

VOLUME FIVE OF EIGHT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable Paul M. Burch, Circuit Court Judge SUPREME COURT

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

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1 Engineering from the University of Tulsa in 1986. I then
2 worked as an engineer for several years before attending
3 medical school in Oklahoma State College of Osteopathic
4 Medicine. I graduated from there in 1997 and attended the
5 Medical University of South Carolina for four years for a
6 psychiatry residency. I then trained one more year doing
7 a forensic psychiatry fellowship at the University of South
8 Carolina in Columbia.

9 Q And what is your present position now?

10 A I am the Program Director of Forensic Psychiatry
11 at the Medical University of South Carolina.

12 Q How long have you been at the Medical University
13 of South Carolina?

14 A In August, I will have been in that position two
15 years.

16 Q All right. And do you have any other duties
17 besides your duties at MUSC?

18 A My duties at MUSC are quite varied. I work with
19 the Department of Juvenile Justice. I work with the
20 Department of Mental Health doing evaluations for
21 competency to stand trial and criminal responsibility. I
22 have occasional patient care responsibilities as well as
23 teaching medical students and residents.

24 Q Okay. And you do competency and criminal
25 responsibility evaluations for the Department of Mental

1 Health?

2 **A** Yes. I did those during my training in my
3 fellowship year. Starting March of this year, I do those
4 through a contract with the Department of Mental Health for
5 the low country counties.

6 **Q** Okay. Have you ever been qualified as an expert
7 in the field of forensic psychiatry?

8 **A** Yes, sir. I have.

9 **Q** How many times have you been qualified as an
10 expert?

11 **A** Probably ten.

12 **Q** Is that in General Sessions?

13 **A** In General Sessions, maybe five or six. I also
14 testified in common pleas and civil court.

15 **Q** Okay. Is that here in South Carolina?

16 **A** Yes, all of my testimony has been in South
17 Carolina.

18 **MR. BARTOSH:** Your Honor, we would offer Dr.
19 Melikian as an expert in forensic psychiatry.

20 **MR. WILLINGHAM:** No objection, Your Honor.

21 **THE COURT:** She is qualified as an expert in
22 forensic psychiatry.

23 **BY MR. BARTOSH:**

24 **Q** Doctor, were you asked to, by us to do an
25 interview with Mr. Marion Lindsey?

1 **A** Yes, I was.

2 **Q** And to prepare a diagnosis, do an examination and
3 prepare a diagnosis?

4 **A** Yes.

5 **Q** Can tell us about that?

6 **A** I saw Mr. Lindsey on May 4th of this year. I
7 also had the opportunity to review records that you
8 supplied. I spent time with Mr. Lindsey on the 4th and
9 evaluated those records. I made a diagnosis of major
10 depressive disorder. I also made the recommendation that
11 he be seen by a behavioral neurologist because of some
12 abnormalities in his psychological testing.

13 **Q** What records did you have the benefit of
14 reviewing?

15 **A** I had the benefit of reviewing his medical
16 records, the records from a psychiatric hospitalization
17 when he was a teenager, records of a head injury when he
18 was an infant, as well as neuropsychological testing. I
19 saw school records. That's all I can recall at this
20 point. I also had the opportunity to see the reports from
21 William S. Hall where he had been evaluated.

22 **Q** So you reviewed the records from Hall?

23 **A** Yes, I did. I reviewed their reports.

24 **Q** Okay. What can you tell us about Mr. Lindsey as
25 far as any cognitive deficits or any kind of problems that

1 he may have had?

2 **A** By Mr. Lindsey's report, he had problems in
3 school and required learning disability classes. He also
4 had problems with speech and reported that he needed some
5 type of help with speech therapy. I'm not sure of exact
6 words he put that in.

7 Mr. Lindsey had had an accident where he was run over
8 by a car when he was 18 or 19 months old and sustained a
9 head injury at that point. He had also inhaled kerosene
10 at one point. He had been in, I believe, a motorcycle
11 accident and a car accident. He had several head
12 injuries. Mr. Lindsey completed the ninth grade and
13 dropped out in the tenth grade. He had trouble with
14 school.

15 Reviewing his neuropsychological testing, he had some
16 abnormalities having to do with naming and being able to
17 copy designs, dexterity and fine motor skills. Based on
18 those things, I would say that Mr. Lindsey had some
19 cognitive deficits.

20 He also has a family history of depression. He had
21 been treated psychiatrically after an overdose when he was
22 15 years old. In talking him about what was going on at
23 the time of the incident, he appeared to meet the
24 diagnostic criteria for depression at that time also.

25 **Q** So does he suffer from a major mental illness?

1 **A** He suffers from major depressive disorder. He
2 is currently being treated for that.

3 **Q** Now can you tell us what is malingering?

4 **A** Malingering is the conscience fainting of
5 symptoms to appear ill. The easy explanation of that is
6 faking that you are sick.

7 **Q** Okay. You had, were there any test that were
8 given to Mr. Lindsey to determine whether or not he was
9 malingering?

10 **A** Yes. Mr. Lindsey's record had malingering on
11 them. Looking back through the results from his
12 evaluation at the Hall Institute where they diagnosed him
13 with malingering, they said that because of his discussing
14 hearing voices and a friend Jimmy, their, by the report
15 Hall had, by their objective testing, he was not
16 malingering. He was putting forth good effort.

17 Because of those concerns when he was seen by Dr.
18 Brawley, a neuropsychologist, he was tested again to see if
19 there was any symptoms of malingering. He was given a
20 test that checks for whether someone is exaggerating a
21 mental illness. He was not faking on that test. He was
22 also given test for malingered memory. He was not faking
23 on that test either. Based on those results, I did not
24 make a diagnosis of malingering.

25 **Q** Do you believe he is malingering?

1 A No, I do not.

2 Q Can you tell the jury why you don't believe he is
3 malingering.

4 A Malingering requires an external incentive.
5 There is some reason why person would be malingering.
6 Mr. Lindsey would not does not have that incentive. He
7 has been suicidal much of the time since the incident
8 occurred and has no reason to faint a mental illness to get
9 any additional help or to reduce his symptoms.

