropriate for you to work after leaving after your service during the day, you would be able to have that rearranged?

A. Yes, I could.

Q. That would make for quite a long day if you had to go to work and then sit in here and do all this all day?

A. Yeah.

Without question, there was a concern that the juror would try to work, and, logically, if she was "picking up" overtime, there is a need for additional work. Applicant has shown no pretext.

Applicant next argues the "equivocation" the Solicitor cited was not more than expressed by accepted Jurors 306 and 221 he claims "expressed stronger reservations about imposing the death penalty than" Juror #101. The voir dire transcript demonstrates that the question was posed because the prosecutor "couldn't read [the] handwriting on the question number forty-seven" on the questionnaire which asks, "What is your opinion, if any, about the death penalty." The uncertainty is reflected in the record. Moreover, the juror did equivocate, saying both that she "could consider" but "wouldn't vote for" the death penalty. Applicant also includes Juror #92's answer without acknowledging she was struck. That could not be evidence of a similarly situated juror who was seated. Applicant's argument simply proves what the Supreme Court has recently again observed:

In a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. Few are likely to have experienced a need to make a comparable decision at any prior time in their lives. As a result, both the prosecution and the defense may be required to make fine

GA 21

judgment calls about which jurors are more or less willing to vote for the ultimate punishment. These judgment calls may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors' demeanor. We have previously recognized that peremptory challenges "are often the subjects of instinct," *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (citing *Batson*, 476 U.S., at 106, 106 S.Ct. 1712 (Marshall, J., concurring)), and that "race-neutral reasons for peremptory challenges often invoke a juror's demeanor," *Snyder*, 552 U.S., at 477, 128 S.Ct. 1203. A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes. As we have said, "these determinations of credibility and demeanor lie peculiarly within a trial judge's province," and "in the absence of exceptional circumstances, we [will] defer to the trial court." *Ibid.* (alterations and internal quotation marks omitted). "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Collins*, 546 U.S., at 343, 126 S.Ct. 969 (BREYER, J., concurring).

Davis v. Ayala, 135 S. Ct. at 2201.

He has not proven the trial judge was incorrect either in factual finding or legal conclusion.

Applicant next argues the Solicitor's questioning was "calculated to produce answers to serve as a basis for her disqualification." He takes exception to the Solicitor asking repeated questions concerning the juror's work schedule. However, this underscores the Solicitor's concern was the work schedule. It is evidence there was no improper motive. Applicant argues other jurors worked, but cites to no indication that any of the other jurors asked about having to leave court proceedings, or that others had expressed it would difficult for them to work at night and participate. They are not similarly situated. He also takes exception to the question posed to the jury about whether the juror could "put a man to death." It is an unsurprising question for voir dire in a death penalty case. It is also echoed in the other questions. [voir dire of Juror #209], "Could you also sign your name to the warrant or verdict commanding someone's death?").

CA 227

As to Juror #92, Applicant argues the Solicitor's reasons (the listed crimes) "smack of racial pretext." He first argues the convictions did not concern the Solicitor because no questions were posed. However, the Solicitor was already aware of those convictions, and it is unclear as to what should be asked to explore the conviction in reference to the discretionary *voir dire* for discretionary strikes. And, as Applicant concedes, the prosecution did not ask any juror about his or her conviction. Thus, Juror #92 was not treated differently. His argument then progresses to a comparison with a seated juror, Juror #209. Applicant asserts this juror is Caucasian, had a record, the Solicitor knew she had a record, and she was not struck. The trial court record supports the juror is Caucasian, and was seated. Applicant's other assertions are without merit.

The FBI record obtained post-trial, which Applicant relies upon, shows Juror 209's name was used as an *alias*, not that the record reflects the juror's background. Moreover, there are significant differences in information: there are different dates of birth between the record of the individual who used the juror's name as an alias, and Juror 209's information in the state court record; there are vastly different locations for a span of activity (Alaska rather than South Carolina); the FBI record shows a 5'7" blond individual while defense counsel's notes reflect a petit dark haired individual presented at the 2009 trial; and, the employee and residence information for Juror 209 obtained during the 2009 trial proceedings does not square with the Alaska entries. Applicant failed to call the Juror during the PCR proceedings to clarify the discrepancies.

Applicant presented no evidence nor does he have a sound basis for asserting the Solicitor "knew" of a record in Alaska. To the exact contrary, there is no indication Juror #209 had worked or lived in Alaska. Her information reflected in the record on appeal shows she lived only in the Charleston and Berkeley areas for approximately 49 years. In fact, the defense asked the juror

 38

about her work at MUSC in Charleston. Applicant has wholly failed in his burden of proof of even showing a conviction exists for Juror #209, much less that the Solicitor knowingly omitted the information. Applicant has not shown the juror was similarly situated.

Applicant further posits three white males had DUI and DUS convictions. He again does not show the jurors were similarly situated – he does not show multiple convictions, or a gun conviction in any of the records. The evidence is consistent with the Solicitor's truthful response that other jurors seated did not have the same type of history or quantity of convictions.

Applicant abandons any attempt to question the strike of Juror #315, and with good reason. The strike is well supported by the record. While defense counsel did not mark a score for that juror that is evidenced in the record, her hesitation is reflected in the record, as Judge Dennis noted at the time of the *Batson* motion. The pattern he attempts to show in regard to the three strikes is undermined by the record itself.

Applicant next argues other later cases that have no bearing on the reasons presented. That has been previously addressed above. The information is from after the 2009 trial and irrelevant to the *Strickland* analysis.

He next argues the Prosecution Commission programs suggest methods for hiding improper reasons for striking jurors. He omits entirely the evidence that the Solicitor did not even utilize or rely upon any such materials for the strikes. Further, under *Daise*, the information does not support his claim.

Lastly, Applicant turns to bare statistics. This is even further removed for the comparative juror analysis on the *Batson* step three analysis at issue. *Hernandez v. New York, supra*; *Juniper v. Zook, supra*. The study from the Michigan State College of Law, twice amended during these proceedings, falls outside the zone of relevancy. Bare statistics are not demonstrative of causation

for any disproportion in strikes and a jury venire's racial composition. The statistics submitted in this case are nothing more than the creation of a ratio between the number of Caucasians stricken versus the number of African-Americans stricken. They do not address even the mere existence of additional reasons for striking jurors; they do not address the entire practice of the Ninth Circuit Solicitor's Office; nor do they address the reasons that strikes were used in Applicant's case which were offered at trial and available in the record. To be sure, statistical studies – indeed, statistical studies undertaken by these same individuals– have been academically considered; however, their other studies are valued precisely because they have taken variables into account. See Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 Ne. U.L. Rev. 299, 322–23 (2017) (describing the North Carolina study by O'Brien and Grosso, "Their study used detailed, descriptive information about one sample of venire members in order to control for factors other than race that may have accounted for the decision to strike."). In a 2010 report, Professors O'Brien and Grosso wrote: "To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered." Barbara O'Brien & Catherine M. Grosso, *Report on Jury Selection Study*, 8 (2011), <http://digitalcommons.law.msu.edu/facpubs/331/>. Here, variables are sorely missing, yet Applicant still depends on the results. There has been no explanation as to why this bare study should be accepted in light of the author's own recognition that variables "must be considered." *Id.* See also David C. Baldus et. al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the Miller-El Line of Cases As Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425, 1454 (2012) ("An ideal model of proof is based on an analysis of valid data for all relevant variables.").

40

Respondent presented Dr. Robert Michael Norton, retired statistics and mathematics professor from College of Charleston. Dr. Norton critiqued the methodology used to create the MSU report and amended report: He had the following comments:

- He critiqued the report as being incomplete from a mathematical and statistical perspective because the sample used, the “universe of cases” was not a true “random sample” as is accepted in statistics;
- He criticized the report as incomplete and simple because it didn’t speak to other factors that go into making a strike;
- He also critiqued the report as failing to show causation. He said it merely showed a correlation between strikes and race which he likened to a type of conclusion that is “over simplistic” for the proposition stated;
- He also testified it would not be sound practice to include the same case twice as was done in one instance (Beyah) because some variables going into the jury pool would overlap and by counting each of two strikes occurring in one case, you’re counting data twice without qualifying it.

In particular, when asked, from a statistical perspective,¹⁸ if a court should rely on the “study to determine whether the Ninth Circuit Solicitor’s Office routinely excluded black juror in jury selection up to and including Mr. Dickerson’s trial in May 2009,” he responded:

Not by itself. There needs to be -- some of the concerns that I have need to be aired including: correlating variables, the idea of selecting the populations, how you pick a sample.

¹⁸ The professor testified that the studies referenced by Professors O’Brien and Grosso were not published in statistical venues.

CE 41

This point is also underscored when reviewing the remainder of the process in this case. In the main jury of twelve, the State had available five strikes. The State exercised four strikes. The defense challenged only three of those strikes. The "study" does not reflect that. Moreover, three African-American jurors were presented and the State, with available strikes, did not exercise those strikes. The "study" does not reflect that. This Court also heard how the defense used all of its strikes – exhausted all 10 strikes – on Caucasian jurors; a rate of 100%. In fact, in subsequent testimony, defense counsel explained the basics of his strike system and explained, though the number rests at 100% for his strikes against Caucasians, the strikes were for specific reasons not pretext:

So even though I acknowledge all 10 strikes were used on Caucasian jurors from their answers these were jurors we felt who would be very pro prosecution in the case, pro death penalty, not open to mitigation and that's why we used that rating system so hopefully it is gender and race neutral and then we can justify that if a motion is made.

Defense counsel also acknowledged that the Solicitor could certainly have made a motion based on the number of strikes against Caucasian jurors; but the individual reasons would have controlled why the jurors were struck.¹⁹ Professor O'Brien did not "analyze defense strikes" in the "study," though she admitted defense strikes "shape the jury" as well as State strikes. Further, Professor O'Brien agreed the jury makeup "appears to be roughly proportional to the population according to the census," with three African American jurors seated and nine Caucasian jurors

¹⁹ For clarity, Respondent reviewed with defense counsel during one of the PCR hearings a portion of the evidence of the rating system as reflected in the Record on Appeal filed previously in the direct appeal proceedings which reflected high ratings on the jurors struck. (See May 12-13, 2016 PCR Tr. p. 203, line 9 – p. 205, line 16). Defense counsel testified that when teaching on capital jury selection, he advises people "to put gender and race and ethnicity aside and really listen to their answers," and, based on his review of the materials, he "would have been able to respond" to any motion against his strikes based on individual ratings on the jurors. (May 12-13, 2016 PCR Tr. p. 206, lines 4-19).

seated. All of these factors shaped the jury selection in this case. Further, and important to the instant issue, the context sheds additional light on the weight that should be given any statistical study.

Nothing in the record undermines the factual basis put forth by the Solicitor for her use of peremptory strikes in this case. Nothing in the record undermines the ruling by Judge Dennis. Nothing in this record undermines the credibility assessment by Judge Dennis. Any evidence outside of the record included in Respondent's discussion is irrelevant.

The statistical study presented in this case failed to give any acknowledgment to the strikes that were considered on *Batson* motions, and were found not to be racially motivated. This is important because the specific strike at issue had already been given judicial, specific consideration. This is evidence of bias or result-focused presentation. It is akin to combining non-errors to obtain reversal which is not recognized. *See Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); *see also United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work[] any cognizable harm, ... [i]t necessarily follows that the cumulative error doctrine finds no foothold.'") (alterations in original) (citation omitted). Additionally, the information known also shows the prosecutor routinely did not use all available strikes. Rather, the numbers are based on the simple strike ratio tied to race. Professor Grosso testified, when confronted with the fact that in one case in the original study that the Solicitor did not exercise any strikes:

... what you're looking at is the pattern over time because in any one case, you might see a particular pattern that just has something to do with the particular jurors that came into the box that day. When you can look across a lot of cases and you see it's a consistent pattern, that doesn't necessarily mean you see it in every single case, but consistent pattern, that's where the -- - that's where the P value

 43

is sort of a way of measuring whether or not you've actually like tapped into something real.

Q. Okay. Then it goes back to that more information is generally better; correct?

A. Yes.

Our appellate court has viewed with disfavor the use of gross figures, statistics, and probabilities in support of post-conviction relief allegations, particularly where "the petitioner has elected not to consider various intangible factors entering into prosecutorial decisions." *Thompson v. Aiken*, 281 S.C. 239, 241, 315 S.E.2d 110, 111 (1984).²⁰ In fact, the Thompson court analysis takes care to show the irrelevance of statistical patterns in post-conviction relief actions designed to focus on real errors and actual prejudice:

The record before this Court includes the full transcript of the post-conviction proceedings. Therein we find much testimony designed to support questions which we have declined to hear on this appeal. Among these questions is petitioner's allegation and attempted showing of a racially discriminatory pattern in prosecutorial decisions to seek a sentence of death. The petitioner submitted to the post-conviction court a deposition taken of Professor Raymond Paternoster, University of South Carolina, bolstered by statistical data which he had compiled. We feel it necessary to comment upon this submission in light of our concern expressed in *State v. Truesdale*, 278 S.C. 368, 371, 296 S.E.2d 528, about "unwise depletion of the obviously limited public funds available for the defense of indigents." Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for

²⁰ In this respect, Respondent maintains its objection to the introduction of statistics in support of any allegations contained in the post-conviction relief application. Respondent also maintains its objection to the use of statistics upon the basis that statistics are not relevant to the third step of the recognized *Batson* analysis. That is, statistics may assist a movant in demonstrating a *prima facie* case for its *Batson* motion, but once the proponent of the strikes replies with its reasons for exercising its preemptory strikes, statistics no longer play a role. The outcome of the motion beyond the first step of the procedure is not aided by statistics because they do not explain why a party's enumerated reasons for striking jurors are, or are not, race and gender neutral. Statistics do substantively answer whether the proponent of the strikes indeed violated *Batson* by refusing to strike other similarly situated jurors.

resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.

In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.

In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data comp[il]ed for academic purposes.

281 S.C. at 241-42, 315 S.E.2d at 111.

In short, the *Thompson* court rejected statistical studies that result in simple possibilities. The Court found and cautioned in other cases that such statistics should give way to consideration of "real and substantial issues in future capital cases." *Id.*

Though *Thompson* dealt with a determination of death penalty notices, the logic is applicable in this case. Peremptory strikes are by nature defined as subjective, nuanced and individual juror fact-driven. *See Davis v. Ayala, supra.* Moreover, *Batson* does not simply suggest but *requires* individual consideration over broad strokes of possibilities. *Johnson v. California*, 545 U.S. at 172, 125 S. Ct. at 2418 ("The *Batson* framework is designed to produce actual answers

 -15

to suspicions and inferences that discrimination may have infected the jury selection process.”). Of further note, the issue here is the third step of the *Batson* analysis not general prima facie evidence. Raw statistics simply do not apply. *Juniper v. Zook*, 117 F. Supp. 3d 780, 799 and n.10 (E.D. Va. 2015), *motion for relief from judgment denied*, No. 3:11-CV-00746, 2016 WL 413099 (E.D. Va. Feb. 2, 2016) (statistics demonstrating “the prosecution struck black venire members at nearly three times the rate of white venire members,” even if accepted, are irrelevant where reasons for strikes on the record given “statistical disparity between black and non-black jurors goes to the first step of *Batson*,” and “not purposeful discrimination at the third step”); *see also State v. Jacobs*, 32 So. 3d 227, 236–37 (La. 2010) (“we have more than a bare statistical viewpoint to gauge the appropriateness of the peremptory challenges” and finding “after a comprehensive review of these issues, five of the seven state peremptory challenges of non-white prospective jurors did not evince a racially-discriminatory intent. Thus, the statistical argument fails to have merit upon further inquiry.”); *State v. Benich*, No. 1 CA-CR 06-0901, 2008 WL 2641309, at *1 (Ariz. Ct. App. Jan. 10, 2008) (“[d]efendant cites no case ... in which a *Batson* challenge was granted based on statistics alone ... Although there might be a case in which the statistics alone would be sufficient, it is unlikely that in such a case there would not be other factors supporting the inference of intentional discrimination,” citing *Miller-El*); *Jackson v. State*, No. 2-09-023-CR, 2010 WL 1509692, at *8 (Tex. Ct. App. Apr. 15, 2010) (“Although the statistical analysis demonstrates that the State used a disproportionate number of peremptory strikes on African-Americans, our comparative analysis of venire member 3 demonstrates that the State’s reason for striking her was not pretextual, and our analysis of the State’s remaining strikes on African-American venire members does not demonstrate discriminatory intent.”).

 46

This position holds true to the Supreme Court's finding in *Miller-El*. After acknowledging statistics that calculated "prosecutor's used their peremptory strikes to exclude 91% of the eligible African-American venire members," the Court still considered the statistics "bare" statistics that did not prove the asserted motive: "More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 2325 (2005). In short, the Supreme Court has instructed "that proper analysis of a *Batson* claim requires that a court engage in comparative juror analysis...." *United States v. Barnette*, 644 F.3d 192, 205 (4th Cir. 2011). Applicant's reliance on bare statistics is misplaced.

5. The Ineffective Assistance of Counsel Allegations Lack Merit
Based on the Record

When the PCR claim is properly analyzed under *Strickland*, the evidence shows Applicant's trial counsel did not perform below the Constitutionally-mandated standard as alleged. The record indicates defense counsel did not have FBI criminal history information at trial, or the privileged prosecutorial training materials created for use by prosecutors in South Carolina. As noted above, training materials – both for the prosecution and defense – are generally considered protected. Moreover, our case law holds that a defendant is not entitled to the criminal history information.

In *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989), the Supreme Court of South Carolina held a defendant was not "entitled to criminal records checks or records of arrest" as "[n]o right to discovery exists in a criminal case absent statute or court rule" and there is no statute or court rule requiring a disclosure of this information...." This decision still holds true.

3247

Rule 5 (a)(1), S.C.R.Crim.P., sets out the information subject to disclosure by the State, and does not include juror criminal histories run in preparation for jury selection. In fact, Rule 5 (a)(2), specifically reserves the protection of other documents "made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case...." See also *State v. Myers*, 359 S.C. 40, 49, 596 S.E.2d 488, 493 (2004) ("Rule 5(a)(2) SCRCrimP, exempts from discovery work product, or 'internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case....'"); *State v. Matthews*, 296 S.C. 379, 384, 373 S.E.2d 587, 591 (1988) (pre-Rule 5 case finding "[b]ackground information on the venire, if any, held by the solicitor here qualified as 'internal prosecution' matter connected with the prosecution of the case. As such it was not subject to disclosure."). Accord *Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (discussing "work product privilege" in civil case context: "in determining whether a document has been prepared 'in anticipation of litigation,' most courts look to whether or not the document was prepared because of the prospect of litigation.") (internal citations omitted). Other jurisdictions follow the logic specifically in regard to arrest records. See, for example, *Kelley v. State*, 602 So.2d 473, 478 (Ala. Crim. App. 1992) ("This court has held that arrest and conviction records of potential jurors do not qualify as the type of discoverable evidence that falls within the scope of *Brady* and that a trial court will not be held in error for denying an Petitioner's motion to discover such documents."); *State v. Weiland*, 540 So. 2d 1288, 1290 (La. App. 5 Cir. 1989) ("Weiland complains because his request for the rap sheets of prospective jurors was denied by the trial judge. A defendant is not entitled to this information.").

To the extent Applicant would allege the rap sheet was incorrect, that would prove nothing in support of the *Batson* motion as it is only discriminatory intent at issue, not correctness in the

2248

record relied upon. Aside from the fact our jurisdiction would not support such a demand, it should be noted a pre-selection request would had to have been for all the potential jurors. This would have been overly broad. NCIC reports on all jurors, even those not selected for the petit jury, are unnecessary. *Cf. State v. Wright*, 803 So.2d 793, 794 (Fla.App. 4 Dist. 2001) (quashing order requiring State to disclose "criminal records of all 100 listed witnesses, notwithstanding the state's notification that it only intended to call 30 of those witnesses"). Such reports contain privileged information that should not be released to an unauthorized user, or may involve other privilege asserted by the database authority. *See generally United States Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 765 and 780 (1989) (acknowledging "the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information" and as to FOIA request, holding "a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"); *State v. Wright*, 803 So.2d at 795 ("because the defendants/respondents offered no authority to refute the state's claim that it is prohibited from disseminating the NCIC information, we hold that the trial court cannot order the state to produce such information."). *See also State ex rel. Multimedia, Inc. v. Snowden*, 647 N.E.2d 1374, 1378 (Ohio 1995) (denying mandamus to compel release of "rap sheets" noting concession that "NCIC and RCIC [Regional Crime Information Center] 'rap sheets' generated in the investigation of police applicants are prohibited from being released by state and federal law"); *Commissioner of Public Safety v. Freedom of Information Com'n*, 76 A.3d 185, 189 (Conn. App. 2013) ("In *Commissioner of Correction v. Freedom of Information Commission*, 307 Conn. 53, 68–74, 52 A.3d 636 (2012), our Supreme Court determined that a copy of an NCIC

BR 49

printout was exempt from disclosure under § 1-210(a) because disclosure was barred by 8 C.F.R. § 236.6 (2007). Although the court did not decide the issue of whether the disclosure of NCIC documents was barred by 28 U.S.C. § 534, *Commissioner of Correction v. Freedom of Information Commission*, supra, at 53, 52 A.3d 636 nonetheless is instructive. Copies of NCIC documents have been held to be exempt from disclosure under § 1-210(a) because our legislature authorized participation in the compact.”). They are not the type of materials which defense counsel would have been granted access to pre-trial.

As to the prosecutorial training materials cited by Applicant, his argument on this issue ignores (1) precedent protecting these documents and (2) that the materials provided are based upon published case law pertaining to *Batson* motions. “The Prosecutor’s Handbook” and other prosecutorial training materials were not privy to defense counsel in preparation for Applicant’s trial, nor could they be produced pre-trial as a matter of law. As more fully addressed above, the Court of Appeals recent decision directly address this issue in *State v. Daise*, 421 S.C. 442, 461–63, 807 S.E.2d 710, 720–21 (Ct. App. 2017), *reh’g denied* (Dec. 14, 2017). This case, too, supports that even had defense counsel made a successful pre-trial request for the training materials, and utilized them in furtherance of his *Batson* motion, he would not have made a meritorious motion.

Akin to part of the ineffective assistance allegation before this Court, Daise argued “that the court’s failure to require disclosure of the State’s *Batson* ‘handbook’ prevented him from making a viable *Batson* challenge.” *Id.* at 461-62, 807 S.E.2d at 720. Like Applicant, “Daise subpoenaed the records custodian of the South Carolina Commission on Prosecution Coordination (the Commission) to provide ‘[a]ll documents regarding jury selection, including but not limited to training documents, training agendas, manuals, policy statements or .

 50

advisements, correspondence with current or former prosecutors and circuit court judges.” *Id.* Daise’s capital counsel suggested the State had a “handbook on how to get around *Batson*” and supported his posture with pre-trial expert testimony from a statistician. The statistician testified that “in Beaufort County, African-American males were struck at a rate four and a half times higher than Caucasian males.” *Id.*

The appellate court affirmed the outcome of the circuit court’s *in camera* review of the Commission’s training materials, which found “they did not ‘include any abusive instructions or teaching materials, nor use of improper technique,’” and found the materials “generally protected as work-product, as they were created and disseminated in a limited fashion with the purpose of assisting the State’s preparations for trial.” *Id.* at 462-63, 807 S.E.2d at 720. The Court of Appeals specifically found

the approximately 1000 pages of Commission materials sealed for appellate review revealed nothing encouraging prosecutors to strike jurors for impermissible reasons—race-based or otherwise. The documents include outlines, slideshows, and handouts from various lectures and training sessions. Many discuss the *Batson* framework, and some do provide general advice on how to evaluate jurors. However, nothing in the submitted documents suggests an intent to help prosecutors racially discriminate. In fact, the materials contain statements such as “the critical question is whether or not a juror can give both the State and the defendant a fair trial” and the repeated caution: “DO NOT RELY ON STEREOTYPES & PREJUDICE.”

Id. at 463, 807 S.E.2d at 720-21 (footnotes omitted).

The record supports defense counsel made the *Batson* motion in furtherance of his client’s right equal protection simply not knowing the precise reason for the strikes. When the reasons were offered, he could determine, as is supported by the record, there was no argument for pretext to be made which is exactly what the trial record reflects.

Additionally, no prejudice flows from any juror-related claim. For all reasons discussed heretofore, Applicant was not denied equal protection as he was tried by a qualified jury and

51

because the basis for the strikes exercised by the Solicitor befit the known Constitutional requirements of jury selection.

The reasons for the Solicitor's strikes have not been hidden nor are they suspect. The reasons for the strikes have been a matter of records since the 2009 trial. The selection shows careful consideration by both parties, strikes exercised by both parties, and a challenge to just three of the Solicitor's strikes. Those strikes were explained to the satisfaction of the trial judge and still remain fully and fairly supported by the trial record. Applicant has shown no deficient performance by defense counsel. Applicant is not entitled to relief on this issue.

I. The Lead Poisoning Claim

The sentencing-phase ineffective assistance of counsel allegation most prominently pursued by Applicant during the course of this litigation pertains to the claim that trial counsel "failed to uncover and present evidence of Applicant's significant neurological deficits" in furtherance of mitigation. Specifically, Applicant alleges trial counsel "unreasonably limited the investigation into Mr. Dickerson's early childhood exposure to lead" by failing to follow up with a preeminent expert in the field, Dr. Herbert Needleman, and by failing to provide subtest results to a neuropsychologist for interpretation, thereby eliminating from the jury's consideration the scientific research demonstrating Applicant's blood lead level at earlier ages and any related neurotoxic effects. Applicant argues that the mitigation evidence it proffered at PCR compels this Court to find the mitigation case put forth at trial *Strickland* error and prejudice. Respondent submits the PCR presentation was largely cumulative to the substance of the mitigation presented at trial.

"When determining if want of mitigation evidence resulted in prejudice, we must determine whether the 'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal

of [the defendant's] culpability.” *Rosemond v. Catoe*, 383 S.C. 320, 326–27, 680 S.E.2d 5, 9 (2009) (citing *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S.Ct. 2527 (2003)) (quoting *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)). “[T]he likelihood of a different result if the [mitigation] evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 2468 (2005) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052) (alteration in original). Prejudice is therefore determined to exist from the lack of proffered mitigation evidence if trial counsel’s “complete failure to present mitigation evidence undermines confidence in the outcome.” *Rosemond, supra.*; see also *Jones v. State*, 332 S.C. at 333, 504 S.E.2d at 824 (“The bottom line is that we must determine whether or not Jones has met his burden of showing that it is reasonably likely that the jury’s death sentence would have been different if counsel had presented additional information about Jones’s mental condition.”).

The “error” prong of *Strickland* remains the same: did counsel utilize reasonable professional strategy in pursuing (or abandoning) a particular mitigation presentation. “During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so.” *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014) (citing *Rompilla v. Beard*, 545 U.S. at 390-93, 125 S.Ct. at 2467-68). As to Appellant’s reliance on specific ABA Guidelines for Appointment and Performance of Counsel in Capital Cases, our courts have found they “may be useful or may offer assistance in the analysis of an issue” in certain instances, but have nonetheless regularly held “these standards are not controlling or dispositive.” *State v. Blakely*, 402 S.C. 650, 664-65, 742 S.E.2d 29, 36-37 (Ct. App. 2013); see also *Council v. State*, 380 S.C. 159, 172–73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel’s conduct fell below the standards set by the ABA for

the appointment and performance of counsel in death penalty cases). South Carolina courts have “never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina,” instead maintaining that reasonableness of counsel’s actions “is best assessed in the broader context suggested by *Strickland*.” *Ard v. Catoe*, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting and Burnett, J., concurring with dissent) (majority citing the ABA’s standards for defense counsel’s performance regarding investigation of a capital case in support of its decision to affirm the PCR court’s finding of ineffective assistance of counsel). The United States Supreme Court has consistently maintained that the guidelines are “‘only guides’ to what reasonableness means, not its definition” nor “inexorable commands” defense counsel must follow. *Bobby v. Van Hook*, 558 U.S. 4, 8, 130 S.Ct. 13, 17 (2009) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065).

Applicant’s proffered mitigation presentation on lead neurotoxicity fails to meet the *Strickland* standard. At the initial installment of the evidentiary hearing, the Court heard from Applicant’s experts in detail on lead levels and purported correlative damage to cognitive development (specifically hyperactivity and impulsivity), but the presentation put forth in furtherance of this claim ultimately replicated the mitigation evidence put forward during the sentencing phase of trial, with an added emphasis on lead exposure. Trial counsel added compelling testimony regarding the extent of his investigation into Applicant’s known childhood exposure to lead. Defense counsel Jeffrey Bloom testified at two stages of the evidentiary hearing: on December 8, 2015, and on May 13, 2016. His testimony established that counsel investigated the scientific information proffered as mitigation at this PCR hearing. The totality of the testimony demonstrates that Bloom reasonably decided not to more heavily base his mitigation presentation on childhood exposure to lead because Bloom could not uncover or produce enough evidence to

CR-54

make a more persuasive presentation than was presented on this subject. Applicant fails to demonstrate prejudice flowing from the manner and extent to which his childhood exposure to lead was presented at trial. The mitigation evidence proffered at PCR does not make it more likely than not that the jury would have returned with a recommendation for a different sentence.

1. The Trial Evidence on Lead

Dr. Robert Phillips, a forensic psychiatrist, offered testimony pertaining to social factors and individual behaviors indicative of Applicant's emotional maturity at certain stages in his life. Regarding the earliest phase of Applicant's life, Phillips testified that he was affected by a number of psychosocial stressors, describing the environment Applicant grew up in as emotionally toxic. Ultimately, Phillips' presentation concluded with a professional opinion that throughout the timeframe of the crimes, Applicant "began to develop psychotic symptoms that culminate in what [he] would diagnose as a cocaine psychosis" onset by "heavy abuse of cocaine" and resulting in a condition of delusions and/or paranoia and hallucinations. Phillips opined that as a result of a cocaine psychosis brought about by Applicant's escalating addiction, that during the timeframe of the murder (1) he was affected by a mental disturbance, (2) his capacity to conform his behaviors was substantially impaired, and (3) his mentality was impaired.

Dr. Mark Cunningham, a psychologist, offered testimony pertaining to a variety of risk factors identified by the Department of Justice as increasing a person's likelihood of delinquency and violence. He described these factors as they pertain to each stage of a person's life and explained why he identified a high concentration of these factors applying to Applicant. He stated that between the time when a person is conceived and when they reach six years of age, Applicant embodied five of a possible seven factors. At the outset, Cunningham stated Applicant's "exposure to lead in his childhood" was one contributing factor, but that "there is no testing that was done

67-55

that demonstrated brain damage, for example, in that earlier age." Later, he expounded upon why, stating "there is no safe lead level for a child to have. It is never a vitamin." Cunningham explained in common terms that the one known blood-lead level of 9 "doesn't mean that it wasn't higher or lower when he was [younger]." His testimony corresponded to a PowerPoint graph depicting how childhood blood-lead levels correspond to incidences of adult crime. He went on to note Armon's higher blood-lead levels "in the same household, around the same paint chips, around the same lead dust" and concluded: "So it raises the implication that the blood levels that William would have had at earlier points in his childhood might have been higher, and certainly gives some confirmation to the zone of risk that he [was] living in when we talk about lead."

Cunningham also stated on cross-examination that from the known blood-lead level he "may be able to infer to some extent" what Applicant's earlier lead levels were if certain testing was done looking at brain function, neuropsychological assessment "and that sort of thing." Cunningham stated he could have ordered a current lead level test for Applicant and did not. He later noted that Applicant's one test was not high enough to be flagged by the Center for Disease Control for additional testing. The State's cross-examination actually focused for a period of time on how children ingest lead, the dangers of lead poisoning and resulting lawsuits, and pointed out that the specific area where Applicant grew up had older low-income homes with a huge lead risk. Cunningham testified that the homes were likely not compliant with lead remediation standards.

Cunningham also agreed with Phillips' cocaine psychosis diagnosis and additionally independently opined that Applicant's capacity to conform and mental state were substantially impaired at the time of the murder, and that he was under the influence of a mental or emotional disturbance at that time.

GA 56

Also at trial, Marjorie Hammock, a social worker, described the known extent of Applicant's lead exposure in her social history testimony presented at the sentencing phase. Specifically to the point of the PCR presentation, Bloom asked Hammock: "Why should we care if children are exposed to high levels of lead or if they eat . . . old lead paint chips . . . ?" Hammock responded:

high level leads and children eating actual lead have a real hazardous effect on their development, both their emotional and physical development. It can cause brain damage and it can cause organic impairment . . . [b]rain development, brain functioning. . . . we know that [Applicant was placed in a leaden environment] but we don't know the result of that.

Defense counsel Bloom then extracted an agreement from Hammock that agencies have taken steps to try to reduce lead levels in certain housing projects. Hammock clarified on cross-examination an awareness that Applicant may have only been screened once for blood-lead levels, but it was known that he lived "in that environment where it was reported that typically had [lead-poisoning] sufferers."

2. Applicant Cannot Demonstrate *Strickland* Error

In December 2015, defense counsel Bloom established his familiarity with lead poisoning and its ability to be utilized as a capital defense—he had used it as a defense in *State v. LeVar Bryant* in Richland County. For Applicant's case, he set up a blood test but "knew that probably wouldn't show anything because of the passage of time." He also looked into conducting an x-ray fluorescence test. However, that test could not be accomplished because South Carolina lacked any medical facility that could administer it and because Applicant could not be transported to Boston. But defense counsel still pursued information in furtherance of a lead-based defense. He explained that his mitigation investigator Dale Davis collected a number of records from "Charleston County and other agencies regarding specific neighborhoods and houses that had had

lead paint problems over the decades." Defense counsel Bloom furthered the investigation by obtaining an order from the trial court directing DHEC to release records "regarding lead levels and specific records also on both William and his brother, Armon." Defense counsel then turned this information over to psychiatrist Dr. Robert Phillips as well as psychologist Dr. Mark Cunningham, who both testified at trial.

Defense counsel retained a neuropsychologist, Dr. Robert Deysach. Deysach consulted with defense counsel and, like Cunningham and Phillips, met with Applicant to assess him in preparation of a mitigation presentation. But Applicant did not cooperate with Deysach's testing. According to defense counsel Bloom, Applicant "wasn't really interested in helping us build a mitigation case." Second-chair trial counsel, Drew Carroll, corroborated defense counsel Bloom's recollection that Applicant would not cooperate with all the tests required to further the lead defense, believing Applicant "saw it as a stigma to even participate in them." Because Applicant would not complete the neurological testing, Deysach could not establish a score or opinion – let alone opine as to potential neurological deficits resulting from childhood exposure to lead.

The dearth of actual records pertaining to Applicant proved another weakness in the accumulation of evidence in furtherance of a lead-based mitigation presentation. The records defense counsel Bloom and his mitigation investigator were able to uncover largely only pertained to Applicant's little brother Armon. All defense counsel could obtain in regards to Applicant was a single lead test taken when he was nearly twelve years old.

This scarcity led to weakness in the defense's ability to further a lead-based mitigation: defense counsel Bloom testified he consulted with the preeminent expert in the field of lead neurotoxicity, Dr. Herbert Needleman, whom he had retained in the LeVar Bryant case, but learned that there was not enough information from which Needleman could testify about lead poisoning.

 58

Defense counsel Bloom notably distinguished the evidence available in Bryant from that available in Applicant's: "We were never able to find the records on William other than what [appears] in the [trial] transcript." Bloom stated:

I just didn't have enough to bring Dr. Needleman in to testify. As I said, I consulted with him via email. And we just weren't able to find the smoking gun, if I can use that phrase, for Dr. Needleman to be confident enough to have the, the documentation he needed to testify. . . . And I did not have a neuropsychological test.

Instead, he presented the extent of the information he could gather on lead poisoning through his psychologist and social worker

From his December 8, 2015, testimony, defense counsel Bloom established that he took reasonable steps to investigate the potential for a lead-based mitigation defense, and that he was familiar with that type of defense as he had pursued it in a previous case. Not only did the defense uncover records about the known lead in the residential area where Applicant grew up and Applicant's one known blood-lead level, but the defense hired a neuropsychologist to assist in developing and presenting a lead-based mitigation defense.

However, defense counsel Bloom had more testimony to offer on this point. His admitted consultation with Needleman prompted a late discovery disclosure and additional testimony on this issue in May 2016. Bloom produced for Respondent the emails he referenced in December. Testimony taken at the May 2016 installment of the evidentiary in this case indicates that the emails were previously made part of a privilege log by Applicant's Counsel. The emails themselves became part of this Record at that hearing and Bloom further testified to the extent of his investigation into the lead mitigation in his testimony taken that day:

BLOOM: [Needleman's email] says, quote, Jeff: A blood level of eight UG/DL at age eight suggests that it was higher in infancy, but no certainty to this statement. Any more info? End quote.



Q BY RESPONDENT: So you were, is it fair to say, looking not only at past records but what you could extrapolate from those records as well?

BLOOM: Yes.

Q BY RESPONDENT: And you were also looking at modern testing, you attempted to do that as well?

BLOOM: Yes.

Q BY RESPONDENT: And Dr. Needleman is a well-regarded expert in this field, correct?

BLOOM: He is. Dr. Herbert Needleman is an expert in blood levels, lead poisoning and the effects of lead poisoning on brain development, especially in children. He is a professor of psychiatry in pediatrics at the University of Pittsburgh School of Medicine in Pittsburgh, Pennsylvania, and I have a professional association with him in this regard. I don't know him personally.

This Court must consider whether defense counsel Bloom's testimony credibly indicates that a strategic decision was exercised to present evidence of Applicants' early childhood exposure to lead in the manner done at trial.

In considering strategic decisions, reviewing courts must take care to consider the decision in light of the circumstances at the time of trial: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689, 104 S. Ct. at 2065. Reviewing courts also must consider "[t]here are countless ways to provide effective assistance in any given case." *Id.* The record here supports there was no deficient performance.

Defense counsel Bloom established the infeasibility of hiring an expert to address Applicant's exposure to lead at trial. Bloom consulted with a qualified expert -- the same qualified expert, Dr. Needleman, that both of Applicant's PCR experts, Drs. Canfield and Israelian, testified

to as being an influential actor in achieving mainstream recognition of the dangers of lead poisoning as well as scientific change. The information the defense uncovered was not expansive enough to pinpoint a solid cause or existence of lead poisoning in Applicant. Moreover, unquestionably, Applicant impeded the defense team's ability to further explore any neuropsychological effects of the evidence of lead exposure that did exist because Applicant failed to fully cooperate with written tests from a neuropsychologist. And, as expounded upon within the remainder of the PCR testimony, Applicant's only known lead level was simply not medically or scientifically significant – Dr. Needleman indicated as much.

3. Applicant's Additional PCR Presentation on Lead

Dr. Richard Canfield, a developmental psychologist with specialties in early development and lead toxicity, testified that Applicant's *only known* lead level was 9 micrograms per deciliter. This level was taken on June 2, 1988, when Applicant was 11 years, 9 months, and 9 days of age. In 1988, the standard for lead poisoning was much higher than 9: it was 25 micrograms per deciliter. The 1990s witnessed that standard reduce to 10 micrograms per deciliter. And while some studies prior to 2009 indicated that 10 was too high a lead level, the standard has only been reduced to 5 micrograms per deciliter since 2012. Applicant's trial occurred in 2009.

Canfield's larger focus on concrete blood-lead levels and correlative evidence of neurotoxicity did not relate so much to Applicant as it did his younger brother Armon Dickerson, who was notably younger than Applicant during the time of testing and whose blood screens showed a significantly higher lead level requiring a number of follow-up tests. Accordingly, Armon—not Applicant—provided Canfield with data points to support his testimony.²¹ Moreover,

²¹ Specifically, two-year-old Armon initially tested on November 16, 1982, at 70 micrograms per deciliter. A test conducted one week later on November 23, 1982 returned a level of 45 micrograms per deciliter. Testing continued on Armon until he reached age 5 with differing results.



to the extent Canfield plotted Applicant's blood-lead levels,²² he testified he could "just make a guess that his lead level was 50% above at all ages" based off of the one number he had been provided with and a straight-line graph plotted for a study based on children from Cincinnati, Ohio. Canfield testified that the reason he used the Cincinnati Cohort for comparison was because it began in the late 1970s, which Canfield dictated was "very much the same time period as when William was growing up in Charleston." Without additional testimony to support his contention, he opined that "inner-city Cincinnati is very similar in terms of its housing stock, in terms of the population: largely African-American; largely impoverished; and, and housing of, of very fairly poor quality, meaning that there's a lot of lead paint hazard. So, Cincinnati will help us understand Charleston." He later testified that he relied upon Google Maps to determine the location and appearance of one address Applicant resided in at some point in his youth. In referencing known causes for these blood-lead levels, Canfield was unable to corroborate, when asked by the court, from where in the materials he determined that someone "tore all the walls out" of one of Applicant and Armon's childhood residences, or when that may have occurred in relation when Applicant may have lived there. Canfield continued to have difficulty tracing where Armon was living versus where Applicant was living during the timeframe in which Armon's blood-lead levels were being consistently screened.

Canfield's remaining testimony, therefore, does not provide a foundation for projecting Applicant's blood-lead levels. Canfield laid a comprehensive presentation regarding lead's

²² Applicant's counsel failed to produce Canfield's graphs depicting specific plot points for Applicant in the ordinary course of discovery. Instead, a draft PowerPoint presentation was furnished to Respondent. The plot points or notations presented to this Court pertaining specifically to Applicant were not inserted and provided until their presentation in open court. Canfield's PowerPoint presentation became Applicant's Exhibit 3 at the December 7, 2015, evidentiary hearing over Respondent's objection to the discovery violation.

absorbency into young bones and the negative effects of lead absorption. But this presentation does not make it more likely than not that, had it been given at trial, Applicant's jury would have returned an alternative sentencing recommendation. Canfield's testimony lacked sufficient underlying facts to support his conclusion that Applicant's environment caused blood-lead levels were consistently 50% above a conservative average prior to the actual blood-lead level that was produced at Applicant's age 11 years and 9 months. Moreover, Canfield based his graph of Applicant's estimated blood-lead level upon a linear study conducted on children from Cincinnati, Ohio in the 1970s, and not concrete data from houses on the upper portion of the Charleston Peninsula in the late 1970s and 1980s.

In addition to Canfield, Applicant produced PCR testimony from developmental neuropsychologist Dr. Marlyne Israelian. Israelian reiterated Applicant's entire social history which was offered during the sentencing phase of Applicant's trial, but did so in correlation to purported childhood exposure to lead, as well as Applicant's reliance on cocaine and his maltreatment as a child. Israelian testified that demographically, Applicant fell at high risk for lead exposure as did other black males in urban centers and communities with antiquated, unrefurbished homes. She described that Applicant grew up in zip codes on the Charleston Peninsula where there were known cases of children with blood-lead levels higher than the threshold level of 10.

Israelian pointed out that Applicant underwent IQ testing in 1990 when he resided at Tara Hall, a group home for boys in Georgetown County, scoring 86 in nonverbal reasoning. Israelian defined his nonverbal score of 86 as below average, and his scoring 96 on verbal as average. Averaged, this IQ score placed him in the 50% percentile. Israelian testified that Applicant performed poorly on one subtest, the Object Assembly Test, which to her was significant because "lead affects selectively that area of the brain" that controls visuospatial functioning necessary for

 63

completion of that test. Israelian juxtaposed this 1990 IQ test with a later test conducted by the Department of Youth Services wherein Applicant's scores dropped to a full scale IQ of 83, a verbal of 81 and a performance of 89. Youth Services administered the adult version of the test though Applicant was only sixteen and still eligible for the children's scaled test. Israelian characterized this reduced score as consistent with previously assessed deficiencies which could, according to Israelian, relate back to lead exposure.

Ultimately, Israelian described the results of her own neuropsychological assessment conducted with Applicant, including an IQ test wherein Applicant's full-scale score was 86. She opined that Applicant has executive frontal-lobe dysfunction. She additionally noted the impact of cocaine, a toxin, on Applicant's functioning. She testified that individuals with lead poisoning "are quite drawn to cocaine" and "are quite susceptible to cocaine" because it allows them to feel reward. "[L]ead exposure will predispose you to cocaine abuse."