10 Also, I can understand why other professionals would
11 wonder about his malingering because he presents with a
12 very atypical description of hearing voices. What Mr.
13 Lindsey reports is that when he was in the psychiatric
14 hospital at age 15 after an overdose that a mentoring or
15 imaginary friend named Jimmy came to visit him. I should
16 say just that he heard these voices. And these were
17 comforting to him.

18 He never discussed this with anyone. He did tell me
19 that his roommate in the psychiatric hospital noticed him
20 talking to unseen others. When Mr. Lindsey is stressed,
21 he reports that this friend Jimmy is with him and tells him
22 good things and supports him in some ways. When he was,
23 right after the incident and when he was being seen by
24 doctors, he was very nervous. He did report that his
25 friend Jimmy was with him. This is the way that Mr.

1 Lindsey has of coping with nervousness and stress.

2 Q When Jimmy first appeared, did he explain to you
3 the circumstances of why he said that Jimmy appeared?

4 A He explained that he had been placed in the
5 hospital after the overdose attempt. He felt very alone
6 in the world and with no friends. And this was a
7 comforting thing to him. He does, when he describes what
8 happens, he does describe hearing a voice much like an
9 auditory hallucination. This is very atypical. That
10 would be why he would be mis-diagnosed as malingering.

11 Q Was there something in particular about one of
12 the folks that, his roommate at that psychiatric hospital?

13 A Mr. Lindsey reported that he was placed in a
14 room at the psychiatric hospital with a man who looked very
15 much like Charlie Manson. He was especially afraid having
16 been in a psychological hospital and having this roommate.
17 He did report that this roommate asked him at times who are
18 you talking to. This is when Jimmy first of showed up.
19 He also related that that roommate turned out to be a very
20 nice man and only looked scary.

21 Q Can you give an opinion as to whether Mr.
22 Lindsey would have been operating under the influence of
23 mental or emotional disturbance when this incident
24 happened?

25 A Mr. Lindsey reported to me that he had been

1 suicidal for several weeks prior to this incident and was
2 actually planing a suicide. He had a decrease in appetite
3 with weight-loss, feelings of open hopelessness and
4 helplessness and sad mood. I feel he would meet the
5 criteria for depression at the time of the incident and
6 since.

7 Q Would you describe his depression as chronic or
8 acute?

9 A He has had periods of depression in the past. I
10 will describe him as recurrent. I'm not sure how long he
11 had had those feelings prior to the incident. He did
12 report that they had been present for more than two weeks.

13 Q Okay. So would that be chronic or acute?

14 A That would be a separate incident of depression
15 at that time.

16 Q Okay. Is there a diagnosis of chronic
17 depression or acute depression?

18 A Yes, chronic depression would be one that would
19 be untreated or is resistant to treatment. I'm not sure
20 when his depression started. That would be a separate
21 incident. I guess you could call it acute.

22 Q Okay. Could you explain the difference between
23 chronic and acute?

24 A Acute is something that is new, a new separate
25 illness. A chronic illness is something that you have had

1 for a while. And it continues to bother you continuously.

2 Q Can you tell us about Mr. Lindsey's intellectual
3 functioning?

4 A On testing at William S. Hall, Mr. Lindsey had a
5 well below average IQ. They actually diagnosed him with
6 borderline intellectual functioning. That is a diagnosis
7 used for someone who is functioning close to the mildly
8 mentally retarded range. His IQ, at that time, I believe
9 was 76 on testing.

10 When he was retested by Dr. Brawley, his testing
11 scores were a little better in the 80s, which is still well
12 below the average for intelligence. I would not have made
13 the diagnosis of borderline intellectual functioning
14 because he does function actually better than what his test
15 scores look like. His intelligence is low. He's had
16 trouble in school. He does have some functioning abilities
17 that I would not say were the basis of worrying or seeing
18 him clinically for decreased intelligence.

19 Q Okay. When you say that he has cognitive
20 deficits, can you explain what that means?

21 A Cognitive deficits would be problems in thinking
22 or acting. The psychological tests that were given showed
23 that he had problems with verbal fluency, meaning, his
24 finding of words. He had trouble naming words. He had
25 trouble with processing memory. He had some other subtle

1 findings of problems with his brain in that his dexterity
2 was different left and right. His motor speed was
3 different left and right.

4 Q Those tests do they indicate some, are there
5 indication of brain damage?

6 A They are an indication of an abnormality, yes.

7 Q Do you have an opinion as to whether or not he
8 does have a brain abnormality?

9 A I would say that using my professional judgment,
10 he does have some kind of abnormality that causes his low
11 test scores and sudden neurological findings.

12 Q Do you know the source of that abnormality?

13 A That could have been something he was born with.
14 It could be head trauma that he has just over the years.
15 He had a period where he ingested kerosene as an 18 or 19-
16 month-old. I don't know if he had had asphyxia associated
17 with that. Like I said, it could be something genetic
18 that he was born with. There are lots of traumatic brain
19 injury that could also contribute. I would not be able to
20 say where it came from.

21 Q But you feel that there is some?

22 A Yes.

23 Q As a matter of fact, you recommended that he be
24 referred to a neurologist?

25 A Yes, after seeing the test results from the

1 neuropsychologist I recommended that he be seen by a
2 behavioral neurologist.

3 Q And he was seen by a behavioral neurologist?

4 A Yes, he was.

5 Q On the suicide attempt when he was 15, that was
6 an overdose?

7 A Yes.

8 Q Do you know what kind of overdose that was?

9 A As I recall, the record stated Tylenol and other
10 medications. Taking basically all of the pills that he
11 could get a hold of.

12 Q Do you know the reason for the attempt? Did he
13 explain that to you at the time?

14 A I don't recall at this time. Do you have
15 material that would refresh my memory on that?

16 Q Well, I don't know if we have it.

17 MR. BARTOSH: Beg the Court's indulgence, Your
18 Honor.

19 BY MR. BARTOSH:

20 Q Let me hand up your notes that you faxed to us
21 and see if that might refresh your memory.

22 A Most of my notes here indicate that that was an
23 overdose. We were talking at the time that I saw him
24 about his auditory hallucinations of Jimmy.