Israelian also discussed Applicant's maltreatment as a child. She finally opined that Applicant suffered from a mental and emotional distress disorder at the time of the murder and that his poor executive functioning played a role in the crime because Applicant expresses an inability to regulate his emotions. She opined his capacity to conform was substantially impaired from (1) lead neurotoxicity, (2) childhood maltreatment, and (3) cocaine psychosis. Israelian did not, however, recommend Applicant undergo any medical tests such as an MRI to see if his brain was visually affected by lead. Nor did she order or recommend any new blood test be conducted for the presence of lead.

Israelian's testimony fails to demonstrate that Applicant suffered prejudice by the failure to have a neuropsychologist, or a developmental neuropsychologist, testify at trial. Bloom established at PCR that Applicant would not comply with the neuropsychological testing required



to garner this testimony. Without assistance by his client prior to trial, this type of testimony was not at Bloom's disposal. Moreover, Israelian's testimony does not identify neurotoxicity as a result of childhood exposure to lead to a degree which undermines confidence in the jury's sentencing recommendation. She largely reiterated other mitigation testimony offered at trial by way of outlining Applicant's childhood circumstances and cocaine addiction.

Israelian's testimony signifies a lack of prejudice flowing from the present PCR allegation. At trial, Bloom pursued and put forth a consistent sentencing-phase presentation that mentioned all of the same risk factors discussed by Israelian, including childhood exposure to lead. But the crux of Bloom's mitigation case lay in professional opinions that Applicant's capacity to conform was compromised due to a cocaine psychosis. Israelian did not deny that a cocaine psychosis and childhood maltreatment affected Applicant. She simply assigned an additional factor by a more scientific name, lead neurotoxicity, and compounded her analysis with additional scientific testimony pertaining to the effects of Applicant's known lead exposure. She opined at PCR that Applicant's cocaine usage contributed to his capacity to conform and led to substantial impairments at the time of the murder. Nothing she said excused or altered the cocaine psychosis theory presented at trial.

4. Applicant Fails in Showing Deficient Performance
And Resulting Prejudice

What is clear from the aggregate of the PCR testimony is that trial counsel had access to the basis for the lead poisoning defense and investigated it. Most importantly, Bloom's PCR testimony and his correspondence with Dr. Herbert Needleman notes his awareness of Applicant's childhood lead exposure, the existence of lead in the area where Applicant grew up, and his investigation into the extent or certainty with which he could establish Applicant suffered a physiological deficiency as a result of that exposure. If this Court were to determine that Bloom

halted his investigation into the lead poisoning, it must be deemed reasonable based upon information counsel culled from notable experts in the field. Ultimately, the preeminent lead professional in the field at the time, Needleman interjected that he would need more information.

Applicant's PCR presentation has not compellingly proffered additional lead-based mitigation in a manner undermining confidence in the jury's sentencing recommendation. The only lead level screening conducted upon Applicant occurred when he was almost 12 years old, and the results, a lead level of 9 micrograms per deciliter, fell below the threshold level for concern applicable in 1988 and even in the 1990s. Key to this Court's analysis is that in 1988, and even through the 1990s, Applicant's only known lead level fell below the standard flagged by the medical community for follow-up. Also key to this Court's analysis is Applicant's lack of cooperation with neuropsychological testing in preparation for trial. Bloom did not abjectly fail to present subtests to a neuropsychologist for review as alleged.

Therefore, even if Bloom had presented the same testimony at trial as was presented at PCR, it fails to persuasively indicate that the jury would have returned an alternative sentencing recommendation. The evidence on this issue shows that Bloom, a seasoned capital trial attorney, exercised a strategic decision that the pursuit of additional lead neurotoxicity evidence was not a viable defense which could be supported by medical testimony at the time of trial. Instead, Bloom incorporated the known evidence of lead exposure through experts other than those presented at PCR. Given the totality of the foregoing, Applicant cannot meet his burden of showing error-and-prejudice in regards to counsel's investigation and presentation of a defense based on Dickerson's purported childhood exposure to lead.

J. Remaining Sentencing Phase Claims

CL 66

Applicant pursues two additional claims of ineffective assistance of counsel during the sentencing phase of Applicant's trial.

Applicant alleges that trial counsel were ineffective in their sentencing-phase representation because, in addition to the claims discussed above, they (1) failed to preserve for the appellate record an objection to Applicant's former probation officer's testimony that Applicant repeatedly stated during a 1996 probation hearing he wished he had shot a police officer; and (2) failed to object to portions of State's closing argument that, according to Applicant, diluted the responsibility of the jurors in rendering a possible death verdict.

When "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). Pursuant to *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. at 2066. "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Therefore, ineffective assistance counsel claims "based on a failure to object are tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "There can be no ineffective assistance of counsel for failing to raise a claim which is not legally viable." *Almon v. United States*, 302 F.Supp.2d 575, 586 (D.S.C. 2004); see, e.g., *Werts v. Vaughn*, 228 F.3d 178, 203 (3rd Cir. 2000) ("counsel cannot be ineffective for failing to raise a meritless claim"). Admissible but unobjected-to testimony fails both prongs of *Strickland* because "failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Hough, supra*.

1. Claim that Counsel Failed to Preserve Objection to Probation Officer's Testimony

During the sentencing phase, the State presented a former South Carolina Department of Probation, Pardon and Parole Officer who served as the presiding Administrative Officer over Applicant's 1996 parole hearing. This witness, Cededrick Davis, testified that during that hearing Applicant repeatedly stated he wished he shot the police officer(s) involved in the incident. Prior to this testimony, the trial court ruled it admissible over Bloom's objection, finding it more probative as to Applicant's character than prejudicial. The court finished: "your objection is noted and preserved."

At PCR, defense counsel Bloom was called upon to address the efficacy of this testimony and whether a proper contemporaneous objection was lodged. He explained that his objection at trial, which was handled *in limine* and included a proffer of Davis' testimony, was that Davis was being called to testify at Applicant's murder trial about a parole proceeding that occurred in 1996 in which Applicant was not represented by, nor had an automatic right to, counsel.²³ Defense counsel Bloom's basis for objection was that the Department kept the report a confidential part of the probation file; it was never objected to; nor could the report ever be challenged after the hearing. Thus, under his logic, its introduction at the 2009 death penalty trial constituted a due process violation. He also recognized that he received the report in discovery and had it well in

²³ The *in limine* record includes testimony from Davis that at a parole hearing the defendant is "advised that it is a matter of evidence, and that they have the right to an attorney at that hearing, and whatever they say can be used against them at a future hearing." (R. p. 3745, lines 12-16). On cross-examination in front of the jury, defense counsel Bloom did not re-elicit this information, but rather pointed out that the Department maintained the report in a confidential file and that Applicant's statements about wanting to shoot the officers was not part of the revocation order issued as a result of that hearing. (R. p. 3774, line 4 – p. 3777, line 24).

advance of trial. Defense counsel Bloom stated that once admitted, he “could tell from the jury’s reception of the evidence that it was . . . bad[.]”

The record on this PCR allegation bears out that counsel reasonably reacted to the trial court’s notation that the issue was preserved following its *in limine* treatment and strategically decided not to object in front of the jury when the evidence came before it. Defense counsel Bloom testified that he believed he properly preserved the issue for appeal and that he later included it in a memorandum to appellate counsel suggesting the issue for appeal. He later stated he believed the objection was preserved because it was handled *in limine*, not in a pretrial hearing, and that “it was clear how the trial judge had ruled” in that the ruling did not leave Bloom feeling as though he needed to renew the objection in front of the jury. “You don’t need have to keep objecting just because the jury is now in the courtroom.”

But even assuming this issue were later raised on appeal and found unpreserved by our appellate court, Davis’ testimony was ruled admissible and thus its admission cannot form a basis for post-conviction relief. Character evidence is admissible (and highly relevant) during the sentencing phase of a capital trial. *State v. George*, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996); *see State v. Tucker*, 324 S.C. 155, 168, 478 S.E.2d 260, 267 (1996). “The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase. In the sentencing proceeding, the trial court may permit the introduction of additional evidence in extenuation, mitigation *or* aggravation.” *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986) (citing *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979)) (emphasis in original).

2. Claim that Counsel Failed to Object to State’s Sentencing-Phase Closing Argument

 69

Applicant next alleges that counsel failed to object to the portions of the State's closing argument which Applicant now identifies as having diluted the jurors' sense of responsibility in rendering a possible death verdict. Applicant has identified two portions of the closing argument in its post-trial brief in support of this allegation.

Any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). So, while the question before this Court is undoubtedly "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998), a court must conduct an "examination of the entire proceedings." *Donnelly* at 643, 94 S.Ct. at 1871; *Northcutt, supra* ("We must review the [closing] argument in the context of the entire record."); *State v. Bell*, 302 S.C. 18, 35, 393 S.E.2d 364, 374 (1990).

"Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007).

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based upon this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981); S.C. Code Ann. § 16-3-25(C)(1) (capital sentence may not be "imposed under the influence of passion, prejudice, or any other arbitrary factor").

As to whether the State's sentencing-phase argument in this case crept outside the bounds of fairness and required an objection by Applicant's counsel, the record reflects a thirteen-page argument in adherence to the principles stated in *Linder, supra*. An examination of the passages cited by Appellant in the full context of the closing indicates that the State was arguing in favor of

 70

a recommendation of death and asking the jury to reject the application of mercy. The State argued for the jury to discount the mitigation evidence put forward by Applicant and assign significance to evidence it put forward in aggravation. The State did not ask the jury to weigh aggravation against mitigation and come to a decision that way.

Testimony on this issue taken at Applicant's PCR hearing also supports a finding that the State's closing argument did not call for objection. Defense counsel Carroll testified at PCR that he believed they should have objected because the excerpts presented to him at the PCR hearing indicated that "the solicitor was clearly painting a picture of the absolute worst of the worst of inhumanity, and telling the jury that they should disregard all the mitigation that had been offered that was relevant to their decision about imposing this ultimate penalty." But defense counsel Carroll acknowledged in later testimony that it is permissible for a prosecutor to argue in favor of their position. Likewise, defense counsel Bloom testified at PCR that at the time the State delivered its closing, he did not view the excerpted portions as problematic but, in hindsight, "should have interposed an objection" and characterized the State's closing as asking the jury to weigh aggravation against mitigation. However, his cross-examination testimony highlights the alternative position, perhaps the one held at the time of trial, that the State's closing argument was indeed within the confines of argument allowed by South Carolina law and was not worthy of objection.

Accordingly, Applicant's allegation fails to meet *Strickland's* error-and-prejudice standard and does not warrant relief.

K. Ineffective Assistance of Appellate Counsel Claims

Applicant seeks post-conviction relief on two claims of ineffective assistance of appellate counsel. The test for reviewing such claims is the basic *Strickland* error-and-prejudice analysis



with little adjustment. To succeed, the applicant must demonstrate that appellate counsel was "objectively unreasonable in failing to find arguable issues to appeal." *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 726, 764 (2000). "To prove prejudice, the applicant must show that, but for counsel's error, there is a reasonable probability that he would have prevailed on appeal" on the issue proffered in the PCR application. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). The *Smith* Court noted "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented[.]" *Smith, supra* at 288, 120 S.Ct. at 766 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

When reviewing appellate counsel's actions under *Strickland* as enunciated in *Smith* and *Anderson, supra*, no finding of deficient Sixth Amendment performance and prejudice is warranted within appellate counsel's selection and treatment of the issues pursued on direct appeal before the South Carolina Supreme Court. Specifically, Applicant alleges in claims 10/11(c)(5) and (7) that appellate counsel should have pursued on direct appeal (1) the objections lodged to a number of autopsy photographs introduced during sentencing²⁴; and (2) the objection lodged to the State's questioning Dr. Phillips about whether Applicant "knew right from wrong" at the time of the murder.

Testimony taken at the December 8, 2015, and May 13, 2016, evidentiary hearings established that first-chair trial counsel Jeff Bloom, who was listed as appellate counsel on the final brief and participated in oral argument before the South Carolina Supreme Court, shared his suggestions for appellate issues in a memorandum to appellate counsel at the Commission on

²⁴ Specifically, State's Exhibits 141, 153, 160, 161, 162, 166, 171, 172, 173, 177, 178, 181, 184, 335, and 336, on file and available for review at the South Carolina Supreme Court.

Indigent Defense. Within that memorandum, he suggested both the photograph issue and the Dr. Phillips issue as potential appellate issues. Jeff Bloom's testimony demonstrated that he discussed potential appellate issues with appellate counsel and considered a range of issues that he believed should be raised on appeal. He also completed portions of oral argument before the Supreme Court. Bob Dudek, Chief Appellate Defender with the Commission on Indigent Defense, also testified about Bloom's memorandum and the proffered issues at the December 8, 2015, PCR hearing.

1. Testimony in the Record Pertaining to the Photograph Allegation

One of the aggravating factors before the jury during the sentencing phase of Appellant's trial was that the murder occurred during the commission of physical torture. During the sentencing-phase, the State re-called forensic pathologist Dr. Cynthia Schandl²⁵ to testify in regards to specific injuries recorded as part of the victim's autopsy. Over Applicant's objection, the trial court admitted the photographs subject to this allegation as probative of the aggravating factor of physical torture. Shandl's testimony was thereafter received and trial counsel did not cross-examine the pathologist.

First-chair trial counsel Jeff Bloom testified at PCR only briefly that he recalled preserving the objection to these photographs and agreed with Applicant's counsel that they "are what they are." At the first convening of the PCR evidentiary hearing, appellate counsel Dudek testified that which he did not recall the specific photographs in this case, that having worked on capital appeals before he was aware that "some horrible, horrible, horrible photographs" have been reviewed on

²⁵ During the guilt phase of the proceedings Dr. Schandl was qualified as an expert and testified in regards to the autopsy she conducted on the victim. (R. p. 2920-93).

appeal by our courts, but that the court has issued "kind of standard language [that] while not pleasant to look at . . . [it did not] think they denied the defendant a fair sentencing phase.

2. Testimony in the Record Pertaining to the Dr. Phillips Allegation

During the sentencing phase, Applicant's counsel put forth Dr. Robert Phillips who was qualified as an expert in psychiatry and forensic psychiatry. Phillips' testimony assigned behavioral significance to certain events in Applicant's life prior to the murder. At the conclusion of his direct examination, Phillips opined that (1) Applicant "was experiencing a cocaine psychosis and, as such, he was affected by a mental disturbance" at the time of the murder; (2) "that as a result of his cocaine psychosis that his capacity to conform his behaviors was substantially impaired" at the time of the murder; and (3) that as a result of cocaine psychosis, that his mentality was impaired" at the time of the murder..

On cross-examination, the State extracted testimony that Applicant does not suffer from any mental or emotional disorder that would impair his decision-making, day-to-day functioning, or require psychiatric treatment—and that he was competent to stand trial. Bloom lodged an objection raised during an off-record bench conference.²⁶ Following the conference, the State elicited a response from Phillips regarding whether Applicant's actions at the time of the murder were volitional. Phillips responded he believed Applicant was in a cocaine psychosis at the time

²⁶

Q: That he was competent to stand trial?

A. Yes.

Q. That means that he basically knows what is going on here, who the lawyers are, who the judge is, the jury is, all that kind of stuff; is that correct?

A. That's correct.

Q. And that is does not meet the standard for ---

Mr. Bloom: Judge, I am going to object at this point. If we may approach?

[OFF RECORD BENCH CONFERENCE]

(R. p. 4242, line 2 – p. 4243, line 9).

CC # 74

of the murder and therefore "his decision was not free," but that "he would have known what he was doing was wrong based on his behaviors after the event."

At PCR, defense counsel Bloom acknowledged that in his practice he consistently objects when the State cross-examines a mental health expert regarding whether the defendant knows right from wrong. He testified he believes that it confuses a jury to hear testimony that a defendant knows right from wrong, which pertains to an insanity defense, when insanity is not an issue in the trial, has not been presented during the guilt phase, and is likewise not part of the mitigation defense being presented. Defense counsel Bloom acknowledged that he included this issue in his memo to appellate counsel as a suggestion for the appeal. Appellate Counsel Dudek simply testified on this point that he did not raise that issue on appeal.

3. Argument in Opposition of Post-Conviction Relief

The above-cited issues would not have prevailed on appeal as argued by Applicant. Effective assistance of appellate counsel does not require that *all* issues that *may* have merit be pursued on direct appeal. *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (*en banc*). "Appellate counsel accordingly enjoys a 'presumption that he decided which issues were most likely to afford relief on appeal,' a presumption that a defendant can rebut 'only when ignored issues are clearly stronger than those presented.'" *United States v. Baker*, 719 F.3d 313, 318 (4th Cir. 2013) (quoting *Bell v. Jarvis*, *supra*). Appellate counsel is given wide discretion in his professional decisions during representation. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004), (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983)).

22 75

Specifically in regards to the photographs, our Supreme Court has expressly upheld the introduction of autopsy photographs during the sentencing phase when the photographs corroborate witness testimony and illustrate the circumstances of the crime and the character of the defendant. *State v. Torres*, 390 S.C. 618, 623–24, 703 S.E.2d 226, 229 (2010) (citing *State v. Rosemond*, 335 S.C. 593, 597, 518 S.E.2d 588, 590 (1999); *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 453 (2007)). In Applicant's case, as in *Torres*, "[t]he doctor who performed the autopsy used the introduced photographs during h[er] testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed." *Id.* Though graphic in nature, the photographs' "net effect" was to show what Applicant did to the victim, "which goes straight to the circumstances of the crime." *Id.* Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." *State v. Collins*, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014) (no abuse of discretion in admission of pre-autopsy photographs of child victim mauled by dogs); see also *State v. Gray*, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) (in prosecution for murder and lynching, gruesome autopsy photographs held more probative than prejudicial and relevant to issue of malice).

The photographs at issue depict the nature of the injuries established by the forensic pathologist as contributing to the victim's death. Given the status of South Carolina jurisprudence on this issue, any likelihood that Applicant would have prevailed on the proffered appellate issue is low. The photographs are relevant to the State's requirement to establish the aggravating factor that the murder occurred during the commission of physical torture. Thus, the photographs were directly linked to a question before the jury's consideration as part of the sentencing phase of trial.

Dudek's testimony reflects that appellate counsel was aware of the status of the law on this issue

CC 76

and intimates that the low likelihood of success caused him to make a strategic choice to forego the issue in Applicant's appeal. Accordingly, the failure to challenge the trial court's admission of those photographs on appeal is not a meritorious ineffective assistance of counsel claim.

Specifically in regards to Dr. Phillip's cross-examination testimony, assuming the off-record objection preserved the issue for appeal, the testimony received was not at all inconsistent with Applicant's mitigation-phase presentation. In fact, it was probative of the mitigating circumstances charged to the jury: that the murder was committed while the defendant was under the influence of mental or emotional disturbance; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; and the age or mentality of the defendant at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2), (6), and (7). At no point during his examination did Phillips obfuscate the elements of an insanity defense with his evaluation of facts probative of the mitigating factors named herein. Instead, the crux of his testimony on both direct and cross examination was that Applicant was subject to a state of cocaine psychosis at the time of the crime. To that end, Bloom's PCR testimony that he believed that type of evidence confused a jury and gave rise to his objection does not form a meritorious basis for appeal. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . ."). Appellate counsel cannot be found ineffective for failing to raise an issue which, from the record, appears "far from 'apparent,' and may be nonexistent." *Lawrence v. Branker*, 517 F.3d 700, 711-12 (4th Cir. 2008) (finding state PCR court's denial a reasonable application of *Strickland*, *supra* and *Bell*, *supra*).

Applicant fails to demonstrate how either of the above-cited issues are stronger than those pursued on appeal, and this claim does not warrant the granting of post-conviction relief. *Hill v.*

 27

State, 415 S.C. 421, 430-31, 782 S.E.2d 414, 419 (Ct. App. 2016) (counsel need not raise every nonfrivolous issue to be considered effective on appeal). The totality of the testimony put forward on the appellate counsel claims shows that in deciding which claims to raise on appeal, counsel considered the likelihood of success of those claims. Counsel does not have to file a "kitchen-sink brief" in order to be effective as "that is not necessary, and is not even particularly good appellate advocacy." *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998). Applicant has failed to show error and prejudice in regards to appellate counsel's performance and post-conviction relief is not warranted on either claim.

L. The Kidnapping Sentence

In addition to the death sentence received, Applicant was indeed sentenced by the trial court to a concurrent thirty years for kidnapping. This concurrent sentence is in violation of S.C. Code Ann. § 16-3-910. If a concurrent sentence is imposed as in this case, the sentence is considered "ineffective." *State v. Council*, 335 S.C. 1, 6, n.2, 515 S.E.2d 508, 510, n.2 (1999). "Generally, when a defendant is convicted for murder any sentence for the kidnapping of the victim would be vacated." *State v. Vasquez*, 364 S.C. 293, 302, 613 S.E.2d 359, 363 (2005) (citing *Owens v. State*, 331 S.C. 582, 585, 503 S.E.2d 462, 463 (1998) (holding that a sentence for kidnapping should be vacated when the defendant received concurrent sentence under the murder statute). While Applicant's kidnapping sentence should be set aside, the kidnapping conviction shall remain. *Id.*; *Vasquez, supra* (affirming conviction but vacating sentence for kidnapping of murder victims).

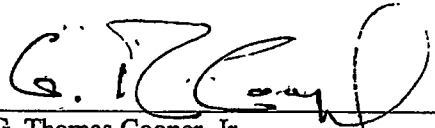
M. Conclusion

Therefore, Applicant is not entitled to post-conviction relief on any surviving allegation. All allegations appearing in the third amended PCR application yet not presented in Applicant's


78

Post-Hearing Brief have been waived and abandoned. The totality of Applicant's claims shall be denied and dismissed in full as Applicant has failed to meet his burden on any claim herein—with the exception of the concurrent thirty-year sentence for kidnapping. That sentence, but not the conviction, is ordered vacated.

AND IT IS SO ORDERED.


G. Thomas Cooper, Jr.
Presiding Judge

July 20, 2018
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2012-CP-10-3216

WILLIAM O. DICKERSON, Appellant,

v.

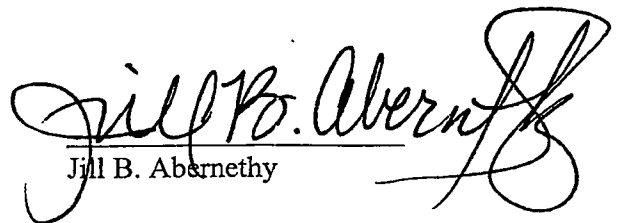
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellant's Notice of Appeal as served by first class United States mail, postage prepaid, this 13th day of August, 2018, upon the following:

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

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


Jill B. Abernethy

RECEIVED

AUG 15 2018

S.C. SUPREME COURT

State of South Carolina)
County of Charleston) The Court of General Sessions
State of South Carolina,) The Ninth Judicial Circuit
vs.) Case No. 05-GS-10-8240
Michael Tyrus Jeter,
Defendant.

VOLUME I of III

Transcript of Record

March 20, 2006

Charleston, South Carolina

B E F O R E:

The Hon. Daniel F. Pieper, Judge, and a Jury

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

Scarlett Wilson, Esq.
Stephanie Bianco, Esq.
Attorneys for the State

Stanley Feldman, Esq.
Attorney for the Defendant

Pages 3-118

Brenda Cooley
Circuit Court Reporter

I N D E X
VOLUME I OF III
MONDAY, MARCH 20, 2006

	PAGE
Exhibits	2.1
<i>Batson</i> List	Volume I - Appendix A
Proceedings	3
Arraignment Waived	3
Jury Voir Dire	4
Jury Selection	22
Jury Foreman	31
Defendant's Motion Withdrawn	33
Defendant's Motion Withdrawn	34
Court's Instructions to the Jury	34
<i>Neil v. Biggers</i> Hearing:	
STATE'S WITNESSES:	
<u>ALDRENSA GINA BROWN</u>	
Direct Examination by Ms. Wilson (In Camera)	38
Cross-Examination by Mr. Feldman (In Camera)	58
<u>DETECTIVE DENICE CATLETT</u>	
Direct Examination by Ms. Wilson (In Camera)	65
Cross-Examination by Mr. Feldman (In Camera)	72

Neil v. Biggers Hearing:

Argument by Mr. Feldman	79
Argument by Ms. Wilson	87
Argument by Mr. Feldman	92
Argument by Ms. Wilson	93
Argument by Mr. Feldman	99
Argument by Ms. Wilson	107
Court's Ruling	110
Certificate of the Court Reporter	118

E X H I B I T S

STATE'S	DESCRIPTION	I.D. REC'D
1	Aerial photo - Montague Avenue	112
2	Aerial photo - Montague Avenue	112
3	Aerial photo - Montague Avenue	112
4	Aerial photo - Montague Avenue	113
5	Aerial photo - Montague Avenue	113
6	Photo of scene - sign	113
7	Photo of scene - towel	113
8	Photo of car - rear	113
9	Photo of car - passenger side	113

STATE'S	DESCRIPTION	I.D. REC'D
10	Photo of car - driver's side	113
11	Photo of car - driver's side	113
12	Photo of prints 1-3	113
13	Photo of prints 1-3	113
14	Photo of prints 4-6	113
15	Photo of prints 4-6	113
16	Photo of prints 6-11	113
17	Photo of car - trunk	114
18	Photo of car - inside	114
19	Photo of car - inside	114
20	Photo of Marsh View Apartments	114
21	Photo of Ruth Drive - car	114
22	Photo of Ruth Drive - car	114
23	Photo of Ruth Drive - car	114
24	Photo of Ruth Drive - car	114
25	Aerial photo of Ruth Drive	114
26	Aerial photo of Ruth Drive	114
27	Map - Sumner Avenue	114
28	Map - Montague Avenue	114
29	Photo lineup - Michael Jeter	115
29-A	Photo lineup - Michael Jeter	115
30	Photo lineup - Michael Dunham	115
30-A	Photo lineup - Michael Dunham	115

STATE'S	DESCRIPTION	I.D. REC'D
31	Copy of photo lineup, no signature - Michael Dunham	115
32	Booking photo - Mr. Johnson	115
33	Booking photo - Michael Jeter	115
34	Booking photo - Michael Dunham	115
35	Proffer letter - Mr. Johnson	115
36	Gunshot residue kit - Mr. Johnson	115
37	Gunshot residue kit - Michael Dunham	115
38	Gunshot residue kit - Mr. Gambrell	115
39	Photo of x-ray - Mr. Gambrell's leg	115
40	Photo of x-ray - Mr. Gambrell's chest	116
41	Photo - projectile	116
42	Fingerprint card L5.1 - Michael Dunham	116
43	Fingerprint card L6.1 - Michael Dunham	116
44	Fingerprint card L3.1 - Michael Jeter	116
45	Fingerprint card L4.1 - Michael Jeter	116
46	Fingerprint card L1.1, 1.2, 1.3 - Michael Jeter	116
47	Projectile fragment	116
48	Photo lineup	116
49	Photo lineup	116
50	Beginner's driver's permit	116
51	Statement of Jean Jacques	116

STATE'S	DESCRIPTION	I.D. REC'D
52	Screen shot of phone records - R. Green	117
53	Screen shot of phone records - V. Martin	117
54	Photo of x-ray - Mr. Gambrell	117
55	Photo of x-ray - Mr. Gambrell	117

COURT'S	DESCRIPTION	I.D. REC'D
2	Photo lineup - Michael Jeter	49
3	Photo lineup - Michael Dunham	49
4	Copy of photo lineup - Michael Dunham	54

(Court's Exhibit No. 1 was marked for identification at a previous hearing per Solicitor Wilson.)

(The exhibits were retained by the clerk of court.)

APPENDIX A

BATSON LISTCOUNTY: CharlestonTRIAL DATE: March 20 - 22, 2006CASE NO.: 2005-GS-10-8420JUDGE: The Hon. Daniel F. PleperSTATE: State of South CarolinaSTATE'S ATTORNEYS:

Scarlett Willson, Esq.

Stephanie Bianco, Esq.

vs.

DEFENDANT: Michael Tyrus JeterDEFENSE ATTORNEYS:

Stanley Feldman, Esq.

COURT REPORTER:

Brenda Cooley

<u>JUROR NO.</u>	<u>JUROR NAME</u>	<u>RACE</u>	<u>SEX</u>	<u>STRIKES</u>		<u>SEATED</u>
				<u>STATE</u>	<u>DEFENSE</u>	
117	Donna Green	B	F			X
141	Michael Jackson	W	M			X
321	Mark Schuster	W	M			X
15	Rita Balliet	W	F			X
100	Joseph Free	W	M		X	
152	Tammie Jones	W	F		X	
19	Sheila Bellah	W	F			X
121	Tamatha Greene	B	F			X
89	Thomas Fath	W	M			X
145	Jamie Jenkins	B	F	X		
314	Lori Lyon	W	F	X		
24	Kevin Bliss	W	M		X	
20	Beverly Benton	W	F			X
207	Gayle Nixon	W	F			X
308	William Ellison	W	M			X
234	Martha Sampson	W	F			X
33	Gail Brown	W	F		X	
102	Debra Gallagher	W	F		X	
136	Kelly Homan	W	F		X	
37	Viola Bryant	B	F			X

ALTERNATES:

218	Mary Ann Polencot	W	F			X
11	Neva Atkinson	W	F		X	
1	Kandace Adams	W	F		X	
58	Janie Curnell	B	F			X

1 (On Monday, March 20, 2006, the defendant being
2 present with counsel, the trial convenes at approximately
3 12:10 p.m., and the following proceedings were had:)

4 THE COURT: We're waiting on the jury panel.

5 MR. FELDMAN: They're out in the hall.

6 THE COURT: They are out in the hall?

7 MR. FELDMAN: Yes, sir.

8 THE COURT: Okay.

9 MS. WILSON: Your Honor, may we approach?

10 THE COURT: Yes. First, before y'all do that, do
11 you request arraignment?

12 MR. FELDMAN: No, Your Honor.

13 THE COURT: Okay. Approach.

14 (There was an off-the-record bench conference.)

15 (Said bench conference being concluded, the
16 following proceedings were had:)

17 THE COURT: All right. Bring the jury in, please.

18 (Whereupon, the jury panel enters the courtroom at
19 approximately 12:10 p.m.)

20 THE COURT: Good morning, ladies and gentlemen.

21 My name is Danny Pieper. I'm a resident judge of
22 the Ninth Circuit which includes Charleston and Berkeley
23 County. It's a pleasure being here with you for this term
24 of court.

25 Can everyone hear me okay? All right. It's real

1 important that you can hear all of my questions.

2 I'll do the best I can, and I know it's getting
3 around lunchtime, so I'll do the best I can to get you out
4 of here at least for lunch, and the rest of you will be
5 probably sent back downstairs temporarily until we make
6 sure all our juries have been drawn.

7 All right. Is the state ready to proceed?

8 MS. WILSON: Yes, sir.

9 THE COURT: The defense ready to proceed?

10 MR. FELDMAN: Ready, Your Honor.

11 THE COURT: All right. Go ahead and call your
12 case and the charge, please.

13 MS. WILSON: Your Honor, this is *The State of*
14 *South Carolina vs. Michael Jeter*. It's indictment number
15 2005-GS-10-8240, an indictment for murder.

16 THE COURT: All right. Now, ladies and gentlemen,
17 again I'm going to ask some questions. The point of these
18 questions is to make sure that everyone involved on each
19 side of the case has a fair and impartial trial.

20 Some of these questions may ask about experiences
21 you've had in life or relationships that you might have.
22 That doesn't disqualify you. It's just information that we
23 need to know. What we're really asking is whether some
24 experience or relationship in your life would affect your
25 ability to give everyone a fair and impartial trial in any

1 sort of way. So please pay close attention to the
2 questions.

3 First, I'll ask that the defendant please stand.
4 (The defendant complies.)

5 THE COURT: Face the panel.

6 (The defendant complies.)

7 THE COURT: Are any of you related by blood or
8 connected by marriage or have any social, business, or
9 professional relationship with Mr. Michael Jeter?

10 (There was no response.)

11 THE COURT: Thank you. Please be seated.

12 If defense counsel would please introduce yourself
13 to the panel.

14 MR. FELDMAN: Thank you, Your Honor.

15 Ladies and gentlemen, my name is Stanley Feldman.
16 I am a sole practitioner with offices at 3 Wesley Drive
17 which is just West of the Ashley.

18 THE COURT: Are any of you related by blood,
19 connected by marriage, or have any social, business, or
20 professional relationship with Mr. Stanley Feldman or any
21 dealings connected with his law office? Please stand.

22 It's hard for me to see your hands. So I'll
23 always need you to stand, please.

24 Yes, ma'am. Your name and number.

25 A POTENTIAL JUROR: My name is Lori Lyon, number

1 314, and we have a working relationship with my husband.

2 THE COURT: You're actually employed by his
3 office?

4 MS. LYON: No, no. He's representing my husband.

5 THE COURT: Okay. So he represents you. Would
6 that in any way affect your ability to give everyone in
7 this case a fair and impartial trial?

8 MS. LYON: Not in a murder case, I guess.

9 THE COURT: I don't need you to -- I can't have
10 you guess.

11 MS. LYON: No.

12 THE COURT: Would the fact that he's representing
13 you affect your ability to hear everything in this case and
14 give both sides a fair and impartial trial?

15 MS. LYON: No.

16 THE COURT: It will not affect you?

17 MS. LYON: No.

18 THE COURT: Okay. Thank you.

19 Anyone else?

20 A POTENTIAL JUROR: I'm number 29, Renee
21 Brockington. I've known Stanley my whole life.

22 THE COURT: Would that in any way affect your
23 ability to give everyone in this case a fair and impartial
24 trial?

25 MS. BROCKINGTON: No.

1 THE COURT: Thank you, ma'am.

2 Anyone else?

3 (There was no response.)

4 THE COURT: Prosecuting the case on behalf of the
5 state is the Solicitor's Office. If you'll please
6 introduce yourself to the panel.

7 MS. WILSON: Thank you, Your Honor.

8 My name is Scarlett Wilson. I'm the chief deputy
9 solicitor here in the Ninth Circuit. This is Stephanie
10 Bianco. Together we'll be trying the case for the state.

11 THE COURT: Are any of you related by blood,
12 connected by marriage, or have any social, business, or
13 professional relationship with Ms. Wilson or Ms. Bianco or
14 any dealings or connections with the Solicitor's Office?
15 If so, please stand.

16 (There was no response.)

17 THE COURT: Anyone?

18 (There was no response.)

19 THE COURT: Thank you. At this time I'm going to
20 call a list of names of individuals who may or may not
21 testify in this case. If any of you have any relationship
22 by blood, marriage, social, business, or otherwise, please
23 stand:

24 Jean Jacques; Rayshawn Green; Patricia Rodriquez;
25 Aldrensa Brown; Ronnie Royal; Robert Horley; Chris White;

1 James Michael; Randy Green; Randell Green; Devon Johnson;
2 Jennie Mitchell; Justin Lemon; Victoria Martin; Sean
3 Washington; Herbert Bowen;

4 Detective Gary Skaggs, Dorchester County Sheriff's
5 Office; Denice Catlett of the Charleston County Sheriff's
6 Office; David Owens of that office; Sergeant David
7 Willoughby of that office; Brandon Cuttino -- or Cuttino?
8 Is it Cuttino or Cuttino?

9 MS. WILSON: I'm not sure, Your Honor.

10 THE COURT: Cuttino. Detective Derrick Boyd of
11 the Charleston County Sheriff's Office; Detective Diane
12 Turner of that office; Detective Matthews; Lori Shaft of
13 that office;

14 Detective Mike Anderson of that office; Sergeant
15 Naomi Morris of that office; Detective Christian Bund of
16 that office; Deputy William Brindman of that office;

17 Deputy Anthony Hourn of that office; Detective
18 Donald Stanley of that office; Investigator Brent Roy of
19 that office; Investigator Cathy Gellman -- Gellman?

20 MS. WILSON: Gellman.

21 THE COURT: Gellman of that office; Officer Kinsey
22 of the North Charleston Police Department -- do you have
23 the officer's first name?

24 MS. WILSON: I don't, Your Honor.

25 THE COURT: Investigator Al Hallman of that

1 department; Bruce Barrus of that department;

2 Hugh Tang of SLED; Dr. Presnell of MUSC; Ray
3 Wooten, the Coroner; and Keith Hair of the Solicitor's
4 Office.

5 Does anyone have any relationship by blood,
6 marriage, social, business, or any other type of dealings
7 or connection to any of those individuals?

8 A POTENTIAL JUROR: I recognize one.

9 THE COURT: I need you to please stand. Give me
10 your name and number first.

11 A POTENTIAL JUROR: My name is Mary Cuttino. I'm
12 160 (sic). Brandon Cuttino is my son.

13 THE COURT: That's your son?

14 MS. MARY CUTTINO: Uh-huh.

15 THE COURT: Would the fact that he may testify in
16 this case affect your ability to give everyone ---

17 MS. MARY CUTTINO: No.

18 THE COURT: It would not affect you?

19 MS. MARY CUTTINO: No.

20 THE COURT: All right. Thank you, ma'am.

21 Does anyone else have any connection to any of
22 those individuals?

23 (There was no response.)

24 (There was off-the-record discussion by the Court
25 and the clerk.)

1 THE COURT: Ma'am, can I have your name again?
2 Can I have your name again, ma'am? Your name, please?

3 MS. MARY CUTTINO: Mary Cuttino.

4 THE COURT: You're number 60, ma'am.

5 MS. MARY CUTTINO: Okay.

6 THE COURT: Okay. Anyone else?

7 Any names I may have omitted, State?

8 MS. WILSON: No, sir.

9 THE COURT: Defense?

10 MR. FELDMAN: No, Your Honor.

11 THE COURT: All right. Were any of you a member
12 of the grand jury which returned the indictment in this
13 case?

14 (There was no response.)

15 THE COURT: Has any member of the panel expressed
16 or formed any opinion about this case or as to the guilt or
17 innocence of this defendant?

18 (There was no response.)

19 THE COURT: Does any member of the panel have any
20 bias or prejudice in connection with this case or any of
21 the individuals involved herein?

22 (There was no response.)

23 THE COURT: Have you or any member of your family
24 been the victim of or accused of a violent crime? And in
25 response to this question, ladies and gentlemen, if you'd

1 like to tell me at the front, you're welcome to do that.
2 You're welcome to come up front and do that. Anyone?

3 Do you wish to approach, sir?

4 THE BAILIFF: Number 124.

5 (The following on-the-record bench conference was
6 had in the presence of the jury panel but out of the
7 hearing of the jury panel:)

8 THE COURT: Your name and number, please.

9 A POTENTIAL JUROR: Colon Hampton, juror number
10 124.

11 THE COURT: Yes, sir.

12 MR. COLON HAMPTON: My brother was convicted
13 recently of assault and battery with intent to kill and
14 possession of a firearm.

15 THE COURT: Would that affect your ability to give
16 everyone in this case a fair and impartial trial?

17 MR. COLON HAMPTON: I would say that I don't know
18 for sure, but if this is the same prosecutor, then...

19 THE COURT: I can't hear you.

20 MR. COLON HAMPTON: I wouldn't know if -- I
21 wouldn't say for sure because I don't know if that's the
22 prosecutor, I mean, the prosecutor that prosecuted his case
23 or not.

24 THE COURT: So you do not think you could give
25 someone a fair trial?

1 MR. COLON HAMPTON: (Shakes head from side to
2 side.)

3 THE COURT: All right. I'll excuse you from this
4 case. Please be seated.

5 (Said bench conference being concluded, the
6 following proceedings were had:)

7 THE COURT: Next.

8 THE BAILIFF: Number one.

9 (The following on-the-record bench conference was
10 had in the presence of the jury panel but out of the
11 hearing of the jury panel:)

12 THE COURT: Your name and number, please?

13 A POTENTIAL JUROR: My name is Kandace Adams. My
14 number is one.

15 THE COURT: All right. Yes, ma'am.

16 MS. ADAMS: And years ago I was a rape victim.

17 THE COURT: Okay. Would that affect your ability
18 to hear everything in this case and give everyone a fair
19 and impartial trial?

20 MS. KANDACE ADAMS: No.

21 THE COURT: Thank you, ma'am.

22 (Said bench conference being concluded, the
23 following proceedings were had:)

24 THE COURT: Anyone else?

25 (There was no response.)

1 THE COURT: All right. Thank you.

2 Has anyone on the panel been involved in any other
3 case, as a witness or civil or criminal?

4 (There was no response.)

5 THE COURT: Does anyone on the panel have any
6 connection to law enforcement, whether through yourself,
7 through your family, relationship-wise, or prior
8 employment? Any type of connection to any law enforcement,
9 whether it be state, city, county, federal, or any other
10 type of law enforcement agency or entity?

11 Yes, sir. Your name and number.

12 A POTENTIAL JUROR: My name is Patrick Flood. My
13 number is 309.

14 THE COURT: And what is your connection?

15 MR. FLOOD: My brother-in-law is a federal Port
16 Authority enforcement officer.

17 THE COURT: Okay. Would that in any way affect
18 your ability to give everyone in this case a fair and
19 impartial trial?

20 MR. FLOOD: No, sir.

21 THE COURT: Thank you, sir.

22 Yes, ma'am. Your name and number.

23 A POTENTIAL JUROR: I'm Tammie Jones, number 152.
24 I work at Charleston Air Force Base at the special security
25 forces as a ---

1 THE COURT: Do you work with them?

2 MS. TAMMIE JONES: Yes, sir. Well, I don't work
3 directly with them. I just service the organization, and
4 it's law enforcement in that -- in that area. I don't get
5 involved with the officer work.

6 THE COURT: All right. Does that in any way
7 affect your ability to give everyone a fair and impartial
8 trial?

9 MS. TAMMIE JONES: No.

10 THE COURT: Thank you, ma'am.

11 Yes, sir.

12 A POTENTIAL JUROR: My name is Kevin Bliss, my
13 number is 24, and I have a cousin-in-law that's in the
14 police department.

15 THE COURT: Do you know which police department?

16 MR. BLISS: I believe it's Summerville.

17 THE COURT: All right. Would that in any way
18 affect your ability to give everyone a fair and impartial
19 trial?

20 MR. BLISS: No, sir.

21 THE COURT: Thank you.

22 A POTENTIAL JUROR: My number is 100. My name is
23 Joseph Free. My mother is retired from SLED, the Uniform
24 Crime Enforcement.

25 THE COURT: All right. Would that in any way

1 affect your ability to give everyone in this case a fair
2 and impartial trial?

3 MR. FREE: No.

4 THE COURT: Thank you, sir.

5 Yes, ma'am, your name and number.

6 A POTENTIAL JUROR: Mary Cuttino, 60. Brandon
7 Cuttino.

8 THE COURT: All right. Would that in any way
9 affect your ability ---

10 MS. MARY CUTTINO: No.

11 THE COURT: --- to give everyone a fair and
12 impartial trial?

13 MS. MARY CUTTINO: No.

14 THE COURT: Thank you, ma'am.

15 Yes, ma'am.

16 A POTENTIAL JUROR: Helen Green, number 118. My
17 husband is an officer of the North Charleston Police
18 Department.

19 THE COURT: Would that in any way affect your
20 ability to give everyone a fair and impartial trial?

21 MS. HELEN GREEN: No, it would not.

22 THE COURT: Thank you.

23 Yes, ma'am, your name and number.

24 A POTENTIAL JUROR: Sonya Floyd, number 94. My
25 husband is a Secret Service agent.

1 THE COURT: Does that in any way affect your
2 ability to give everyone in this case a fair and impartial
3 trial?

4 MS. FLOYD: No, sir.

5 THE COURT: Thank you, ma'am.

6 Anyone else?

7 (There was no response.)

8 THE COURT: Has anyone on the panel ever been
9 known by any other name or alias?

10 (There was no response.)

11 THE COURT: Has anyone on the panel received any
12 type of training or education in the area of law or law
13 enforcement? If so, please stand.

14 Yes.

15 A POTENTIAL JUROR: Kelly Homan, number 136. I
16 have a bachelor's degree in forensics.

17 THE COURT: Would that in any way affect your
18 ability to give everyone in this case a fair and impartial
19 trial?

20 MS. HOMAN: No, sir.

21 THE COURT: Thank you.

22 A POTENTIAL JUROR: My name is Patrick Flood,
23 number 309. When I was in college, I took some
24 Constitutional law classes and stuff like that.