25 Q Nothing as to why?

1 A No.

2 Q He never explained that to you?

3 A He may have. I don't have that in my notes.

4 Q Let me ask this. His neurological problems,
5 would you describe them as chronic or acute?

6 A Given the history of school problems, I would say
7 those were chronic. They were not tested until he was
8 seen at Hall Institute and by Dr. Brawley.

9 Q Chronic means long-term?

10 A Yes.

11 Q How would all of this is affect Mr. Lindsey's
12 ability to cope with things?

13 A Mr. Lindsey has a limited ability to cope with
14 things due to his decreased intelligence in general. He
15 also has poor coping skills as evidence by continuing to
16 have an imaginary friend as an adult. During the time of
17 the stress with his wife and the separation from her, he
18 was in addition depressed at that time, which would also
19 decrease his coping abilities.

20 Q Okay. Did he discuss with you the incident that
21 we're here, the killing of his wife?

22 A Yes, he did.

23 Q What did he tell you about that?

24 A He stated that his wife was taking, was leaving
25 and taking the kids. And he would never see them again.

1 He had moved into his cousin's house and had planned to
2 commit suicide by driving off the cliff. But he was
3 worried that he might not die.

4 He stated that he begged his wife to return to him.
5 Had wrote suicide notes but did not know what those said.
6 He said he had planned to shoot himself and that his cousin
7 had taken the keys and that his mother and uncle and
8 brother had talked to him. He stated that he was unable
9 to reach his wife. She was blocking the numbers on the
10 phone. He had been crying which was something very
11 unusual for him. He usually never allow anyone to see him
12 cry.

13 He had lost weight from 225 pounds down 160 pounds in
14 three weeks. He stated that he had got in touch with his
15 wife at work where the phone numbers were not blocked and
16 told her he was going to commit suicide. And she laughed
17 at him.

18 On the date of the incident, he talked to Latresse for
19 a couple of hours and drove her car home. He was tired.
20 He stated that he had planned to go to his mother-in-law's
21 home and blow his brains out, as he put it, in front of the
22 house. While he was there, he was driving and was talking
23 to his wife's cousin, saw an image in the back. There was
24 dark windows in the car. The cousin drove off.

25 Mr. Lindsey stated that he just like snapped. He

1 followed them. He stated he did not remember and he did
2 not know he had shot his wife until EMS told him. He said
3 he shot four times and shot himself one time and that the
4 police also shot him. He asked the ambulance driver what
5 had happened to his wife and stated he did not know he had
6 shot her even after he left the hospital. He was also
7 able to report to me that he had asked the EMS, the
8 paramedics who came to the scene to let him die.

9 Q Had you reviewed his hospital records?

10 A I reviewed several hospital records.

11 Q And saw a gunshot wound to his head?

12 A Yes, I did.

13 Q Can you describe that wound for the jury.

14 A It was a wound that went, Mr. Lindsey put the
15 gun to head shot himself in the head. The bullet went
16 through. An enter and exit wound is my understanding. It
17 did not penetrate his brain. He was shot there and also
18 shot multiple times by police officers at the time of the
19 incident.

20 Q There was an entrance wound and an exit wound?

21 A That is my understanding, yes.

22 MR. BARTOSH: That's all I have, Your Honor

23 MR. WILLINGHAM: May it please the Court.

24 CROSS-EXAMINATION

25 BY MR. WILLINGHAM:

1 Q Doctor, did you prepare a report in this case?

2 A No, I did not.

3 Q You did a year fellowship that William S. Hall?

4 A Yes, I did.

5 Q You are now the Chief Forensic Psychiatrist at

6 MUSC?

7 A I am the program director.

8 Q Is that close to the same thing?

9 A I guess so.

10 Q Is it normal to evaluate a defendant and prepare
11 a report?

12 A It depends on the case.

13 Q When you testified in General Sessions Court
14 determining competency and criminal responsibility, how
15 many of those cases did you not prepare a report?

16 A In those cases, I prepared a report every time.
17 I was working for the Court at that time. It was my duty
18 to report back to the Court.

19 Q What was the purpose of preparing a report?

20 A A purpose of preparing a report is to inform the
21 Court of your findings.

22 Q And you did not prepare a report in this case?

23 A That is correct.

24 Q You understand if you had prepared a report, that
25 would have to given?

1 A Yes.

2 Q And it would have been beneficial to proving your
3 testimony?

4 A I would think so, Yes.

5 Q That was not done?

6 A Right.

7 Q And why not?

8 A I was not asked to prepare a report in this case.

9 Q Did, do you know who Dr. Pam Crawford is?

10 A Yes, sir.

11 Q Who is Dr. Crawford?

12 A Dr. Crawford is sitting in the courtroom right
13 there. She was the Director of Forensic Psychiatry when I
14 was in William S. Hall doing my training.

15 Q Did Dr. Crawford attempt to talk to you?

16 A Yes, she talked to me earlier today.

17 Q Did you agree to talk to her?

18 A No, I did not have time.

19 Q Tell me about Jimmy.

20 A I'm sorry about?

21 Q Jimmy.

22 A What would you like to know about Jimmy?

23 Q Well, do you know when the first time Jimmy came
24 into existence?

25 A By Mr. Lindsey's report, Jimmy came into exist

1 when he was 15 and in the hospital.

2 Q Now, other than what he told you -- we're going
3 to get to the stuff he told you later. Other than what he
4 told you, when was the first documented evidence of there
5 ever being any Jimmy?

6 A There was mention of the Jimmy on intake to
7 Spartanburg Mental Health. I am not sure if there was
8 mention of Jimmy when he was hospitalized with the gunshot
9 wound.

10 Q Okay. Did you rely on the report of Freeman
11 Smith, Dr. Smith, during your evaluation?

12 A I did look at the information, yes.

13 Q I think that is probably the first time that he
14 mentions Jimmy. Do you disagree with that?

15 A I believe so. Can I look at those notes?

16 Q Sure, you can.

17 A (Reviewing.) I don't see Ms. Howard's notes who
18 was on the stand earlier. She had, Ms. Howard saw him
19 initially and referred him to Dr. Freeman.