25 THE COURT: All right. Would that in any way

1 affect your ability to give everyone a fair and impartial
2 trial?

3 MR. FLOOD: No.

4 THE COURT: Thank you.

5 Anyone else?

6 (There was no response.)

7 THE COURT: And I didn't ask, but that would also
8 include any type of family member that received any type of
9 training or education or involved in law or law
10 enforcement. Does anyone else need to stand in response to
11 that?

12 (There was no response.)

13 THE COURT: Is anyone enlisted in the Armed
14 Forces, including the Reserves and ROTC? If so, please
15 stand.

16 Yes, ma'am, your name and number.

17 A POTENTIAL JUROR: Kandace Adams, number one.

18 THE COURT: Connection?

19 MS. KANDACE ADAMS: I'm a chaplain in the Navy.

20 THE COURT: Would that in any way affect your
21 ability to give everyone in this case a fair and impartial
22 trial?

23 MS. KANDACE ADAMS: No.

24 THE COURT: Thank you.

25 Anyone else?

1 (There was no response.)

2 THE COURT: Has anyone previously served on any
3 type of jury in this court? Anyone?

4 (There was no response).

5 THE COURT: Is anyone familiar with the area of
6 West Montague in North Charleston or Sumner Avenue and Ruth
7 Drive in North Charleston? If so, please stand. Familiar
8 with or live around or you have family members that are in
9 that area?

10 Yes, ma'am.

11 A POTENTIAL JUROR: Angela Lawrence, 173. Yes. I
12 have a brother that lives over in that area.

13 THE COURT: Would that in any way affect your
14 ability to give everyone in this case a fair and impartial
15 trial?

16 MS. LAWRENCE: No.

17 THE COURT: Thank you.

18 Yes, ma'am.

19 A POTENTIAL JUROR: Helen Green, number 118. For
20 21 years I worked in that area.

21 THE COURT: Would that in any way affect your
22 ability to give everyone in this case a fair and impartial
23 trial?

24 MS. HELEN GREEN: No, it doesn't.

25 THE COURT: Yes, ma'am.

1 A POTENTIAL JUROR: Jamie Jenkins.

2 THE COURT: I can't hear you.

3 MS. JAMIE JENKINS: Jamie Jenkins, number 145. I
4 used to live there.

5 THE COURT: Would that in any way affect your
6 ability to give everyone in this case a fair and impartial
7 trial?

8 MS. JAMIE JENKINS: No, it would not.

9 THE COURT: Has anyone on the panel ever been in
10 -- I asked if you had any connection with law enforcement.
11 That would include assisting law enforcement in any way
12 whatsoever even though you were not technically employed by
13 law enforcement. Anyone?

14 (There was no response.)

15 A POTENTIAL JUROR: Excuse me. Timothy Trout,
16 246 (sic). Would that involve security work?

17 THE COURT: Any kind of connection.

18 MR. TROUT: Yeah, I've been in security.

19 THE COURT: For, like, a private company?

20 MR. TROUT: Yes.

21 THE COURT: All right. Would that in any way
22 affect your ability to give everyone in this case a fair
23 and impartial trial?

24 MR. TROUT: I don't think so. No, it would not.

25 THE COURT: Can I have your number again, please?

1 MR. TROUT: Two-four -- two-six-eight.

2 THE COURT: Thank you.

3 Does anyone on the panel have any type of -- know
4 of any reason why you cannot give everyone in this case a
5 fair and impartial trial whether it's some philosophical
6 position you take, some group you belong to, some moral or
7 religious position? Any type of information that I need to
8 know that would affect your ability to give everyone in
9 this case a fair and impartial trial?

10 (There was no response.)

11 THE COURT: Anyone?

12 (There was no response.)

13 THE COURT: Any objection to the clerk drawing the
14 jury? State?

15 MS. WILSON: No, sir.

16 THE COURT: Defense?

17 MR. FELDMAN: Your Honor, would the Court indulge
18 me? I think there's one I would like the Court to ask.

19 THE COURT: Okay.

20 MR. FELDMAN: Would the Court ask number 13,
21 please?

22 THE COURT: Okay.

23 Does anyone have any other type of relationship or
24 acquaintance with anyone else that has been called for jury
25 duty? Please stand.

1 Yes, sir, your name and number.

2 MR. ELLISON: 308, William Ellison. My
3 brother-in-law's sister.

4 THE COURT: Your brother-in-law's sister is
5 serving on the jury panel?

6 MR. ELLISON: Yeah.

7 THE COURT: And what's her name?

8 MR. ELLISON: Tammie Jones.

9 THE COURT: All right. Would that in any way
10 affect your ability to give everyone in this case a fair
11 and impartial trial?

12 MR. ELLISON: No.

13 THE COURT: Do you want to state your name and
14 number?

15 A POTENTIAL JUROR: Tammie Jones, 152.

16 THE COURT: That's your ---

17 MS. TAMMIE JONES: 152.

18 THE COURT: I'm sorry. What's your number?

19 MS. TAMMIE JONES: 152.

20 THE COURT: And you're related to him that way?

21 MS. TAMMIE JONES: Yes.

22 THE COURT: Would that in any way affect your
23 ability to give everyone a fair and impartial trial?

24 MS. TAMMIE JONES: No.

25 THE COURT: Thank you.

1 Any objection to the clerk drawing the jury?

2 MR. FELDMAN: No, Your Honor.

3 THE COURT: All right. Give us a jury, Mr. Clerk.

4 THE CLERK: Yes, Your Honor.

5 The strikes are five and ten.

6 Ladies and gentlemen, if I call your name, if
7 you'll please bring your belongings, come up to this
8 podium, turn and face the parties, and then I will direct
9 you.

10 Juror number 117, Donna Green.

11 (Black female approaches.)

12 THE COURT: What juror number?

13 THE CLERK: 117, Donna Green.

14 What say you for the state?

15 MS. WILSON: Please present Ms. Green.

16 THE CLERK: What say you for the defendant?

17 MR. FELDMAN: Please seat the juror.

18 THE CLERK: Ms. Green, please have a seat in the
19 jury-box. You've been selected as a juror in this case.

20 Juror number 141, Michael Jackson.

21 (White male approaches.)

22 THE CLERK: What say you for the state?

23 MS. WILSON: Please present Mr. Jackson.

24 THE CLERK: What say you for the defendant?

25 MR. FELDMAN: Please seat the juror.

1 THE CLERK: Mr. Jackson, please have a seat in the
2 jury-box. You've been selected as a juror in this case.

3 Juror number 321, Mark Schuster.

4 (White male approaches.)

5 THE CLERK: What say you for the state?

6 MS. WILSON: Please present Mr. Schuster.

7 THE CLERK: What say you for the defendant?

8 MR. FELDMAN: Please seat the juror.

9 THE CLERK: Mr. Schuster, please have a seat in
10 the jury-box. You've been selected as a juror in this
11 case.

12 Juror number 15, Rita Balliet. How do you
13 pronounce your name, again?

14 MS. BALLIET: Balliet.

15 THE CLERK: Balliet. Excuse me.

16 MS. WILSON: What number?

17 THE CLERK: Fifteen.

18 (White female approaches.)

19 THE CLERK: What say you for the state?

20 MS. WILSON: Please present Ms. Balliet.

21 THE CLERK: What say you for the defendant?

22 MR. FELDMAN: Please seat the juror.

23 THE CLERK: Ms. Balliet, please have a seat in the
24 jury-box. You've been selected as a juror in this case.

25 Juror number 100, Joseph Free.

1 (White male approaches.)

2 THE CLERK: What say you for the state?

3 MS. WILSON: Please present Mr. Free.

4 THE CLERK: What say you for the defendant?

5 MR. FELDMAN: Please excuse Mr. Free.

6 THE CLERK: Mr. Free, please have a seat back in
7 the audience. You've been excused from the trial of this
8 case.

9 Juror number 152, Tammie Jones.

10 (White female approaches.)

11 THE CLERK: What say you for the state?

12 MS. WILSON: Please present Ms. Jones.

13 THE CLERK: What say you for the defendant?

14 MR. FELDMAN: Please excuse Ms. Jones.

15 THE CLERK: Ms. Jones, please have a seat back in
16 the audience. You've been excused from the trial of this
17 case.

18 Juror number 19, Sheila Bellah.

19 (White female approaches.)

20 THE CLERK: What say you for the state?

21 MS. WILSON: Please present Ms. Bellah.

22 THE CLERK: What say you for the defendant?

23 MR. FELDMAN: Please seat the juror.

24 THE CLERK: Ms. Bellah, please have a seat in the
25 jury-box. You've been selected as a juror in this case.

1 Juror number 121, Tamatha Greene.
2 (Black female approaches.)
3 THE CLERK: What say you for the state?
4 MS. WILSON: Please present Ms. Greene.
5 THE CLERK: What say you for the defendant?
6 MR. FELDMAN: Please seat the juror.
7 THE CLERK: Ms. Greene, please have a seat in the
8 jury-box. You've been selected as a juror in this case.
9 Juror number 89, Thomas Fath.
10 (White male approaches.)
11 THE CLERK: What say you for the state?
12 MS. WILSON: Please present Mr. Fath.
13 THE CLERK: What say you for the defendant?
14 MR. FELDMAN: Please seat the juror.
15 THE CLERK: Mr. Fath, please have a seat in the
16 jury-box. You've been selected as a juror in this case.
17 Juror number 145, Jamie Jenkins.
18 (Black female approaches.)
19 THE CLERK: What say you for the state?
20 MS. WILSON: Please excuse Ms. Jenkins.
21 THE CLERK: Ms. Jenkins, please have a seat in the
22 audience. You've been excused from the trial of this case.
23 Juror number 314, Lori Lyon.
24 (White female approaches.)
25 THE CLERK: What say you for the state?

1 MS. WILSON: Please excuse the juror.

2 THE CLERK: Ms. Lyon, please have a seat back in
3 the audience. You've been excused from the trial of this
4 case.

5 That's two strikes for the state.

6 Juror number 24, Kevin Bliss.

7 (White male approaches.)

8 THE CLERK: What say you for the state?

9 MS. WILSON: Please present Mr. Bliss.

10 THE CLERK: What say you for the defendant?

11 MR. FELDMAN: Please excuse the juror.

12 THE CLERK: Mr. Bliss, please have a seat back in
13 the audience. You've been excused from the trial of this
14 case.

15 Three strikes for the defendant.

16 Juror number 20, Beverly Benton.

17 (White female approaches.)

18 THE CLERK: What say you for the state?

19 MS. WILSON: Please present Ms. Benton.

20 THE CLERK: What say you for the defendant?

21 MR. FELDMAN: Please seat the juror.

22 THE CLERK: Ms. Benton, please have a seat in the
23 jury-box. You've been selected as a juror in this case.

24 Juror number 207, Gayle Nixon.

25 (White female approaches.)

1 THE CLERK: What say you for the state?

2 MS. WILSON: Please present Ms. Nixon.

3 THE CLERK: What say you for the defendant?

4 MR. FELDMAN: Please seat the juror.

5 THE CLERK: Ms. Nixon, please have a seat in the
6 jury-box. You've been selected as a juror in this case.

7 Juror 308, William Ellison.

8 (White male approaches.)

9 THE CLERK: What say you for the state?

10 MS. WILSON: Please present Mr. Ellison.

11 THE CLERK: What say you for the defendant?

12 MR. FELDMAN: Please seat the juror.

13 THE CLERK: Mr. Ellison, please have a seat in the
14 jury-box. You've been selected as a juror in this case.

15 Juror number 234, Martha Sampson.

16 (White female approaches.)

17 THE CLERK: What say you for the state?

18 MS. WILSON: Please present Ms. Sampson.

19 THE CLERK: What say you for the defendant?

20 MR. FELDMAN: Please seat the juror.

21 THE CLERK: Ms. Sampson, please have a seat in the
22 jury-box. You're been selected as a juror in this case.

23 Juror number 33, Gail Brown.

24 (White female approaches.)

25 THE CLERK: What say you for the state?

1 MS. WILSON: Please present Ms. Brown.

2 THE CLERK: What say you for the defendant?

3 MR. FELDMAN: Please excuse the juror.

4 THE CLERK: Ms. Brown, please have a seat back in
5 the audience. You've been excused from the trial of this
6 case.

7 Juror number 102, Debra Gallagher.

8 (White female approaches.)

9 THE CLERK: What say you for the state?

10 MS. WILSON: Please present Ms. Gallagher.

11 THE CLERK: What say you for the defendant?

12 MR. FELDMAN: Please excuse the juror.

13 THE CLERK: Ms. Gallagher, please have a seat back
14 in the audience. You've been excused from the trial of
15 this case.

16 That's five strikes for the defendant.

17 Juror number 136, Kelly Homan.

18 (White female approaches.)

19 THE CLERK: What say you for the state?

20 MS. WILSON: Please present Ms. Homan.

21 THE CLERK: What say you for the defendant?

22 MR. FELDMAN: Please excuse the juror.

23 THE CLERK: Ms. Homan, please have a seat back in
24 the audience. You've been excused from the trial of this
25 case.

1 Juror number 37, Viola Bryant.

2 (Black female approaches.)

3 THE CLERK: What say you for the state?

4 MS. WILSON: Please present Ms. Bryant.

5 THE CLERK: What say you for the defendant?

6 MR. FELDMAN: Please seat the juror.

7 THE CLERK: Ms. Bryant, please have a seat in the
8 jury-box. You've been selected as a juror in this case.

9 Your Honor, one alternate or two?

10 THE COURT: Two.

11 THE CLERK: Now picking for the first alternate.
12 The strikes are one and two.

13 Juror number 218, Mary Ann Potencot.

14 (White female approaches.)

15 THE CLERK: What say you for the state?

16 MS. WILSON: Please present the juror.

17 THE CLERK: What say you for the defendant?

18 MR. FELDMAN: Please seat the juror.

19 THE CLERK: Madam Juror, please have a seat in the
20 jury-box. You've been selected as a juror in this case.

21 Picking for second alternate. Juror number 11,
22 Neva Atkinson.

23 (White female approaches.)

24 THE CLERK: What say you for the state?

25 MS. WILSON: Please present Ms. Atkinson.

1 THE CLERK: What say you for the defendant?

2 MR. FELDMAN: Please excuse the juror.

3 THE CLERK: Ms. Atkinson, please have a seat back
4 in the audience. You've been excused from the trial of
5 this case.

6 Juror number one, Kandace Adams.

7 (White female approaches.)

8 THE CLERK: What say you for the state?

9 MS. WILSON: Please present Ms. Adams.

10 THE CLERK: What say you for the defendant?

11 MR. FELDMAN: Please excuse the juror.

12 THE CLERK: Ms. Adams, please have a seat back in
13 the audience. You've been excused from the trial of this
14 case..

15 Juror number 58, Janie Curnell.

16 (Black female approaches.)

17 THE CLERK: What say you for the state?

18 MS. WILSON: Please present Ms. Curnell.

19 THE CLERK: Any challenge from the defendant?

20 MR. FELDMAN: No. No, sir.

21 THE CLERK: Ms. Curnell, please have a seat in the
22 jury-box. You've been selected as a juror in this case.

23 Your Honor, the jury has been selected and are
24 seated.

25 THE COURT: Any matters or motions pertaining to

1 the jury selection process or as to the selected jurors?
2 State?

3 MS. WILSON: None from the state.

4 MR. FELDMAN: No, Your Honor. Thank you.

5 THE COURT: All right. All right.

6 Ladies and gentlemen, we were just informed that
7 the rest of you will not be needed elsewhere in the
8 building so you may be excused, but if you'll please call
9 back in after 6:00 p.m. for any instructions about
10 tomorrow. Make sure you have that caller number before you
11 leave. Call back after 6:00 p.m.

12 Thank you very much and have a good day.

13 (Whereupon, the jury panel is excused at
14 approximately 12:48 p.m.)

15 THE COURT: All right. Ladies and gentlemen,
16 those of you on the jury -- Mr. Schuster, I'm going to
17 designate you as the foreperson, and when we actually
18 reconvene the trial you'll sit in this first seat, please.

19 At this time I'm going to send you to the jury
20 room so we can coordinate the schedule and see when we
21 might expect to start, as well as lunch break, etc., so if
22 you'll go to the jury room at this point.

23 Do not discuss this case in any way whatsoever.

24 Thank you very much. We'll be with you momentarily.

25 (Whereupon, the jury goes to the jury room at

1 (The within matter came before the Court on June 7,
2 2004)

3 THE COURT: Good morning, ladies and gentlemen, and
4 thank you so much for being here.

5 I know your process already this morning has been such
6 that you've been at it a while, so I just want to reiter-
7 ate what Judge Young said to you this morning, and that
8 is, thank you all so very much for being here.

9 Quite frankly, if you were not here, there certainly
10 would be no reason for any of us to be here because we are
11 a citizen-based judicial system in our country, and I am
12 so grateful that you are here.

13 What we are about here this week, quite frankly, ladies
14 and gentlemen, is a resolution of disputes, be they crimi-
15 nal matters or civil matters, and in the case that we are
16 about to try there is a dispute between the State of South
17 Carolina on the one hand and a citizen on the other hand,
18 and you are needed to help resolve that dispute.

19 So I am truly so grateful for your being here this
20 morning and giving of your very, very precious time, which
21 I am well aware of that gift and grateful to you for it.

22 Ladies and gentlemen, in just a moment Ms. Wilson is
23 going to be calling the first case for trial that we have
24 this week, and then we'll get right into this process.

25 Ms. Wilson, are you ready to call your first case?

8

1 SOLICITOR: Yes, ma'am, Your Honor.

2 THE COURT: Very well.

3 SOLICITOR: Your Honor, the State calls the case of
4 2001 GS 10 1736, State versus Jalal P. Beyah, indictment
5 for attempted armed robbery.

6 Indictment number 2001 GS 10 1735, State versus Jalal
7 Faheem Beyah, indictment for armed robbery.

8 Indictment number 2001 GS 10 1731, State versus Jalal
9 P. Beyah, indictment for carrying.

10 Indictment 2001 GS 10 1737, State versus Jalal Faheem
11 Beyah, indictment for kidnapping.

12 Indictment 2001 GS 10 1737, State versus Jalal Beyah,
13 indictment for kidnapping.

14 And Indictment 2001 GS 10 1718, State versus Jalal
15 Faheem Beyah, indictment for possession of a knife during
16 the commission or attempt to commit a violent crime.

17 Thank you.

18 THE COURT: Thank you very much.

19 Now, ladies and gentlemen, what has just happened is
20 that Ms. Wilson on behalf of the State of South Carolina --
21 and criminal cases in South Carolina are prosecuted or pre-
22 sented on behalf of the State by the Solicitor, and Ms. Wilson
23 of course, is a Deputy Solicitor, and she's just called the
24 case for trial.

25 Let me tell you that to even and every one of these

9

1 charges Mr. Beyah has pled not guilty, and what that means
2 is that that places upon the State of South Carolina the
3 burden of proving each and every allegation of each and
4 every indictment beyond a reasonable doubt before Mr. Beyah
5 can be found guilty of any or all of these charges.

6 Now, ladies and gentlemen, in a moment I am going to
7 be reading to you some of the allegations of these indict-
8 ments, and the reason that I'm going to be doing that is
9 that I'm going to want to find out whether or not any of you
10 know or think you may know, or have heard or think you may
11 have heard, anything about this matter.

12 And to do that, Ms. Wilson, either you can do that or
13 I'll do it, but I need them in order to do that.

14 Mr. Young, you've had an opportunity to review them?

15 MR. YOUNG: Yes, Your Honor.

16 THE COURT: Very well. Now, ladies and gentlemen,
17 again, even before I read you some of these allegations, I
18 would tell you that I'm reading these allegations from
19 pieces of paper called indictments.

20 And an indictment is simply a charging document. It
21 is simply the piece of paper that is used to notify a
22 citizen that the State of South Carolina believes that they
23 have violated a criminal law of the State of South Carolina.

24 It is not evidence of anything, and it is simply the
25 notifying document, and so it's important that you know that.

10

1 And I will reiterate that to these allegations that
2 Mr. Beyah has pled not guilty.

3 Now, ladies and gentlemen, I'm going to be reading to
4 you an indictment which is numbered, for the record, 2001
5 GS 10 1733, and it says in part that in Charleston County,
6 on or about the 14th day of September, 2000, that Jalal F.
7 Beyah knowingly and wilfully did take a motor vehicle, to
8 wit, a 1997 Honda Accord, from Reed Messer by force and
9 intimidation, while the victim was then operating and/or in
10 the said vehicle.

11 And then it goes on to say that it's a violation of
12 the law of the State of South Carolina.

13 Now, Indictment 2001 GS 10 1735 says, in part, that
14 in Charleston County on or about the 14th day of September,
15 2000, Jalal F. Beyah knowingly, wilfully and feloniously
16 did take approximately Two Hundred Dollars in U. S. currency
17 from the presence of Reed Messer by means of force or in-
18 timidation, and while armed with a deadly weapon; to wit,
19 a knife, in violation of the law and statutory provisions
20 cited.

21 And then Indictment 2001 GS 10 1736 says, in part,
22 that in Charleston County on or about the 14th day of Septem-
23 ber, 2000, Jalal F. Beyah knowingly, wilfully and felon-
24 iously did attempt to take goods and money from the person
25 or presence of Marisa Raymond by means of force or

11

1 intimidation, and while armed with a deadly weapon; to wit,
2 a knife, in violation of the law and the citation of the
3 law is given.

4 And then 2001 GS 10 1734 says, in part, that in
5 Charleston County on or about September 14, 2000, Jalal
6 Paheem Beyah knowingly, wilfully and unlawfully did seize,
7 confine or kidnap Reed Messer, without authority of law.
8 The statutory provisions are cited.

9 And Indictment 2001 GS 10 1737 says, in part, that in
10 Charleston County on or about the 14th day of September,
11 2000, Jalal Paheem Beyah knowingly, wilfully and unlawfully
12 did seize, confine or kidnap Marisa Raymond without authority
13 of law, and again the statutory provisions are cited.

14 And then Indictment 2001 GS 10 1738 says, in part,
15 that in Charleston County on or about the 14th day of Sep-
16 tember, 2000, Jalal Paheem Beyah knowingly and wilfully
17 did possess or visibly display a knife during the commission
18 or attempted commission of a violent crime; to wit, he
19 possessed and used a knife during the commission of an armed
20 robbery and carjacking, in violation again of the statutory
21 provisions that are given.

22 And, again, as to each and every allegation in each and
23 every one of the indictments, Mr. Beyah has pled not
24 guilty.

25 The reason that I read the indictments to you, ladies

12

1 and gentlemen, is to find out whether or not any of you may
2 know or think you may know, or if any of you have heard or
3 think you may have heard, anything about these allegations.

4 If so, if you think you've heard, if you think you
5 know anything about these allegations, please stand at this
6 time.

7 (No response from jurors)

8 THE COURT: And I find no one standing.

9 Now, ladies and gentlemen, present on behalf of the
10 State is Ms. Scarlett Wilson. This is Ms. Wilson.

11 And, Ms. Wilson, if you would introduce who will be
12 assisting you and the members of the Solicitor's Office
13 here in the office, I would sure appreciate it.

14 MS. WILSON: Yes, marm. Paul Thurmond, who is also
15 with our office -- together we will be trying this case.

16 During the trial, you may see a detective with the
17 Charleston County Police Department also sitting at the
18 table.

19 I'm going to read through the names of other attorneys
20 in our office now.

21 The Solicitor is Ralph Hoisington. Mark Bourdon is
22 with our office. Jennifer Burny, Heyward Carter, Sarah
23 Cobb, Bruce DuRant, Beth Delontay, Charlotte Goodrich, Amy
24 Harrell, Debbie Herring Lash, Henry Leventis, Amy Meyer,
25 Doug Novak, Joyce Sanders, Linda Seabrook, Abigail Walsh,
13

1 Burns Westmore, Nathan Williams and Shannon Wright.
2 THE COURT: Thank you, Ms. Wilson.
3 With regards to each and every one of those individuals,
4 I would ask this question of you.
5 Are you related by blood or marriage or acquainted
6 with any of those individuals that Ms. Wilson just men-
7 tioned, to include Mr. Thurmond and Ms. Wilson as well?
8 Yes, sir. Tell me your name, first of all.
9 JUROR: Matt Goodrich.
10 THE COURT: Mr. Goodrich, I want you just to answer my
11 question. I don't need any more information than I need. All
12 right?
13 And I give you that instruction for a particular reason.
14 First of all, tell me who you know.
15 JUROR: Charlotte Goodrich.
16 THE COURT: You all have the same last name. Are you
17 married?
18 JUROR: We are married.
19 THE COURT: You are married. Very well, Mr. Goodrich.
20 Mr. Goodrich, because of that relationship I am going to
21 excuse you from the service on this particular jury, and I
22 know that there are civil matters that are being tried
23 this week..
24 I quite frankly think that's more appropriate for you
25 to be on a civil jury, and let me see if I can get some scoop

14

2

1 about when they're going to be selecting the next civil
2 jury.
3 (Brief pause in the proceeding)
4 We're going to get that information for you.
5 CLERK: Send him next door to the civil and they
6 are picking a jury right after we are, Your Honor.
7 (Juror excused to another Courtroom)
8 THE COURT: Now, anyone else? Yes, sir, tell me
9 your name.
10 JUROR: Kenneth Buhle, Juror number 18.
11 THE COURT: Yes, sir, and tell me who you know.
12 JUROR: Debbie Herring Lash.
13 THE COURT: And do you know her in a professional capac-
14 ity or more as an acquaintance or a friend?
15 JUROR: Professional.
16 THE COURT: In her professional capacity. All right.
17 And is it as a result of her employment as a Solicitor or
18 Assistant Solicitor?
19 JUROR: It is.
20 THE COURT: And is the matter ongoing or is the matter
21 in the past?
22 JUROR: Past.
23 THE COURT: In the past. How long in the past?
24 JUROR: Oh, probably four -- a minimum, four, five
25 years ago.

15

1 THE COURT: Four or five years in the past.
2 As a result of that experience, do you believe that
3 that experience might or would, in any regard, in any re-
4 gard, interfere with your ability to be completely fair and
5 impartial both to the State as well as to Mr. Beyah?
6 JUROR: Not at all.
7 THE COURT: You can set that experience completely
8 aside and try this case based on the evidence in this Court-
9 room?
10 JUROR: Absolutely.
11 THE COURT: Thank you so much. Please stay with us.
12 Now, yes, tell me your name.
13 JUROR: Anthony Bartelme, Number 8.
14 THE COURT: Yes, sir, Mr. Bartelme, tell me who you
15 know.
16 JUROR: I'm acquainted with Ralph Hoisington, Debbie
17 Herring Lash.
18 THE COURT: I ask ask of you, do you know each of them
19 -- and you may need to answer this separately, but do you
20 know them in their professional capacity or more of a friend-
21 ship or acquaintance?
22 JUROR: Professional.
23 THE COURT: Professional. Is it a result of a matter
24 which is currently ongoing or in the past?
25 JUROR: In the past.

16

1 THE COURT: In the past. How far in the past?
2 JUROR: Ranging from a few weeks to a few years.
3 THE COURT: A few weeks to a few years. All right.
4 And as a result of that experience, do you believe that
5 that might or could in any regard, in any regard, interfere
6 with your ability to be completely fair and impartial both
7 to the State as well as to Mr. Beyah?
8 JUROR: Would have no effect, no.
9 THE COURT: You can set that experience or those experi-
10 ences aside, try this case based on what you hear in this
11 Courtroom?
12 JUROR: Absolutely.
13 THE COURT: Thank you, please stay with us.
14 Now, ladies and gentlemen, let me define the term
15 acquaintance with you to be sure that I'm clear with you,
16 because I use a very general definition of the term acquainted
17 with because, you see, I'm trying to find out if you have
18 any connection with the folks that I will be asking you
19 about at all.
20 For example, you may have gone to school with someone
21 that I'll ask you about twenty years ago and you have not
22 seen them in twenty years.
23 However, you know that you went to school with them
24 twenty years ago, and you remember that. You just have not
25 seen them in twenty years.

17

6096

1 Believe it or not, that relationship would be encom-
2 passed within my definition of the term acquainted with.
3 As a further example, it might be that you work at
4 the same location as someone whose name I mention, and
5 you don't know them, don't go to lunch with them, but maybe
6 you wave at them across the parking lot, and you know that
7 you work in the same location with this individual.
8 That relationship, as limited as it is, would be encom-
9 passed within my definition of acquainted with.
10 And the reason for that, again, is that I'm trying to
11 find out if you have any connection whatsoever with these
12 folks.
13 With the benefit of that definition, which I know might
14 not be what you would typically consider as being the defi-
15 nition of acquainted with, I would ask if you are related by
16 blood or marriage or acquainted with any of the individuals
17 that Ms. Wilson just mentioned?
18 If so, please stand at this time. For me, that
19 definition will apply throughout the rest of this questioning
20 by me as well.
21 (No response from jurors)
22 Now, ladies and gentlemen, also present with us today is
23 Mr. Jalal F. Beyah. Mr. Beyah, will you stand
24 and face the jury panel?
25 (Defendant standing before the jury)

18

1 Thank you so much, Mr. Beyah, and you may be seated.
2 And I'd ask whether or not any members of our jury panel
3 are related by blood or marriage or acquainted with Mr. Jalal
4 F. Beyah? If so, please stand.
5 I hope I'm pronouncing that correctly. I think that's
6 -- Mr. Young, Mr. Beyah, is that correct? Beyah?
7 (Defendant pronouncing his name)
8 THE COURT: Thank you so much. Say it one more time.
9 (Defendant pronouncing his name)
10 THE COURT: If I mess it up one more time, you feel
11 free to correct me.
12 Now, Mr. Beyah -- anyone that's related by blood or
13 marriage or acquainted with Mr. Beyah, please stand at this
14 time?
15 (No response)
16 And I find no one standing.
17 And Mr. Beyah is represented by Mr. Boyd Young, and
18 this is Mr. Young, and if you would introduce to me who is
19 going to be assisting you and also the members of your
20 office, Mr. Young?
21 MR. YOUNG: Good morning. My name is Boyd Young, and
22 I am one of Mr. Beyah's attorneys.
23 MS. JENKINS: My name is Martha Kent Jenkins, and I
24 also represent Mr. Beyah.
25 Other attorneys in our office are Jennifer (inaudible),
19

1 Shawn Butler, Rhett Dunaway, Martha Dicus, Rodney Davis,
2 Melissa Orrilla, Janelle Farrera, Danny Prinner,
3 David Holcomb, Doug Smith, Mark Moore, Laurie Proctor,
4 Mary Ellen Rankin, Harry Hancock and Karen Worthy.
5 THE COURT: Thank you so much, and I ask if you are
6 related by blood or marriage or acquainted with any of the
7 individuals that Ms. Jenkins mentioned, or Ms. Jenkins or Mr.
8 Young? If so, please stand.
9 Your name for the record?
10 JUROR: Kenneth Buhle, Number 18.
11 THE COURT: And, Mr. Buhle, tell me who you know?
12 JUROR: Laurie Proctor.
13 THE COURT: And I would ask, do you know Ms. Proctor
14 in her professional capacity or more of a personal relation-
15 ship?
16 JUROR: Professional.
17 THE COURT: In her professional capacity. Is it a re-
18 sult of the matter you mentioned earlier that that is how
19 you knew folks in the Solicitor's Office?
20 JUROR: Yes.
21 THE COURT: And that was about four or five years ago?
22 JUROR: Yes, ma'am.
23 THE COURT: As a result of that experience, do you
24 believe that that might or could in any regard in any way
25 interfere with your ability to be completely fair and impartial
20

1 as to the State as well as Mr. Beyah?
2 JUROR: No, ma'am.
3 THE COURT: Thank you so much, and please stay with
4 us.
5 Now, ladies and gentlemen, I have some additional
6 questions to ask of you, and in a moment I'm going to be
7 reading to you a list of potential witnesses, and as to each
8 and every one of these potential witnesses the question
9 is, are you related by blood or marriage or acquainted with
10 any of these individuals?
11 I'm going to go over the list with you now. If any of
12 these individuals happen to be in the Courtroom, if you
13 would please -- as your name is called, please stand and
14 face our jury panel. That will allow our panel to put a
15 face perhaps with a name.
16 Dr. Jason O'Dell
17 Richard Burkhardt
18 Ed Gardner
19 George Dawson
20 Jack Weiss
21 Katherine Butler
22 Kalisha Knutsen
23 Shane Lafromboise
24 Dr. Russ Chaplin
25 Corporal Jones
21

1 Ed Bates
2 Janice Nguyen
3 Marisa Raymond
4 Reed Messer
5 Dr. Diane Lowndes
6 Robert Reaves
7 Russ Munn, Jr.
8 Bernadette Dewitt
9 Are you related by blood or marriage or acquainted with
10 any of those individuals? If so, please stand at this
11 time.
12 (No response from jurors)
13 And I find no one standing.
14 Now, all right, ladies and gentlemen, have you or any
15 member of your family ever had criminal charges handled by
16 the Charleston County Solicitor's Office? If so, please
17 stand at this time.
18 (No response)
19 And I find no one standing.
20 Have you, your relatives or close personal friends --
21 and by close personal friend, someone that you consider to
22 be as close as a family member or nearly as close as a
23 family member -- have you, your relatives or close friends
24 had any contact with law enforcement officials that might
25 affect your opinion of law enforcement? If so, please stand.

1 the Beyah Family? If so, please stand.
2 (No response)
3 And I find no one standing.
4 Now, ladies and gentlemen, are you a former law en-
5 forcement employee? Are you a former law enforcement em-
6 ployee?
7 You're so popular. Please tell us for the record what
8 your name is?
9 JUROR: Kenneth Buhle, Number 18.
10 THE COURT: Yes, sir, Mr. Buhle. You are not a law
11 enforcement officer apparently now?
12 JUROR: I'm not.
13 THE COURT: How long ago in the past?
14 JUROR: If you count overseas time, one year, but I've
15 been out of Charleston County law enforcement for just over
16 three years.
17 THE COURT: All right, and you are no longer employed
18 with law enforcement?
19 JUROR: I am not, no.
20 THE COURT: As a result of that employment, might that --
21 could that interfere with your ability to be completely fair
22 and impartial both to the State as well as to Mr. Beyah?
23 JUROR: Not at all.
24 THE COURT: Thank you so much. Please stay with us.
25 Now, let me ask you this question. When you were

1 (No response)
2 And I find no one standing.
3 Have you or any member of your family -- I've asked
4 that one. Let me skip along.
5 Is there anyone, any member of our jury panel, who
6 holds religious, moral, ethical or philosophical
7 beliefs that would prevent you from being able to sit on a
8 jury in this case or sitting in judgment of your fellow human
9 beings in a criminal case? If so, please stand at this
10 time.
11 (No response)
12 And I find no one standing.
13 Does any member of our jury panel have any belief what-
14 soever which would prevent you from being a fair and im-
15 partial juror to both the State and to Mr. Beyah? If so,
16 please stand.
17 (No response)
18 And I find no one standing.
19 Does any member of our jury panel have any business
20 or personal relationship with the owners, operators or em-
21 ployees of Wally's Fish Market which is located on Spring
22 Street? If so, please stand at this time.
23 (No response)
24 Does any member -- and I find no one standing.
25 Does any member of our jury panel know any member of
23

1 employed in Charleston County, it's been how many years
2 ago?
3 JUROR: I was employed with North Charleston and left
4 in 2001, and I was with Charleston County for nine years prior
5 to that.
6 THE COURT: Thank you very much. You were with the
7 Sheriff's Department?
8 JUROR: Yes, ma'am.
9 THE COURT: Are any members of your immediate family
10 employed by law enforcement agencies? Any members of your
11 immediate family employed by law enforcement agencies?
12 (No response)
13 I find no one standing.
14 Do you belong to or do you contribute, do you give
15 money to any civic groups such as Mothers Against Drunk Driv-
16 ing, MADD, People against Rape, PAR, Citizens Advocating
17 Decency and Return to Ethics, CADRE, or Parents Empowered
18 to Save Teens, PEST, or Citizens Against Violent Crime, CAVE?
19 If so, please stand.
20 (No response)
21 And I find no one standing.
22 Have you been the victim of a -- ladies and gentlemen,
23 I'm going to ask the next three questions together, so
24 please don't respond to any of them until I've asked all
25 three.
24

1 three.

2 The first question, have you been the victim of a
3 crime of violence in the last five years?

4 Have any of your close personal friends or close rela-
5 tives been the victim or victims of a crime of violence in
6 the last five years?

7 Next question I would ask, do you have any particular
8 opinions or feelings about the crimes of armed robbery,
9 attempted armed robbery, carjacking, kidnapping or possession
10 of a weapon during a violent crime which would make it
11 difficult for you to serve on a jury where a Defendant or
12 where a person is charged with these crimes?

13 If you need to respond to any of those questions, I'm
14 going to ask you to stand and come forward.

15 All right, just come on one at a time, and I'm going
16 to meet you down there.

17 Let me see one at a time. Good morning.

18 (Jurors coming forward one at a time to speak to the
19 Court)

20 JUROR: Good morning.

21 THE COURT: Tell me your name.

22 JUROR: Dale Brissie.

23 THE COURT: All right, Ms. Brissie. I just wanted to have
24 an opportunity -- those are sensitive questions. I wanted
25 to be able to take those a little more privately.

25

1 So tell me, which of my questions are you responding
2 to?

3 JUROR: My first cousin was murdered almost two years
4 ago.

5 THE COURT: Where was that?

6 JUROR: North Carolina.

7 THE COURT: All right, has that case been resolved?

8 JUROR: No.

9 THE COURT: Okay, as a result of that experience, do
10 you believe that it might or could in any way interfere with
11 your ability to be a fair and impartial juror in this case
12 both to the State and to Mr. Beyah?

13 JUROR: No, ma'am.

14 THE COURT: Can you set that experience aside completely
15 and try this case based on what you hear in this Courtroom?

16 JUROR: Yes; ma'am.

17 THE COURT: Thank you so much. Thank you so
18 much. Please stay with us.

19 (Juror returning to seat)

20 THE COURT: Come on down.

21 (Another juror approaching)

22 THE COURT: Good morning. Come on down.

23 JUROR: Good morning. My name is Mark Morris, 227.

24 Just a while ago, I was pulled to the front of the room
25 and my name said that I had committed a burglary, and I'm
26

1 very ill about it and I'm very upset.

2 THE COURT: Oh, don't blame you at all.

3 JUROR: And I really would like to leave and go to

4 Joe Mendelsohn's office right now. I'm very upset.

5 THE COURT: Bless your heart. I understand that.

6 Let me make sure I understand what you are telling

7 me. While the panel in its entirety was being impaneled,

8 that is when they pulled records, and they asked you to

9 come forward and they said, we've got . .

10 JUROR: I saw by my name my address, and it said

11 burglary.

12 THE COURT: Oh, my goodness, and you never heard

13 anything about that?

14 JUROR: No, ma'am.

15 THE COURT: I'm absolutely floored and flabbergasted.

16 JUROR: I'm a nervous wreck.

17 THE COURT: Well, I can see you're upset. Tell me your

18 full name again.

19 JUROR: Mark Morris.

20 THE COURT: Mark Morris. Did you get a copy of that?

21 JUROR: No, ma'am. I was wanting to ask him but, you know,

22 we were right in the middle of the process.

23 THE COURT: And you were concerned about that?

24 JUROR: I did say -- I said you can call Joe

25 Mendelsohn's office. I just had a closing. I remember the

number, but I'm really upset about it.

1 THE COURT: Well, you know, I can tell -- I can see

2 how upset you are. I really can because you are literally

3 shaking.

4 Let me ask you this question. If you are selected to

5 serve on this jury, do you think you would be distracted

6 by that?

7 JUROR: Yes, ma'am, I would be.

8 THE COURT: Here's what I'm going to do. I'm going

9 to excuse you for today and I'll ask you to -- I'll find out

10 what you need to do and who you need to call back

11 and when.

12 (Juror excused from Courtroom)

13 THE COURT: Okay, anything else?

14 JUROR: I think I wasn't paying attention. Did you say

15 five years?

16 THE COURT: Yeah. Tell me your name.

17 JUROR: More than five years ago.

18 THE COURT: Tell me about it.

19 (Juror coming forward)

20 THE COURT: Hello. Tell me your name.

21 JUROR: James Ward. It's nothing. I live on the Isle

22 of Palms and as I was going home after I got the door opened

23 I got mugged.

24 THE COURT: Okay.

25 JUROR: It was on the front page of the news -- really

28

1 embarrassing because I was on City Council at the time.
2 THE COURT: I understand. How long ago was that?
3 JUROR: In '94.
4 THE COURT: In '94.
5 JUROR: I got mugged and the lady I was with they took
6 her pocketbook but never caught the guy. It was a while
7 back.
8 THE COURT: Sure. As a result of that experience, do
9 you think that could keep you from being able to be fair and
10 impartial to the State and to Mr. Beyah?
11 JUROR: No, I don't think it would affect it at all.
12 THE COURT: You can listen and make up your mind based
13 on what you hear in the Courtroom?
14 JUROR: Yes, ma'am.
15 THE COURT: Thank you so much, Mr. Ward.
16 (Juror returning to seat in Courtroom)
17 Ladies and gentlemen, I'm not talking about magistrate's
18 court of municipal court, but other than magistrate's court
19 and municipal court, have you ever served on a jury before
20 on a civil case or criminal case?
21 If so, please stand.
22 JUROR: Grand jury.
23 THE COURT: How long ago?
24 JUROR: About four years. Carol Brown, Juror 16.
25 THE COURT: Thank you, Ms. Brown.