20 Q Uh-huh (affirmative).

21 A And she was concerned because he did mention
22 auditory hallucinations with her at that time. I don't
23 know whether he used the name Jimmy or not. But that was
24 part of her referral to Dr. Freeman.

25 Q And that has effective 10/10/02?

1 A That is when Dr. Freeman saw him.

2 Q Okay. No mention of Jimmy in particular until
3 10/10/02?

4 A Correct.

5 Q Would, you don't think he is malingering?

6 A No, I do not.

7 Q Would it be any significance to you, Doctor, to
8 know that that is the date that the State served the notice
9 of intent to seek the death penalty on him?

10 A Well, that would be interesting to know. And
11 had I had that information, I would have asked him about
12 that during the evaluation?

13 Q I'm going to show you the notice to seek the
14 death penalty. I'll have you look at it.

15 A (Reviewing.)

16 Q It is dated what day?

17 A That is dated October 10, 2002.

18 Q I'm going to show you an affidavit of service.

19 A (Reviewing.)

20 Q It shows it was served what day?

21 A October 10, 2002.

22 Q So the same day that he came up with Jimmy or the
23 first time we have documented in the records about a Jimmy,
24 correct?

25 A That is correct.

1 Q Does that change your opinion?

2 A No, it does not. Mr. Lindsey has used Jimmy as
3 a coping mechanism. I'm sure that being served with a
4 notice that the State would seek the death penalty was one
5 of the most stressful things that happened in his life.

6 Q Okay. Tell me again what malingering is.

7 A Malingering is the conscious fainting of symptoms
8 for a secondary gain.

9 Q A secondary gain would be to avoid
10 responsibility?

11 A That could be one of them, yes.

12 Q Okay. But you don't think he was doing that?

13 A Well, Mr. Lindsey has been suicidal since the
14 time of the incident. He was also still suicidal in May
15 when I saw him. Fainting symptoms would not keep him from
16 his goal.

17 Q Would blaming Jimmy help avoid his
18 responsibility?

19 A Blaming Jimmy might avoid responsibility. It
20 may be a coping mechanism of Mr. Lindsey's in dealing with
21 what he had done.

22 Q That is exactly what he tried to do on 10/10/02,
23 wasn't it? The highlighted part.

24 A Yes.

25 Q He tried to say it was Jimmy's fault, not his?

1 A That is correct.

2 Q That is avoiding responsibility, right?

3 A Correct.

4 Q But he is not malingering?

5 A No, I believe that that is a manner in which Mr.
6 Lindsey copes with stress.

7 Q Did you look at Dr. Narayan's report from William
8 S. Hall Institute?

9 A Yes, I did.

10 Q That was done in July of 2003?

11 A I don't recall the date.

12 Q I'm sorry. The report is July 18, 2003. He
13 actually saw him before then.

14 A Yes.

15 Q During that second incident, were you aware of
16 Jimmy being present for the interview?

17 A I was aware that when Dr. Narayan and asked Mr.
18 Lindsey questions, Mr. Lindsey referred to Jimmy who was
19 supposedly also in the room.

20 Q He did more than just refer to him, didn't he,
21 Doctor?

22 A He had him sitting somewhere and pulled out a
23 chair for him.

24 Q He pulled a chair right up next to him and
25 started carrying on a conversation with him?

1 **A** That is my understanding, yes.

2 **Q** But you don't think he was malingering?

3 **A** No, sir. I do not.

4 **Q** Did you rely on Lauri Barwick's report dated
5 November 13, 2003?

6 **A** I looked through those report those notes, yes.

7 **Q** And she indicated, Dr. Barwick indicated in her
8 report that it did not appear to be attending to any
9 internal stimuli. But when asked about Jimmy, he would
10 point and say he is in the room. The doctor says these
11 are not consistent with true psychosis. Would you agree
12 with that or disagree with that?

13 **A** I would agree with that. She noted that Jimmy
14 would be appear to be more of an imaginary friend in her
15 note which would not appear to be the way that Mr. Lindsey
16 uses Jimmy as a coping mechanism.

17 **Q** But again, he is not malingering?

18 **A** By objective test, Mr. Lindsey was not
19 malingering that he cannot remember or that he was fainting
20 any psychotic symptoms on formal testing?

21 **Q** What is the Ray test?

22 **A** The Ray test is a copy of a complex design.

23 **Q** Okay. Is that an effort to determine whether he
24 is malingering or not?

25 **A** That was an effort to determine his cognitive

1 ability.

2 Q Could it be used to determine if someone was
3 malingering?

4 A It is not specific for that, no.

5 Q Could it be used for that?

6 A I suppose, yes.

7 Q What did you put down? These are your notes?

8 A Yes. The Ray test was borderline. Borderline
9 cognitive functioning.

10 Q Is Marion Lindsey competent to stand trial?

11 A I did not do a formal assessment of his
12 competence to stand trial. But in my limited interaction
13 with him, I would say yes.

14 Q Does Marion Lindsey know the difference between
15 right and wrong?

16 A Yes, he does.

17 Q Does Marion Lindsey have the capacity to conform
18 his conduct to requirements of law?

19 A Once again, I did not do that formal exam. But
20 on my limited interactions with him, yes.

21 Q So he knew right and wrong?

22 A Correct.

23 Q He knew he could conform his conduct?

24 A Correct.

25 Q And he is competent?

1 **A** Correct.

2 **Q** So tell me again what is wrong with him.

3 **A** He has cognitive deficits. He has low
4 intelligence. He was depressed and still remains
5 depressed.

6 **Q** All right. I should have asked this before I
7 asked you. It's going to take me a second. Tell me again
8 what is was wrong with him.

9 **A** He has some cognitive deficits. N-i-t-i-v-e.

10 **Q** Deficits?

11 **A** Right. Those include low IQ.

12 **Q** Okay. Okay.

13 **A** And neurologic impairments.

14 **Q** Neurologic?

15 **A** Uh-huh (affirmative).

16 **Q** Impairment?

17 **A** Yes.

18 **Q** Okay. That's one thing, right?

19 **A** Yes.

20 **Q** Those are?

21 **A** Those are part of his cognitive deficit tests.