29

1 SOLICITOR: Our records show she was on in 1999.
2 THE COURT: I'm going to send her to civil court. Ms.
3 Brown, what I'm going to do is that rather than sit you on
4 this case since you were on the grand jury you think four or
5 five years ago, what I'm going to do is I'm going to just
6 ask you to step next door and sit for the selection of the
7 next civil matter.
8 Yes, sir, tell me your name.
9 JUROR: Ed Smith, 179.
10 THE COURT: Yes, sir, Mr. Smith. Was it a civil case?
11 JUROR: Civil.
12 THE COURT: How long ago?
13 JUROR: About fifteen years ago.
14 THE COURT: Is there anything about that experience that
15 might or could interfere with your ability to be completely
16 fair and impartial to these parties?
17 JUROR: No.
18 THE COURT: Thank you, Mr. Smith.
19 Yes, ma'am? Your name?
20 JUROR: Gale Auld, 221.
21 THE COURT: Yes, ma'am, Ms. Auld. Was it civil or crim-
22 inal?
23 JUROR: It was criminal, four year ago.
24 THE COURT: Four years ago. Anything in that exper-
25 ience that could keep you from being able to be fair and
30

9616

1 impartial both to the State as well as to the Defense?
2 JUROR: No, ma'am.
3 THE COURT: Thank you.
4 JUROR: Number 8, fourteen years ago on two criminal
5 cases.
6 THE COURT: Two what?
7 JUROR: Two criminal cases.
8 THE COURT: Mr. Barrelme, could that or might that
9 interfere with your ability to be completely fair and im-
10 partial both to the State as well as to Mr. Beyah?
11 JUROR: No.
12 THE COURT: Thank you. Your name?
13 JUROR: Judy Crites, 35. I was an alternate on a
14 civil case in about 1999, but it was in another state.
15 THE COURT: All right. Anything about that experience
16 that might or could interfere with your ability to be com-
17 pletely fair and impartial to these parties?
18 JUROR: No.
19 THE COURT: Thank you so much, and please stay with us.
20 All right, ladies and gentlemen. This question is
21 going to sound very general. I just want you to know that I
22 know that it sounds general, but I mean for it to sound gen-
23 eral, and the question is this.
24 Does any member of our jury panel know of any reason
25 why you think that you should not, could not, ought not
31

1 to be a juror in this case, being willing to be fair and
2 impartial both to the State as well as to Mr. Beyah, being
3 able to listen to the evidence in this case and listen to my
4 charge on the law, making a decision based on what you hear
5 in this Courtroom, unaffected by an extraneous matters?
6 For example, does someone think that a Defendant ought
7 to be required to prove himself or herself innocent?
8 Anyone concerned about the standard that a Defendant
9 must be proven guilty beyond a reasonable doubt?
10 Anyone concerned that you might not be able to follow
11 my instructions on the law?
12 Anybody got any tickets to Tahiti home in the drawer
13 and you're supposed to leave tomorrow afternoon, and you were
14 scared and nervous, and you were afraid to tell Judge
15 Young you were supposed to go to Tahiti tomorrow afternoon,
16 and now you're a little more warmed up, a little more relaxed?
17 In fact, you are supposed to go to Tahiti tomorrow and
18 you would really like to make that trip?
19 If there is anything whatsoever, come on forward and
20 let's talk about it?
21 Going, going -- all right, I find that our panel is
22 now qualified.
23 Now, let me tell you what happens next.
24 All right, you all ready to go? Any further voir
25 dire?
32

1 SOLICITOR: No, ma'am.
2 THE COURT: Anything else?
3 MR. YOUNG: No, ma'am.
4 THE COURT: All right. Let me tell you what happens
5 next.
6 Do you waive the turning of the hopper by a small child
7 or blind person?
8 SOLICITOR: Yes.
9 MR. YOUNG: We do.
10 THE COURT: Turn the hopper. We have the hopper turn-
11 ing. That was very quiet.
12 Your names are in the hopper, and the hopper has just
13 been turned. It's like my favorite part.
14 Now, ladies and gentlemen, in just a moment, Mr. Wilson
15 will begin to call names. When your name is called, if
16 your name is called, I want you to come right through those
17 doors and come stand about where I'm standing.
18 I am happy to report to you that I myself sat not here
19 but up in Dorchester County, and, you know, my name was
20 called and all I can remember was, gosh, I wish I could have
21 left my hands in my seat because I didn't know what to do
22 with my hands. It's okay. Just bring your hands with you.
23 Whatever you want to do, it doesn't matter.
24 If you brought a book with you or maybe an umbrella,
25 because they said they have a thirty percent chance of rain,
33

1 bring that with you, and then you just stand here.
2 Then what you're going to hear is you're going to hear
3 from the State either present the juror or excuse the juror;
4 on behalf of the Defense you will hear seat the juror or ex-
5 cuse the juror.
6 If you are excused, please don't take any embarrassment
7 whatsoever. It is a very old and ancient process. I can assure
8 you no one means you any embarrassment whatsoever. It is
9 just the process that we have used for well over, I guess,
10 two hundred years now.
11 So please be mindful of that. It's just a very old
12 process.
13 If you are selected, please take a seat in our jury
14 box.
15 Counsel, let me see you just a second.
16 (Conference at the bench between counsel and the Court
17 off the record)
18 THE COURT: Let's have our jury.
19 (Whereupon, jurors were called forward and a jury was
20 impaneled as follows:
21 Juror 189, Ashton Suttle, seated (white male)
22 Juror 115, Sally Magruder, excused by the Defense
23 (white female)
24 Juror 26, Jacqueline Cheatham, excused by the State
25 (black female)
34

1 Juror 22, Angela Capers, seated (black female)
2 Juror 24, Todd Cornwell, seated (white male)
3 Juror 228, Ethan Farmer, seated (white male)
4 Juror 78, Jeann Green, seated (black female)
5 Juror 59, Edna Ferguson, excused by the State (black
6 female)
7 Juror 194, Fletcher Truesdell.
8 SOLICITOR: What was that number?
9 CLERK: Number 194.
10 THE JUROR: May we see you just a second, please?
11 (Conference at the bench between counsel and the
12 Court, where following colloquy occurred, out of the pres-
13 ence of the jury, with the juror called:
14 JUROR: Something came up. My sister in law was
15 arrested two years or three years ago.
16 THE COURT: Okay.
17 JUROR: And she's pending trial. Does that have any
18 bearing on this?
19 THE COURT: I thought I asked that question. Did I
20 not ask that question?
21 JUROR: I might have missed it.
22 SOLICITOR: What was it?
23 THE COURT: His sister's been arrested and has charges
24 pending currently.
25 MR. YOUNG: Could have been in City Court.

35

1 JUROR: It was the police in Mount Pleasant.
2 THE COURT: And do you know what the charges are?
3 JUROR: She was walking a dog late and she had a pistol
4 on her.
5 THE COURT: Okay.
6 JUROR: It was like two o'clock in the morning.
7 THE COURT: All right, I'm with you.
8 If you will just stop aside right there and let me talk
9 with counsel.
10 (Juror stepping aside from bench)
11 THE COURT: What do you want to do?
12 SOLICITOR: I think ask him if that would affect his
13 ability to be fair and impartial.
14 THE COURT: Okay.
15 MR. YOUNG: I'd ask that he be excused.
16 THE COURT: I'm concerned about it. I think the ques-
17 tion was pretty clear, and I have some concerns that he did
18 not disclose that, so I'm going to excuse him from this
19 trial.
20 SOLICITOR: He answered you -- I mean, he came and
21 told you.
22 THE COURT: No, not until his name got called out.
23 When he got called. I think he was hedging his bets that
24 he wouldn't come down. He didn't want to disclose for what-
25 ever reason or he didn't disclose it, and he felt he needed
36

1 to disclose it when his name came up, and that is not the
2 way jury qualification works.
3 I'm going to excuse him.
4 Thank you, sir. Please be seated back in the audience.
5 (Juror returning to seat in Courtroom, while jury
6 selection continued)
7 Juror 18, Kenneth Buhle, excused by the Defense (white
8 male)
9 Juror 228, Patricia Grant, excused by the Defense (black
10 female)
11 Juror 174, Judy Singleton, excused by the State (black
12 female)
13 Juror 156, David Richards, seated (white male)
14 Juror 138, Matthew Nauman, excused by the defense (white
15 male)
16 Juror 110, Don Lee, seated (white male)
17 Juror 88, David Hendricks, excused by the Defense (white
18 male)
19 Juror 204, James Ward, excused by the Defense (white
20 male)
21 Juror 142, Leah Neiss, seated (white female)
22 Juror 125, Betty McKelvey, seated (black female)
23 Juror 35, Judy Crities, excused by the defense (white
24 female)
25 Juror 8, Anthony Bartelme, excused by Defense (white
37

1 male)
2 Juror 164, Jennifer Rogers, excused by Defense (white
3 female)
4 Juror 15, Dale Brisale, excused by Defense (white
5 female)
6 CLERK: The Defendant has exhausted all of their
7 strikes.
8 CLERK: Juror 166, Frank Sanders. (white male)
9 MR. YOUNG: May we approach?
10 (Bench conference off the record between counsel and
11 the Court)
12 MR. YOUNG: Please seat the juror.
13 (Jury selection continued)
14 Juror 64, William Freeman, excused by the State (black
15 male)
16 Juror 82, Joyce Grimes, seated (white female)
17 Juror 108, Kevin Kornickey, excused by the State (black
18 male)
19 CLERK: The state has excused all their strikes.
20 (Jury selection continued)
21 Juror 150, Linda Phelps, seated (white female)
22 CLERK: That's twelve jurors, Your Honor. How many
23 alternates?
24 THE COURT: One.
25 CLERK: Juror 130, Jacqueline Mitchell.
38

1 MR. YOUNG: I'm sorry, Your Honor. May we approach?
2 (Conference at the bench off the record between counsel
3 and the Court)
4 (Whereupon, Jacqueline Mitchell was seated as alternate
5 juror)
6 CLERK: Maam, you've been selected for the trial of this
7 case. Please have a seat in the jury box.
8 Your Honor, the jury has been selected.
9 THE COURT: Thank you so much. Are there any matters
10 regarding the qualification or selection of the jury, from
11 the State?
12 SOLICITOR: None from the State.
13 THE COURT: From the Defense?
14 MR. YOUNG: May we have a moment, Your Honor?
15 THE COURT: Certainly.
16 (Pause in proceedings)
17 MR. YOUNG: Your Honor, the Defense has a motion.
18 THE COURT: There is a matter. Is that right?
19 MR. YOUNG: Yes, Your Honor.
20 THE COURT: Let's see. Ladies and gentlemen, I'm try-
21 ing to think if I should send the remaining jurors next door.
22 Where is the jury room?
23 Ladies and gentlemen, there is a matter which I must
24 hear outside of all of your presence. If you would be so kind,
25 those of you who are now known as our remaining jurors,
39

1 if you would please follow Mr. Wilson and he will direct
2 you where to go outside of the Courtroom, and we'll be with
3 you shortly.
4 And ladies and gentlemen, those of you who are in our
5 jury box, if you would be so kind as to step in your jury room.
6 Be mindful, any of you, not to discuss the matter or
7 allow anyone to discuss it with you. We'll be with you shortly.
8 (Whereupon, all jurors were excused from the Courtroom
9 by the Court)
10 THE COURT: Mr. Young?
11 MR. YOUNG: Your Honor, at this time the Defense would
12 make a Batson challenge to the State's five strikes.
13 Specifically their strikes against Juror Number 26, Number
14 59, 174, 64 and 108.
15 All of the jurors struck by the State are African-
16 Americans. Mr. Beyah is an African-American.
17 I have some concern about whether or not all of those
18 strikes were race neutral.
19 THE COURT: All right, I'm waiting to hear from you.
20 SOLICITOR: Your Honor, with regards to Number 108,
21 Kevin Kornickay, I believe was his name -- he had CPD,
22 Charleston Police Department arrests.
23 It looks like for criminal sexual conduct. That caused
24 me some concern obviously since this is a CPD case.
25 As for Mr. . . .
40

1 MR. YOUNG: It's a CDV case?
2 SOLICITOR: CPD.
3 THE COURT: Charleston Police Department.
4 SOLICITOR: As for Mr. Freeman, Number 64, you may have
5 noticed that he was rather sloppily, casually dressed. He
6 had dreadlocks. He did not take the oath in the qualification
7 room, I noticed, and he also was dozing several times
8 this morning.
9 THE COURT: Wait a minute now. That's several differ-
10 ent ones. Number one, he was sloppily dressed, he was --
11 he had dreadlocks.
12 SOLICITOR: Which is often related to a sort of Rastafarian
13 type lifestyle, which I think is sometimes equated with
14 anti-government.
15 The main thing being he didn't take the oath this morn-
16 ing. I noticed he didn't raise his hand all the way. He
17 didn't say, I do, or whatever it was the Judge asked for
18 when given the oath this morning.
19 And he also was dozing in the Courtroom.
20 THE COURT: All right.
21 SOLICITOR: As for Ms. Singleton, Number 174, I was
22 concerned about her because she is unemployed and I believe
23 she was also a housekeeper
24 If you note there was another black female who was
25 also unemployed, but we did not strike because she had a
41

1 history in the Army.
2 I think they were similarly situated, but we felt better
3 about Ms. McKelvey because she had a career in the Army, it
4 appeared, based on what we had.
5 As for number 59, Edna Ferguson, she was called to
6 the front this morning in the jury qualification because
7 she had a breach of trust conviction.
8 It turns out that it looks like she may have been
9 pardoned, but I was concerned about her being charged with
10 conspiracy to commit a breach of trust.
11 Also I was concerned because her employment was listed
12 as a social worker, and I think social workers can often
13 be more sympathetic jurors.
14 As for Number 25, Ms. Cheatham, she was also unemployed,
15 and the information we had was inconsistent with what she
16 gave in the information that we had on the questionnaire or
17 the form that was sent in.
18 It was inconsistent with what she gave in jury quali-
19 fication and we were concerned about that, as well as her
20 being unemployed.
21 It just seemed as if, you know, she was trying to say,
22 you know, whatever sounded better versus just coming out
23 and saying what she did and what she didn't do, and that
24 caused me some concern with her.
25 That's Number 26, Ms. Cheatham.
42

1 THE COURT: Okay.

2 MR. YOUNG: I'm sorry, I don't -- that she was unem-
3 ployed was the basis of your strike?

4 SOLICITOR: And that she -- the information we had writ-
5 ten as -- from her information on the form she sent in, it was
6 inconsistant with what she said in the jury qualification
7 room this morning.

8 MR. YOUNG: I'm sorry. Can you be more specific on
9 that, because my jury forms say that occupation unemployed;
10 former employer, Trident Tech, which I have as being
11 exactly what she said.

12 SOLICITOR: On the sheet that I was using.

13 THE COURT: Yes.

14 SOLICITOR: The notes that were prepared for me had
15 unemployed slash student. When she stood up she said
16 she was an administrative assistant which isn't the same.

17 MR. YOUNG: I'm sorry. I thought you were referring
18 to the juror information. Where are you getting that
19 sheet from?

20 SOLICITOR: I suppose that's where it came from. I
21 didn't prepare it myself.

22 THE COURT: All right.

23 MR. YOUNG: Your Honor, the Defense would have several
24 concerns as to the State's alleged strikes.

25 First off, they struck two African-Americans because of the

43

1 fact they were unemployed; yet seated a similarly situated
2 African-American who was unemployed.

3 As far as to the dreadlocks, I don't think that is a
4 race neutral challenge on its face, and I think Batson
5 should be granted on that strike alone.

6 As to the -- as far as the record for Juror 108 and Num-
7 ber 69, I would just have to ask the State since I don't
8 have access to all rap sheets on all the jurors whether or
9 not -- if they would certify for the record that they
10 didn't seat any other jurors with a record.

11 THE COURT: I understand, or arrests.

12 MR. YOUNG: Or arrests.

13 SOLICITOR: For criminal sexual conduct in the second
14 degree, I believe it was. I don't believe there were
15 any other jurors who had CSC second arrests made by the
16 Charleston Police Department.

17 MR. YOUNG: I am sure you would know whether or not
18 any of our jurors have arrests on their rap sheet ranging
19 from breach of trust to . .

20 SOLICITOR: I can't certify that, but my concern is he
21 had an arrest by the Charleston Police Department for crim-
22 inal sexual conduct in the second degree which in my view
23 is a very serious crime, and I don't believe we had anybody
24 else similarly situated.

25 THE COURT: I'm with you, Mr. Young. In other words,

44

1 the question is, are there any other jurors who were selected
2 for which the Solicitor's Office is aware that there are
3 arrests.

4 I would simply ask if that's so or not so.

5 SOLICITOR: I think that one of the jurors had an arrest
6 from twenty years ago.

7 THE COURT: Okay.

8 SOLICITOR: Or actually he might have had a conviction
9 for twenty years ago for shoplifting, which I think is much
10 different from CSC.

11 That's the only one that comes off the top of my mind.

12 THE COURT: Okay.

13 SOLICITOR: There were some -- I think some jurors who were
14 called, whether they were seated or not, who had fraudulent
15 check arrests, which lots of people have.

16 THE COURT: What you would be telling me, Ms. Wilson, is
17 that while there may be arrests or conviction for the shop-
18 lifting, there was not -- there would not be any arrests
19 or convictions for felonies?

20 SOLICITOR: Well, for felonies like that, sexual conduct
21 or . . .

22 THE COURT: Okay. Well -- okay.

23 SOLICITOR: Violent type offenses.

24 THE COURT: Violent offenses.

25 MR. YOUNG: Breach of trust -- I'm showing they struck

45

1 Juror Number 59 because of the breach of trust.

2 THE COURT: I understand.

3 MR. YOUNG: Given the State's position, I have to ask
4 the State to provide me with the copies of the rap sheets
5 for the jurors that . . .

6 THE COURT: I agree, Mr. Young.

7 MR. YOUNG: . . . were called up.

8 THE COURT: Yes.

9 SOLICITOR: Your Honor, in addition, as far as the
10 breach of trust lady, again, she wasn't only stricken because
11 she had a breach of trust. She was . . .

12 THE COURT: I know that, Ms. Wilson, but here is the
13 problem.

14 The law says that there is no dual purpose. Once the
15 State states two reasons for striking a juror, both of the
16 reasons must be race neutral -- both of them. They stand
17 alone.

18 So, for example, if you struck Ms. Ferguson because she
19 was a social worker and that's race neutral, that's fine.
20 If you struck her for being a social worker and because
21 she has a breach of trust conviction and someone else was
22 seated with breach of trust conviction, that very well may
23 be violative of Batson.

24 In other words, it wasn't -- we got that one of them
25 works, so that's okay. They all must be race neutral.

46

1 So when you tell me you struck her because she had a
2 breach of trust conviction but also because she was a social
3 worker, they both have to be race neutral.

4 SOLICITOR: Because she had a breach of trust conviction,
5 she was called up and questioned about that, and it
6 was a concern.

7 THE COURT: I understand, but the question that Mr.
8 Young is asking is, are there any other jurors with breach of
9 trust convictions that were seated.

10 SOLICITOR: Not that I know of, Your Honor, and he is
11 welcome to the rap sheets. I don't have a problem with that
12 at all.

13 THE COURT: All right.

14 MR. YOUNG: Thank you, Your Honor, and I would still
15 stand on the grounds that they struck two African-American
16 females because of their status of being unemployed but yet
17 seated a third, I think -- I believe the comments about Juror
18 Number 64 as being a Rastafarian is not race neutral.

19 That is akin to -- I believe the case refers to someone
20 who uses a strike on referring to somebody as a redneck and
21 that was held to be non race neutral on its face and war-
22 ranting a new jury panel for that reason alone.

23 SOLICITOR: Judge, I believe that Rastafarians are a
24 recognized group. I don't believe that is a slang term.

25 I believe that is something that some people want to

47

1 be and who hold themselves out to be, and I think that in-
2 cludes white people. It is not just black people who can
3 be Rastafarian or have dreadlocks.

4 There are plenty of white people out there who have
5 dreadlocks.

6 Judge, if you'd like, we could -- while Mr. Young re-
7 views the rap sheets, I need to run to my office and get
8 something, and I'll be right back. Is that all right?

9 THE COURT: Sure. That would be fine. I assume you
10 will just be a couple of minutes?

11 SOLICITOR: Oh, yes.

12 THE COURT: Okay.

13 (Brief pause in proceedings)

14 MR. YOUNG: Your Honor, Mr. Beyah has requested to be
15 allowed to use the restroom real quick.

16 THE COURT: Sure. Absolutely.

17 (Brief pause in proceedings)

18 THE COURT: Yes, ma'am, everyone is present. Have you
19 had an opportunity to go through the rap sheets?

20 MR. YOUNG: Your Honor, I've been provided a copy of
21 rap sheets for Juror Number 189, Juror Number 26, Number
22 59, Number 88, and Number 108.

23 I would point out to the Court after a review of the
24 rap sheets Juror Number 89 is a white male with -- Number
25 189 -- I'm sorry, I said it wrong -- with a record of an

47

1 arrest in 1996 for a fraudulent check.

2 He was not struck by the State, and I also point out to

3 the Court Juror Number 88, also a white male, who has a

4 conviction for DUI second, which I don't recall.

5 SOLICITOR: What number?

6 MR. YOUNG: Juror Number 88.

7 THE COURT: DUI Second.

8 MR. YOUNG: I'm sorry. I may have misspoke. It just says

9 DUI.

10 THE COURT: Okay.

11 MR. YOUNG: I apologize. In 1996 and a shoplifting and

12 a larceny of city property in '82.

13 I think that the State keeping those jurors while strik-

14 ing black jurors with different arrests and/or an arrest and

15 conviction and pardoned, and another arrest, while keeping

16 white jurors with other criminal convictions, is further

17 evidence of the State's non-race neutral use of their

18 strikes.

19 THE COURT: When was the conviction for Juror Number 59 for

20 breach of trust?

21 MR. YOUNG: That conviction was in '84. The pardon was

22 in '89.

23 THE COURT: All right, anything further from anyone?

24 SOLICITOR: Your Honor, again I think we've shown race

25 neutral reasons for our strikes.

48

1 Again, we pointed out the reasons that we struck Ms.

2 Ferguson was that she had a breach of trust conviction and

3 she was called up front in front of the crowd.

4 In addition, I was concerned about her being a social

5 worker. I think both of those reasons are race neutral.

6 I think that they -- that her conviction is different than

7 the others that were described.

8 I think we discussed fraudulent check convictions

9 earlier and she also received some sort of punishment, you

10 know. She wasn't just arrested for it. She had had, I

11 think, a three year suspended sentence on that matter.

12 Again, as far as Mr. Kornickey goes, his arrest was

13 for a violent crime, which I would presume would be a vio-

14 lent crime against a woman, since it was criminal sexual

15 conduct, second.

16 It may have been a man, I suppose, but that obviously

17 caused me some concern, and I don't believe any of the

18 arrests Mr. Young mentioned come close to that sort of thing

19 with the same police agency that we have here.

20 I understand what the Court was talking about -- dual

21 purpose, but it is not just arrests. It's arrests, the

22 GPD, for violent offense.

23 THE COURT: All right, all right. This would be my

24 determination and how we will be proceeding.

25 I do have -- and let me say that I do have concerns

49

1 about the selection or the striking of Juror Number 59,
2 Ferguson, because Ms. Ferguson has a -- while she has a
3 breach of trust conviction in 1984, she received a pardon in
4 1989, and the State chose to strike Ms. Ferguson, who is an
5 African-American woman while it chose to keep Juror number
6 88, who had a DUI conviction in '96, a shoplifting conviction
7 and a larceny of city property arrest as I understand
8 it, more recent than -- I have great concerns that the
9 strike and the reasons given for Ms. Ferguson is pretextual
10 because under the dual purpose doctrine although the strike
11 for the reason that she is a social worker is certainly race
12 neutral, each reason given by the State must be independently
13 race neutral.

14 If you give two and one is race neutral and one is
15 not, then under the Peyton versus Kearce decision the strike
16 fails in Batson.

17 I also have concerns . .

18 SOLICITOR: Judge, before you move to the next one, I
19 just want to make sure we're clear that nobody else was
20 summoned up and questioned about it the way Ms. Ferguson
21 was, and that was part of our concern.

22 Remember, I said that she earlier this morning
23 was called up and questioned about her breach of trust and
24 went over that with the Judge; whereas, nobody else was,
25 and that is a concern.

1 THE COURT: Okay.

2 SOLICITOR: I think that is different than it just
3 being about the breach of trust. You follow me?

4 THE COURT: No, because what -- the State didn't call
5 her up. I gather the Court called her.

6 MR. YOUNG: No, Your Honor. She would have been . .

7 SOLICITOR: She was -- go ahead.

8 MR. YOUNG: I'm sorry. She would have been summonsed
9 to the front by the State providing to the Court a record in
10 which it clearly showed her breach of trust conviction from
11 1984 had been pardoned. I mean, the rap sheet also shows
12 that it was pardoned.

13 It wasn't like that was information provided by her.

14 THE COURT: Right.

15 MR. YOUNG: She was brought up here by the State's
16 own actions. I don't think they should rely on that to
17 differentiate between the similarly situated jurors.

18 THE COURT: I missed the point about that.

19 SOLICITOR: Judge, it caused me -- it causes me concern
20 and whether or not, I mean, you agree with whether it should
21 cause me concern, that she's questioned about that in front
22 of the Court when the Court is clearly looking to us, because
23 at that point I didn't realized she had been pardoned.

24 At that point, I just thought she had the conviction.

25 THE COURT: Did the pardon appear on the rap sheet?

1 SOLICITOR: I totally missed that. The Judge looked
2 at us like, did you hear that, and I could hear a part of
3 it, and I was like -- I just kind of shook my head, no, meaning
4 I haven't seen many people who have been pardoned.

5 Then when we came up here I realized that, yes, it
6 was on the rap sheet, and yes, she was in fact pardoned.

7 THE COURT: So what you think is that -- your concern
8 is that you think that she was offended by the State because
9 you all called -- had her called to the front when in fact
10 she had been pardoned?

11 Is that what you're telling me? She ought not serve
12 because the State embarrassed her?

13 SOLICITOR: Well, I don't think it was that strong be-
14 cause I don't know for certain whether or not she would attribute
15 it to the State.

16 Certainly that was some back and forth between me and
17 the Judge which did not happen with anyone else.

18 And I think that -- that causes me concern -- whether
19 or not she's white or African-American or whatever.

20 That is a race neutral reason that she had this thing
21 she was questioned about.

22 THE COURT: I understand. I understand. In other
23 words, it is not -- Mr. Young, it is not the fact that she
24 has a conviction. It's the fact that the State caused her
25 to be called up and embarrassed, I guess.

1 What of that? They say it's a race neutral reason --
2 probably is. What of that?

3 MR. YOUNG: Through their own actions, Your Honor.

4 I certainly don't think they should be allowed to
5 rely on their own action to create or manufacture for
6 them a race neutral reason to strike a juror.

7 SOLICITOR: I don't think there is any evidence that we
8 tried to manufacture, and there is no evidence of that as an
9 officer of the Court.

10 That wasn't the reason we gave Judge Young the rap sheet.
11 If I had seen it was pardoned, I would have known not to
12 give it to him because it wouldn't have mattered under our
13 statutory scheme.

14 THE COURT: Okay, I will reconsider on that basis.
15 I will reconsider on that basis clearly.

16 And what of Freeman? I have concerns about
17 Freeman.

18 SOLICITOR: I think the biggest concern that the Court
19 should have is that he didn't take the oath this morning.

20 THE COURT: You're missing the dual purpose, Ms. Wilson.

21 SOLICITOR: I understand.

22 THE COURT: Listen to me because it's real important.
23 I agree with you if you had stood up and said he didn't
24 take the oath. That would be the end of it, but that is not
25 what you said.

1 SOLICITOR: I got you.

2 THE COURT: What you say is there were three reasons.
3 He was sloppily dressed. He had dreadlocks, and he didn't
4 take the oath.

5 If you choose to say a lot, then each one of those rea-
6 sons has to be racially neutral.

7 SOLICITOR: I got you.

8 THE COURT: I agree with you completely that not taking
9 the oath is racially neutral. I give you that. The ones that
10 worry me . .

11 SOLICITOR: Right -- the dreadlocks.

12 THE COURT: Yes.

13 SOLICITOR: Our position, Your Honor, is that many peo-
14 ple have dreadlocks. Black people have dreadlocks. To say
15 that someone has dreadlocks does not say anything about
16 their race.

17 I think for that to cause us concern that may be asso-
18 ciated with some Rastafarian type situation.

19 Again, you do not have to be African-American to be
20 Rastafarian, and to have the belief.

21 Mr. Thurmond was telling me earlier -- he knows a little
22 bit more about the Rastafarian beliefs than I do, but that
23 caused me concern, and again I think there are white people,
24 plenty of white people, who consider themselves Rastafarian
25 and who have dreadlocks.

54

1 I think that is what sets them apart. It's not --
2 Rastafarian does not mean African-American or black or any-
3 thing like that.

4 If dreadlocks are in fact associated with that, which
5 in my mind they can be because lots of Rastafarian people
6 who have those sorts of anti-government beliefs, whether they
7 are white or black, are a concern to the State.

8 And I think or believe under the -- I need to look at
9 this again but under the cases I was reviewing when we had
10 the break I think it is clear that if there is a -- if the
11 person would have been stricken anyway, in other words if he
12 had been white and had that, would he have been stricken
13 anyway, and I submit to the Court that he would because that
14 is associated with an anti-government, anti-State, anti-
15 authority type movement.

16 And that is the concern.

17 THE COURT: Yes, sir. Anything further, Mr. Young?

18 MR. YOUNG: I would just point out for the record that
19 I don't think that is the basis of any Rastafarian culture.
20 I think it originated in Ethiopia.

21 While it certainly did start with an anti-government
22 as to one individual whose name was Rastafarie, who was being
23 kicked out of Ethiopia, he certainly had some concerns
24 toward that particular government.

25 I know of no other basis for those statements by the

55

9629

1 State.

2 (Pause in the proceedings.

3 THE COURT: Okay.

4 SOLICITOR: Judge, I don't have a copy of Peyton with me,
5 but that was the case that I think Mr. Young was talking about
6 where the Plaintiff said redneck or something.

7 And I'm just looking at Macanich's book, and maybe
8 I'm reading this wrong -- dispute the presence of what the
9 Court assumed to be a racial motivation for the strike, it
10 found based upon the other explanations that no Batson
11 violation occurred.

12 And, again, I think we've shown -- I don't believe that
13 the dreadlocks issue is rational at all. I'm not conceding
14 that issue at all.

15 I'm saying even if it were, the other thing showed the
16 Court we haven't set out to do a pattern. There is a real
17 reason and a racially neutral reason for making that strike,
18 and I think you can look to the totality of the circumstances.

19 THE COURT: But not dual purpose. But not dual purpose.
20 There are two cases that concern me. One of them is called
21 United States versus Nurse.

22 SOLICITOR: Nurse?

23 THE COURT: Nurse, and it's -- the citation is 127 F
24 Third 1100. It's a Fourth Circuit case.

25 SOLICITOR: That was a case I tried, by the way.

56

1 THE COURT: Okay, and there's another case which is --
2 actually it is a civil case but Batson applies equally in
3 civil cases as it does in criminal cases, and that case is
4 -- I'll get you the full name in a minute, but it's against
5 United Parcel Service. It's a Title Seven case, a discrim-
6 inatory hiring case.

7 And in both of those cases -- the Nurse case, the court
8 considers both dress as well as hair style -- happens to be
9 dreadlocks -- and in the UPS case the case was dreadlocks --
10 and whether or not it was discriminatory -- it was discrim-
11 inatory firing because someone was fired and had dreadlocks.

12 And in both of those cases, and understanding they
13 are not State cases but are Federal Fourth Circuit -- well,
14 one of them is a Fourth Circuit case, the Nurse case, but
15 the other one, I think, is out of the -- I think the
16 Northern District of New York, maybe Eastern District of
17 New York, and it makes a determination that the firing on the
18 basis of dreadlocks is non-discriminatory, is facially non-dis-
19 criminatory, and comparing that with the United States versus
20 Nurse case, the Court there says that the striking of a
21 juror because of dreadlocks -- the case is called Eastman
22 versus UPS, 194 F Second 256, Southern District of New
23 York.

24 And the United States versus Nurse case says that
25 strikes on the basis of clothing and dreadlocks or hair

57

9630

1 style was --they said hair style not dreadlocks -- was rac-
2 ially neutral.

3 And, therefore, I find that based upon the arguments
4 of counsel the Defendant had failed to meet the burden under
5 Batson.

6 It is important, however, and the case law talks about
7 that you certainly can consider the counsel's argument, and
8 I think that the record needs to reflect with regards to the
9 strike of Juror Number 59 that I am accepting the explanation
10 of counsel that counsel was mistaken with regards to the par-
11 don and that was the reason for the strike, not the conviction
12 for breach of trust, but the State's actions in the inad-
13 vertent actions of having her called up.

14 SOLICITOR: Judge, I just want to be clear on one
15 thing. She was up there with Judge Young. I had given Judge
16 Young the rap sheet.

17 I don't think he summonsed her totally for that.
18 While she was up there he -- I notified his law clerk that
19 that was the same lady that I wanted questioned, so I got
20 him, you know -- which she can see all this happening I'm
21 sure.

22 They then started questioning. Judge Young was looking
23 at me as if can you hear it, and I heard something about
24 pardon. I couldn't hear everything they were saying, and I
25 started shaking my head no because I was just kind of in

58

1 disbelief because I've not seen someone who had been pardoned,
2 but I just wanted to make sure that we're clear that I did
3 not call her up, but clearly there was interaction between
4 the Judge and me about her.

5 THE COURT: Why don't you just articulate -- I feel as
6 though we are playing games about this at this point, Ms.
7 Wilson.

8 Tell me the reason --- either you struck this lady be-
9 cause she had a breach of trust conviction in '84 or you
10 struck her because you feel like you embarrassed her and you
11 were worried she was going to hold it against the State.
12 Which is it? And is it both? It may be both.

13 SOLICITOR: Well, Judge, that's the problem. It is
14 both. It is both, and I think I've been clear on that. I
15 am not trying to play games with the Court.

16 I want the Court to understand so that whatever you
17 decide is based on what happened. My concern is that she
18 has a conviction of that, and I did not realize she had been
19 pardoned.

20 When she was up there discussing it with the Judge, I
21 notified the law clerk while she's standing there for Judge
22 Young to question her. I feel sure she could have attributed
23 it to me.

24 THE COURT: That's the embarrassment factor.

25 SOLICITOR: That's right.

59

1 THE COURT: Okay, but you're telling me you also struck
2 her on the basis that she had the 1984 conviction?
3 SOLICITOR: I'm telling you that caused me concern.
4 That's why we had her questioned, and then as a result of all of
5 that it still causes me concern that she has a breach of
6 trust conviction and that she now probably attributes her
7 being questioned about it and probably saw me when the
8 Judge said . .
9 THE COURT: I've got the embarrassment factor. I'm okay
10 with the embarrassment factor. The embarrassment factor I
11 am fine about.
12 Here is the part that I have concern about, and I am not
13 -- are you telling me that in addition to the embarrassment
14 factor that she was also struck in this case because she had
15 a conviction for breach of trust in 1984?
16 SOLICITOR: Yes, ma'am.
17 THE COURT: That's pretextual then. It violates
18 Batson, and I am going to order a new jury strike because
19 if she was also struck because she had a 1984 conviction
20 for breach of trust, I find that that strike on that basis
21 is pretextual because Juror Number 88 was kept who had a
22 1996 conviction for DUI, shoplifting and
23 larceny against city property -- more recent and he was
24 kept.
25 So obviously under the Peyton versus Kearce, one person

60

1 without any distinguishing factors that I can determine --
2 one of the black jurors is struck and has a pardon; whereas,
3 Mr. Hendricks who is white is kept with a DUI, shoplifting
4 and larceny.
5 On the basis that the strike was pretextual, and is
6 not racially neutral, therefore, we must have a new strike.
7 Okay, bring the jury, please. Bring me the jury,
8 please.
9 (Whereupon, jury returned to the Courtroom)
10 THE COURT: Come on back out here, ladies and gentle-
11 men.
12 (Jurors previously drawn and balance of panel returned
13 to Courtroom)
14 THE COURT: Ladies and gentlemen, we're going to do
15 this one more time, please. We're going to go through our
16 process once more.
17 Thank you so much. If you all will just come back out
18 into our audience. Thank you.
19 All right, ladies and gentlemen. Thank you so much
20 for your patience as we go through this process, and we will
21 proceed just as efficiently as we can.
22 Ladies and gentlemen, at this time we are going to
23 restrike the jury based upon my determination that that needs
24 to be done.
25 So if you will please pay attention now, and you know how

1 to go through this process, and you know what to do if your
2 name is called.

3 Mr. Wilson, will you turn the hopper? Do you waive the
4 selection of the jury from a small child or blind person,
5 on behalf of the State?

6 SOLICITOR: Yes, ma'am.

7 THE COURT: And on behalf of the Defense?

8 MR. YOUNG: Yes, ma'am.

9 THE COURT: Very well.

10 (Whereupon, the jury was drawn and struck as follows:

11 CLERK: Juror Number 179, Edward Schmidt. (white male)

12 SOLICITOR: May we approach?

13 (Conference at the bench between counsel and the Court
14 off the record)

15 THE COURT: Mr. Schmidt, I'm going to be able to excuse
16 you just on this one occasion, and I'll explain that to you in
17 just a little bit.

18 Be seated and stay with me a little longer. Thank you
19 so much.

20 (Juror returning to seat)

21 (Jury continued to be drawn and struck)

22 Juror 42, Karen Dejong, struck by Defense (white fe-
23 male)

24 Juror 221, Gale Auld, struck by Defense (white female)

25 Juror 51, Thomas Driggers, seated (white male)

62

1 Juror 82, Joyce Grimes, struck by Defense (white female)

2 Juror 22, Angela Coers, seated (black female)

3 Juror 16, Carol Brown, previously excused by Court

4 Juror 164, Jennifer Rogers, struck by Defense (white
5 female)

6 Juror 18, Kenneth Buhle, struck by Defense (white male)

7 Juror 142, Leah Noiss, seated (white female)

8 Juror 8, Anthony Bartelme, struck by Defense (white
9 male)

10 Juror 62, Solomon Frazier, struck by State (black male)

11 Juror 78, Jean Green, seated (black female)

12 Juror 46, Abraham Dilligard, struck by State (black
13 male)

14 Juror 214, Kendra Wilson, seated (black female)

15 Juror 40, Caroline Davila, seated (white female)

16 Juror 133, Amy Robinson, seated (white female)

17 Juror 26, Jacqueline Cheatham, struck by State (black
18 female)

19 Juror 125, Betty McKelvey, seated (black female)

20 Juror 194, Fletcher Truesdell, previously excused by
21 the Court

22 Juror 11, Linda Bertucci, struck by Defense (white
23 female)

24 Juror 156, David Richards, seated (white male)

25 Juror 174, Judy Singleton, seated (black female)

63

1 Juror 138, Matthew Newman, struck by Defense (white
2 male)
3 Juror 115, Sally Magruder, struck by Defense (white
4 female)
5 Juror 166, Frank Sanders, struck by Defense (white
6 male)
7 CLERK: The defense has exhausted all their strikes)
8 Juror 204, James Ward, seated (white male)
9 Juror 110, Don Lee, seated (white male)
10 CLERK: We have twelve jurors. Striking for alternates,
11 strikes are two and one.
12 Juror 71, Barbara Gilchrist, struck by Defense (white
13 female)
14 Juror 25, Judy Crites, struck by Defense (white female)
15 Juror 34, Todd Cornwell, seated (white male)
16 CLERK: Your Honor, the jury has been selected.
17 THE COURT: Thank you. Are there any matters regarding
18 the selection or qualification of the jury, from the State?
19 SOLICITOR: No matter from the State, Your Honor.
20 THE COURT: From the Defense?
21 MR. YOUNG: Just a moment, Your Honor.
22 (Pause in proceeding)
23 MR. YOUNG: The Defense would have a matter for the
24 Court.
25 THE COURT: All right. Ladies and gentlemen, I'm going
64

1 to excuse you for your lunch, and I'm going to ask those
2 of you, first of all, who are at this moment our remaining
3 jurors -- I'm going to ask you to please be back in the
4 Courtroom at four o'clock, and enjoy your lunch.
5 Let me just admonish you, ladies and gentlemen. You
6 have received a very little, tiny bit about this matter.
7 I've introduced you to some folks. I've read you some of the
8 allegations of the indictments, so you have a little bit of
9 information.
10 So I'm actually going to instruct all of you not to
11 discuss this matter with anyone or allow anyone to discuss it
12 with you.
13 Ladies and gentlemen who are our remaining jurors, I'll
14 see you back in the Courtroom at four o'clock.
15 Ladies and gentlemen, those of you who have been selected,
16 you all likewise please go to your lunch, but I do want you
17 to go with our bailiffs. They will show you how to come
18 and go to your jury room.
19 I likewise want you to be in your jury room at four
20 o'clock. They'll show you how to get there and how to come
21 and go.
22 Remember not to discuss this matter or to allow anyone
23 to discuss it with you.
24 Have a great lunch, and I know your little dinner ball
25 has been going off for quite a while.
65

1 (All jurors excused from Courtroom at 2:22 P.M.)

2 THE COURT: All right. Yes, sir?

3 MR. YOUNG: Your Honor, the Defense challenge would be
4 as to Juror Number 26, an African-American female struck by
5 the State.

6 That juror was previously struck by the State on the
7 grounds given by the State for excusing that she was unem-
8 ployed.

9 The same grounds were given by the State previously
10 when they previously struck Juror 125, who is also African-
11 American, who is also unemployed.

12 However, the State did not strike Juror 125 - I believe
13 she is similarly situated -- seated 125, and, therefore, the
14 State may have a different reason for striking Juror Number
15 26 at this time.

16 I'd also point out the State also accepted Juror 174
17 who is also unemployed.

18 SOLICITOR: Your Honor, this time as to Juror Number
19 26 -- we struck because we had struck her last time. At
20 the time that Ms. Singleton was called, I probably would
21 have stricken her but I needed to save two strikes because
22 I had two other jurors that I was concerned about, so I couldn't
23 afford to use a strike on her and then risk getting one of
24 the other two that I was concerned about.

25 At the time I struck Ms. Chatham, I had three strikes

66

1 left. When Ms. Singleton was called up, I had used a -- if I
2 had used a strike then, I would have only had one strike
3 left.

4 MR. YOUNG: Your Honor, I just -- it's my understanding
5 from reading the case law that in a de novo jury strike you
6 cannot use the reason that I struck her before to justify it
7 as a race neutral reason in the de novo jury pull.

8 My understanding is the state's reason for striking Juror
9 Number 26 at this point in time is because we struck her
10 before, where the Defense was granted a Batson motion and
11 the jury pull begins again de novo.

12 I don't think that that is a valid reason for the strike,
13 and I would point out the two similarly situated jurors were
14 accepted by the State.

15 THE COURT: Let me -- and I guess, Mr. Young, I want
16 to be sure that I understand your motion.

17 Your motion is that Ms. Singleton was struck -- Ms.
18 Singleton was struck while Juror 125 was kept and while 174
19 was kept.

20 And both Jurors 125 and 174 are African-American fe-
21 males so you're -- so why would the State have kept two
22 African-American women similarly situated and struck Ms.
23 Singleton, Juror 26, who is also an African-American female,
24 and you would say that it was racially -- that the reason
25 given was yes, we struck her before and we were concerned

67

9635

1 about the other two jurors but we were concerned about -- we
2 were more concerned about other jurors and we were running
3 out of strikes, whereas 125 and 174 are both of the same
4 race as Ms. Singleton. Right?

5 MR. YOUNG: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. YOUNG: But the grounds under Batson would be it
8 would apply individually to any African-American excluded
9 off the jury panel regarding whether or not African-Americans
10 were left on.

11 THE COURT: It would, it would, but under *Peyton v. Kearce*,
12 as I understand it, if you would show similarly situated
13 people who were kept to show it is racially pretextual,
14 wouldn't you show that there were similarly situated folks
15 of a different race, of perhaps a Caucasian or Asian, for
16 example, race, to show that they were in fact used on the
17 jury or kept on the jury by the State, whereas, the African-
18 American person similarly situated was struck?

19 MR. YOUNG: Your Honor, I certainly understand the Court's
20 position that all three of the jurors we're talking about
21 are African-American females. I believe Juror 26's last name
22 is Cheatham, for the record.

23 THE COURT: Right.

24 MR. YOUNG: However, the State last time struck her
25 because of her unemployment, the same reason as given for

68

1 striking another juror and not striking another juror all of
2 the same race.

3 My Batson challenge would be as to Ms. Cheatham's abil-
4 ity to sit on this particular jury -- the strike that the
5 State exercised against her in her individual capacity was
6 not neutral where they kept other jurors regardless of what
7 their race was for the same condition in which they alleged
8 as a reason for using a strike against her.

9 THE COURT: Okay, thank you. Yes, ma'am, Ms. Wilson?

10 SOLICITOR: Which part would you like me to address?

11 THE COURT: I don't know, quite frankly. My understand-
12 ing is that there is an expressed concern about Ms. Singleton
13 being struck and Ms. Cheatham being struck.

14 SOLICITOR: As I said earlier, Ms. Singleton was not struck
15 by me. She had been stricken last time by me. She was not
16 stricken this time by me because that would have left me
17 with only one strike and I felt like I needed to have two
18 strikes because I had two people that I was very concerned
19 about.

20 So, therefore, that is why she stayed on, and I think
21 that is race neutral.

22 THE COURT: I agree. I think it is racially neutral. I
23 think that -- and, again, the individuals that Mr. Young is
24 showing as being people kept similarly situated are of the
25 same race.

69

0096

1 SOLICITOR: Yes, mazz.
2 THE COURT: So I think that underscores that in fact as
3 a race neutral reason, and I think we have a jury.
4 All right.
5 MR. YOUNG: Thank you, Your Honor.
6 THE COURT: Now, you all go and get some lunch. The
7 jury is coming back at four o'clock which in just a moment
8 I can excuse them, and then we can get into the trial of
9 this case.
10 I'm going to ask you to just take an hour because
11 I understand that we do have the Jackson v. Denno hearing,
12 and you all think we can do that in thirty minutes.
13 SOLICITOR: I think so.
14 MR. YOUNG: I think so.
15 THE COURT: All right.
16 SOLICITOR: How late do you plan to go today?
17 THE COURT: I don't believe I'm going to start this
18 trial today. Well, if we finish promptly at four o'clock we
19 can at least get opening statements done.
20 SOLICITOR: So no witnesses today?
21 THE COURT: I would like to go until five o'clock for
22 sure.
23 SOLICITOR: So maybe kept the first two.
24 THE COURT: Yes, maybe kept the first one or two. You can
25 rely on if you just keep one witness . .