22 **Q** And what else do you got?

23 **A** Depression.

24 **Q** Depression. Okay. Now the cognitive deficit,
25 how did you determine that?

1 **A** By neuropsychological testing done by Dr. Brawley
2 as well as IQ testing done by William S. Hall.

3 **Q** Now you said that you referred him to a
4 neuropsychologist?

5 **A** Dr. Brawley is a neuropsychologist, yes.

6 **Q** Who is the behavioral neurologist?

7 **A** That is Dr. Asburger. I'm sorry. Absher.

8 **Q** What did Dr. Absher say was wrong with him?

9 **A** Dr. Absher said he had a normal neurological
10 exam.

11 **Q** So Dr. -- I can't say his name.

12 **A** Absher.

13 **Q** Absher said there was nothing wrong with him
14 about him neurologically?

15 **A** He said he had a normal neurologic exam.

16 **Q** Tell me what that means.

17 **A** I guess I'm not being specific enough, is that he
18 would have a normal neurologic exam. And his reflexes are
19 normal and those kind of things. His neurologic problems
20 are pretty subtle. They are problems with right, left
21 things, naming. Those kind of tests. His reflexes on the
22 general neurology exam would be normal.

23 **Q** Okay. And the depression, how did you determine
24 that?

25 **A** I determine the depression by his subjective

1 report of symptoms as well as reviewing the records from
2 when he was hospitalized for the shooting as well as when
3 Spartanburg Mental Health was seeing him while in the
4 detention center.

5 Q Okay. Tell me what are the symptoms of
6 depression.

7 Q Symptoms of depression include sad moods,
8 suicidality, decreased injury, inability to enjoy things,
9 decreased concentration, decreased appetite, difficulty
10 sleeping.

11 Q Could symptoms include feeling tired and having
12 no energy?

13 A Yes, I believe I stated low energy.

14 Q Feeling down on yourself?

15 A Yes.

16 Q Problems sleeping?

17 A Yes.

18 Q Problems with appetite?

19 A Yes.

20 Q Lost of sexual interest?

21 A Could be, yes.

22 Q Feel people don't like you?

23 A Could be, yes.

24 Q Feel like people don't understand you?

25 A That is not usually listed as part of depression.

1 Q Okay. You rather stay by yourself than with
2 other people?

3 A Social isolation can be a symptom, yes.

4 Q Feel like life is hopeless?

5 A That is correct.

6 Q Sometimes feel like you are on a special mission?

7 A That is not usually listed as part of depression.

8 Q Difficulty keeping thoughts focused?

9 A Yes.

10 Q You hear voices that bother you and don't know
11 where they are coming from?

12 A That is not usually listed as part of general
13 depression but could be as part of psychotic depression.

14 Q Psychosis?

15 A Yes.

16 Q Okay. Did you have the benefit of his
17 Department of Corrections records when he served time for
18 assault and battery with intent to kill?

19 A No, I did not.

20 Q Well. Don't you think that would have been
21 important?

22 A It might have been helpful. I'm not sure.

23 Q Especially if they had done a mental assessment
24 on him, correct?

25 A At the time, it would've been helpful, yes.

1 Q Okay. And it would have been important to know
2 that when asked if he often feel tired and have no energy,
3 he said no. That would be important, wouldn't it?

4 A This would have been at what time?

5 Q This was after he was convicted of assault and
6 battery with intent to kill. Do you need a date?

7 A Yes.

8 Q December the 29th of 1996.

9 A That would really have no relevance to whether
10 Mr. Lindsey was depressed around the time of this incident
11 or not.

12 Q Well, I thought you said he had a major
13 depressive disorder that was not limited to this time frame
14 and you went all the way back to when he tried to commit
15 suicide when was 15 years old?

16 A That is correct.

17 Q Okay. So we are talking about more than just
18 this time frame, aren't we?

19 A That's what I was trying to explain in my
20 testimony is he's having acute periods of depression.
21 They were not chronic in that he did recover from his
22 depression in between.

23 Q Okay. So in 1996, when he shot through a
24 windshield at Stanford Wilkins and was convicted of assault
25 and battery with intent to kill, he was not suffering from

1 depression?

2 A I did not examine him then.

3 Q But these records indicate that he didn't.

4 A According to those records, he was not having a
5 depressed mood at the time. Without having done the
6 evaluation or looking at more than the old record, I would
7 not want to make an opinion about that.

8 Q When asked if he heard voices that bother you and
9 you don't know where they are coming from. He indicated
10 no, right?

11 A That is what it says there, yes.

12 Q But you did not have these?

13 A No.

14 Q You think they would have been helpful to have?

15 A Given how old they are, they really did not have
16 a whole lot of relevance about this incident and what's
17 going right now.

18 Q Well, Doctor, you relied on records a whole lot
19 older than that, didn't you?

20 A Just that he had had the diagnosis in the past.
21 I did not have a chronology of his moods throughout his
22 entire life.

23 Q You testified to this jury now, Doctor, that he
24 had a suicidal ideation back as long as 15 years old.

25 A I testified he made a suicide attempt at 15, yes.

1 Q Okay. So it is that old records can still be
2 useful records?

3 A Correct.

4 Q But those you don't think to be useful?

5 A Not if he wasn't suffering from depression at the
6 time.

7 Q You still don't think he was malingering?

8 A No, sir.

9 Q I'm certainly no expert in mental health. But
10 can't malingering also be labeled as lying?

11 A Yes.

12 Q Okay. And does he have a history of lying that
13 you are aware of?

14 A Not that I know of in particular. But I did not
15 address those.

16 Q I'm sorry. I did not hear.

17 A I should go back and say that lying an
18 malingering are different things. Malingering is faking
19 an illness specifically by lying.

20 Q All right. Let's go all the way back to 1988.
21 That was the alleged suicide attempt.

22 A Okay.

23 Q Isn't that right?

24 A I don't recall the date.

25 Q Let me show you the date and see if that will

1 refresh your recollection.

2 A Yes.

3 Q Okay. You relied on these records?

4 A I reviewed those, yes.

5 Q Here it says in this report that the patient did
6 appear to be minimizing his problems trying to manipulate
7 to go home.

8 A Correct. He was trying to pretend that he was
9 doing better than he was because he wanted out of the
10 hospital.

11 Q The patient -- well, the patient states he did
12 this for manipulative reasons but did not realize that
13 Tylenol was so toxic. It was not that he was manipulating
14 to go home. His manipulative behavior was taking the
15 Tylenol overdose.

16 A Those were two different references to
17 manipulative behavior.

18 Q All right. Tell me what that is about.

19 A That was talking about trying to get attention.

20 Q Okay. And he got attention by taking Tylenol.

21 A Yes. He did not realize how toxic a Tylenol
22 overdose was.

23 Q So was it really a suicide attempt?

24 A I was not there at the time. It was a serious
25 problem in that he ingested that much, that many pills and

1 had to be treated for it.

2 Q But it is manipulative?

3 A In that he was trying to get attention and later
4 that he was trying to pretend that he was in better shape
5 than he was so he could go home.

6 Q But not malingering?

7 A No, not at this point.

8 Q Again, you did not have the benefits of the
9 Department of Corrections records where he told them that
10 he completed the 11th grade in school.

11 A No, I did not.

12 Q That would have been helpful though -- well, you
13 know that is not true, right?

14 A He explain to me that he completed the 9th grade
15 and quit in the 10th grade. There are many varying
16 records about his education record that are confusing. I
17 would not be surprised by that.

18 Q You had his school records, didn't you, Doctor?

19 A I had some school records, yes.

20 Q What did they show?

21 A They show incorrectly that he was in the 8th
22 grade three times. When, apparently, he was in the seventh
23 twice and repeated the first grade once. It was difficult
24 to interpret because of his school moves around what grades
25 he did where.

1 Q Did you know that he had made an application for
2 employment at BMW?

3 A In talking with him, I knew he made application
4 or that he been hired actually?

5 Q Did you see the record?

6 A No, I did not.

7 Q Well, here is his application. He told you he
8 was hired?

9 A I understood he had a job that was pending.

10 Q He told you that?

11 A I have to check but that's my recollection. I
12 don't see that in my notes. That may have been a
13 misunderstanding on my part. I know he was, had been
14 employed as a fork lift operator. I was under the
15 impression that he was going to work at BMW.

16 Q You don't know if worked there or not?

17 A I don't know.

18 Q Would it be important for you to know that he
19 lied on his application?

20 A That would be interesting to know, yes.

21 Q In fact, he said he completed Chapman High
22 School?

23 A I have not seen that document before. But it is
24 marked that Chapman High School, 12th grade diploma, yes.

25 Q We know that ain't true, right?

1 **A** Could I see the document?

2 **Q** Yes.

3 **A** This is a document I had not seen before.

4 **Q** If you need time, take all the time you need.

5 **A** I just wanted to look at the front page. Marion
6 Lindsey application for forklift driver.

7 **Q** What is the date on there?

8 **MR. BARTOSH:** Your Honor, we're going to
9 object to this. They have not laid the foundation
10 for the authenticity of the document.

11 **MR. WILLINGHAM:** There has not been any
12 authenticating laid for anything this doctor relied on
13 so far. I think experts can do that, Judge. Your
14 Honor, respectfully, I don't mean to interrupt your
15 thought process. She said it would have been
16 important for her to have reviewed that document.

17 **THE COURT:** I believe every question you have
18 asked her except questions that would elicit the
19 content of that document are appropriate. We need a
20 break anyway. Let me think about this.

21 We will take a short break.

22 (WHEREUPON, the jury exits at approximately 4:32 p.m.)

23 **THE COURT:** Let me hear your theory about that.

24 **MR. WILLINGHAM:** Your Honor, what she has
25 relied on -- any expert is allowed to rely on

1 inadmissible hearsay or other inadmissible items of
2 evidence in order form a conclusion. If she did not
3 look at the important documents, I think she would
4 have an opportunity to review those documents to see
5 if it changes any of her opinions. I'm not
6 introducing that document --

7 **THE COURT:** I agree with that. That is what I
8 said a second ago. You can ask her if she reviewed
9 that document. You can ask her if she knows of any
10 lies that he might have told. You can ask her if she
11 knows of a statement that he might have made about
12 completing high school on an application. But I
13 don't think you can introduce the content of the
14 document.

15 **MR. WILLINGHAM:** I was not trying to do that.
16 I apologize if somehow I did.

17 **THE COURT:** Okay.

18 **MR. WILLINGHAM:** I apologize. I'm a little
19 bit confused as to what I think the objection may be,
20 Your Honor.

21 **THE COURT:** I think the objection is to hearsay
22 contained within that application.

23 **MR. BARTOSH:** That's correct.

24 **THE COURT:** I think the real objection has to be
25 the authenticity of the document itself. If it is a

1 statement that is made by the defendant, -- well, the
2 statement is to authenticity and hearsay, the
3 objection is to authenticity and hearsay, right?

4 **MR. BARTOSH:** Yes, sir.

5 **MR. WILLINGHAM:** Your Honor, under Rule 703
6 basis of opinions by testimony of experts, is that it
7 both the type recently relied by experts in a
8 particular field in forming opinions upon the subject,
9 the facts or data need not be admissible into
10 evidence.

11 **THE COURT:** I agree completely. But you are
12 turning that little proposition of law upside down on
13 its head. It is saying that an expert can rely on
14 inadmissible evidence.

15 **MR. WILLINGHAM:** Yes.

16 **THE COURT:** It is does not necessarily say that
17 everything the expert relies on is admissible. It
18 does certainly not say that everything that an expert
19 did not rely on become admissible because the expert
20 might have relied on it if she had known about it.

21 Let's take a break.

22 (WHEREUPON, a short recess was taken at approximately
23 4:38 p.m.)

24 (WHEREUPON, the Court resumed at approximately 4:49
25 p.m.)

1 **THE COURT:** Are we in agreement now?

2 **MR. WILLINGHAM:** Yes, sir.

3 **THE COURT:** Bring the jury in.

4 (WHEREUPON, the jury enters at approximately 4:50
5 p.m.)

6 **MR. WILLINGHAM:** May it please the Court?

7 **THE COURT:** Yes, sir.

8 **BY MR. WILLINGHAM:**

9 **Q** Would it had been helpful to have the application
10 that he filled out for BMW on September the 9th, 2002?

11 **A** It might have been.

12 **Q** I'm sorry. September the 12th of 2002?

13 **A** It might have been.

14 **Q** You were not given this?

15 **A** No, I wasn't.

16 **Q** Would it have been helpful to talk with Celeste
17 Nesbitt, one of the witnesses to the crime?

18 **A** I am not sure.

19 **Q** Did you talk to Celeste Nesbitt?

20 **A** No, I did not.

21 **Q** Were you given a copy of the defense's case file
22 concerning the facts of the case?

23 **A** I am not sure how complete a case file. I
24 received incident reports and autopsy reports.

25 **Q** Would it have been helpful to have the full

1 discovery in formulating your opinion?

2 **A** I'm not sure. I cannot say without having seen
3 it.

4 **Q** Did you talk to -- I think we been over this --
5 Dr. Pam Crawford?

6 **A** She asked me to speak to me today. I did not have
7 time to speak with her.

8 **Q** Were you aware that she had talked to the
9 defendant?

10 **A** Yes, I was.

11 **Q** What it had been helpful to talk with her?

12 **A** I am not sure.

13 **Q** But possibly?

14 **A** Possibly.

15 **Q** How about Dr. Pratap Narayan? Did you talk with
16 him?

17 **A** No, I did not.

18 **Q** Would it had been helpful?

19 **A** I'm not sure.

20 **Q** Have you seen him before?

21 **A** Yes, I have.

22 **Q** He was the one that diagnosed him with
23 malingering?

24 **A** That is correct.

25 **Q** You said he ain't malingering?

1 A I disagreed with him. That is correct.

2 Q Would it had been helpful to talk with him about
3 why he came up with that diagnosis?

4 A No, I did not feel like it would. I had his
5 report.

6 Q Okay. You talked with Officer Benny Godfrey?

7 A No, I did not.

8 Q Would it had been helpful to know how the
9 defendant was acting at the time of the crime?

10 A It might have been. I was not doing a
11 evaluation for responsibility in terms of how he was acting
12 at the time of the crime. I was asked for help with the
13 mitigation.

14 Q Was it not important as to whether or not he was
15 suffering from these things at the time of the crime?

16 A Yes, it could have been.

17 Q It could have been important.

18 A It could have been important to talk to that
19 person. I felt like I had enough information to make that
20 diagnosis.

21 Q Did you talk to Latreese Smith?

22 A No, I did not.

23 Q Would it have been important to talk to one of
24 the last people he saw that day before he gunned down his
25 wife?

1 **A** It might have been.

2 **Q** But you did not do that?

3 **A** I did not do that.

4 **Q** But you did talk to Marion Lindsey?

5 **A** Yes, I did.

6 **Q** Now, a lot of what you testified to is based on
7 what he told you?

8 **A** That is correct

9 **Q** You don't believe he is malingering?

10 **A** That is correct.

11 **Q** But if he was or if he was lying, that would
12 affect your opinion, wouldn't you?

13 **A** If he was malingering?

14 **Q** If he was lying to you. You said there's a
15 difference between malingering and lying. I'm using the
16 word lying.

17 **A** Right. If he were lying about his symptoms,
18 that would have changed my opinion.

19 **Q** If he was lying about his behavior, would that
20 have changed your opinion?

21 **A** I was not looking at his behavior so much. I
22 was looking for signs and symptoms of mental illness.

23 **Q** You were not looking at his behavior, but you are
24 coming in to explain his behavior?

25 **A** I'm coming to explain things that I found

1 including mental illness and cognitive problems.

2 Q What was he suffering from back in 1994 when he
3 can gunned down Stanford Wilkins?

4 A I did not evaluate him at that time. I cannot
5 say.

6 Q What was he suffering from back in the year 2000
7 when he assaulted his wife at Applebee's?

8 A I did not evaluate him at that time. I can not
9 say that either.

10 Q You used the old phrase trash-in/trash-out. If
11 you got the bad information coming in, bad information is
12 going out, correct?

13 A That is correct. That's why in a forensic exam
14 you use some collateral information also because you are
15 not evaluating him as a treater in that you look for other
16 things that were going on. That is why I looked for the
17 records for when he went in the hospital and his other
18 mental health records. I was looking at things over time.
19 Whereas, if I was going to take him on as a patient, I
20 would take him where he sits.

21 Q Part of that trash-in possibly, arguably could
22 have been the fact that Jimmy never came up until the death
23 notice was served, is a fair statement?

24 A Jimmy does not really have to do with diagnosis
25 of mental illness. He is suffering from depression

1 regardless of whether he had the hallucination of the
2 imaginary friend or not. I'm not sure that that would
3 change, that would not change his neurological impairment
4 or his low IQ.

5 Q Tell me, Doctor, tell this jury what about his
6 depression makes it okay for him to gun down his wife.

7 MR. BARTOSH: Objection, Your Honor, as to the
8 form of the question.

9 THE COURT: Uh, approach the bench, please.
10 (WHEREUPON, a bench conference was held off of the
11 record.)

12 THE COURT: Sustained as to the form of the
13 question.

14 Let me see you.

15 (WHEREUPON, a bench conference was held off of the
16 record.)

17 BY MR. WILLINGHAM:

18 Q Doctor, what about his depression caused him to
19 gun down his wife?

20 A I never made the statement that his depression
21 caused him to gun down his wife.

22 Q What about his low IQ caused him to gun down his
23 wife?

24 A I did not make the statement that his low IQ
25 caused this. My testimony is that these should be

1 considered as mitigating factors.

2 Q What about his neurological impairment caused him
3 to gun down his wife?

4 A Once again, I did not state that it caused but
5 should be considered as mitigating factors.

6 Q What about his cognitive deficit caused him to
7 pull that trigger four times hitting his wife?

8 A As I said, I did not testify that these were the
9 cause. It is my testimony that these are mitigating
10 factors and should be considered in the imposition of a
11 death penalty.

12 Q Thank you.

13 THE COURT: Redirect?

14 REDIRECT EXAMINATION

15 BY MR. BARTOSH:

16 Q Doctor, on the malingering issue, Doctor,
17 malingering if I understand it, the purpose of that is to
18 give some benefit to you?

19 A That is correct. Faking an illness to get some
20 other benefit.

21 Q Do you know of any benefit that Mr. Lindsey
22 could receive by malingering?

23 A Not that I could discern.

24 Q Okay. And you still stand by your original
25 diagnoses of cognitive deficit, depression and neurological

1 deficit?

2 **A** Yes, I do.

3 **Q** on September 18th, was Marion Lindsey functioning
4 under any mental or emotional disturbance, chronic, acute
5 or recurring?

6 **A** I believe that on September of 2002, Mr. Lindsey
7 was suffering from acute depression.

8 **Q** Thank you.

9 **RECROSS-EXAMINATION**

10 **BY MR. WILLINGHAM:**

11 **Q** But you never talked to a single soul that saw
12 him on that day?

13 **A** I reviewed notes. I did not speak to anyone
14 other than Ms. Howard who takes care of him at the
15 detention center.

16 **Q** Well, that was not the answer to my question.
17 The question was you had not talked to anyone, not one
18 single soul that saw him on the day that he murdered his
19 wife?

20 **A** That is correct.

21 **Q** Thank you.

22 **THE COURT:** You can step down, ma'am.

23 **MR. BARTOSH:** Your Honor, we ask that Dr.
24 Melikian be excused.

25 **MR. WILLINGHAM:** No objection.

1 **THE COURT:** You're excused.

2 **MR. BARTOSH:** Are you ready for the next
3 witness, Your Honor?

4 **THE COURT:** Yes, sir.

5 **MR. BARTOSH:** Virginia Lindsey.

6 **VIRGINIA LINDSEY**

7 having first being duly sworn testified as follows:

8 **DIRECT EXAMINATION**

9 **BY MR. BARTOSH:**

10 **Q** You are Virginia Lindsey?

11 **A** Virginia Lindsey.

12 **Q** Ms. Lindsey, Marion Lindsey is your son. Is that
13 correct?

14 **A** Yes.

15 **Q** How old is Marion?

16 **A** Marion is 30 years old.

17 **Q** How many children do you have, Ms. Lindsey

18 **A** I have three boys. I had four boys. I lost one
19 in a drowning.

20 **Q** Where does Marion fall in your children?

21 **A** Marion would be my third child.

22 **Q** Okay. He has two older brothers?

23 **A** Yes.

24 **Q** Really he had three older brothers at one time,
25 is that correct?

1 **A** Two older.

2 **Q** And one younger?

3 **A** One younger.

4 **Q** One of the older brothers drowned?

5 **A** Yes.

6 **Q** You also had a daughter, didn't you, Ms. Lindsey?

7 **A** Yes. I had a daughter. In 1969, she was killed
8 in a car accident at seven months old.

9 **Q** You were never married to Mr. Lindsey's father,
10 were you?

11 **A** No.

12 **Q** Did you raise Marion basically by yourself?

13 **A** Yes, I did.

14 **Q** Was there any man or male influence in your home?

15 **A** Only his Uncle Steve.

16 **Q** What is Marion's father's name?

17 **A** Leon McDowell, Senior.

18 **Q** Let's talk about how Marion grew up. You had
19 how many children in the house?

20 **A** I had four boys at the time.

21 **Q** And yourself?

22 **A** And myself.

23 **Q** The house that you lived in, how large was it?

24 **A** A two-bedroom home.

25 **Q** The boys would stay in one room and you were in

1 the other?

2 A Yes.

3 Q Okay. Would the boys have to sleep in the same
4 bed?

5 A The boys shared beds. Yes, they did.

6 Q So it was a small home?

7 A Small home. Very small.

8 Q Were you working at that time?

9 A Yes, I were.

10 A Where were you working?

11 A Howard Johnson Motel.

12 Q Okay. What were your hours there?

13 A My hours was from 8:00 in the morning until 4:00
14 in the evening.

15 Q Who would watch the children while you were
16 working?

17 A Their Uncle Steve was there with them when I
18 would go work. So I guess you could consider him watching
19 them while I was at work.

20 Q Okay. What kind of child is Marion?

21 A Marion is a very loving, sweet child. He would
22 do anything for anybody. He was a very loving child.

23 Q Do you remember some injuries Marion received as
24 a young child?

25 A Yes.

1 Q Can you tell the jury about the first one when he
2 was 19 months old and inhaled some kerosene.

3 A Yes, Marion was 19 months old. I was in the
4 kitchen doing dishes. We had a wood heater. We would
5 always start our fire with kerosene. So we had a jar
6 sitting behind the heater with kerosene in it.

7 He was crawling around the floor at that time. All
8 of a sudden, I heard a screen. When I turned around to
9 look to see why he was screaming, he had poured kerosene
10 all over his face and down his clothes. So I grabbed him
11 up to try to give him milk. I could not get the milk in
12 him fast enough. So I grabbed him up and rushed him to the
13 rescue squad.

14 Q You took him to the hospital?

15 A Yes.

16 Q He was treated for that?

17 A Yes.

18 Q Did anything else happen to him when he was
19 younger?

20 A Yes, a month later, Marion got ran over by a car
21 driven by my brother Paul Pilgrim. He always had a thing
22 with following his Uncle Steve. He thought Steve was
23 driving a car so he was going to run and go with Steve.
24 It was a bank side on the side of the road where the car
25 sit. So when Paul got in the car to back up, Marion

1 crawls up the back hill. My brother did not know he was
2 there. He backed over his head with the car.

3 Q Did he receive a severe head wound?

4 A Yes. He still have the scars in his head.

5 Q What happened after that? Can you tell us who
6 took him to the hospital.

7 A His Uncle Steve took him to the hospital. I was
8 at work at the time. So his Uncle Steve carried him to
9 the hospital.

10 Q He was treated for that?

11 A He was treated for that.

12 Q You know how long he stayed in the hospital?

13 A He came back home that night.

14 Q Did he have a normal childhood in the sense of,
15 how was he at school? Was he a good student?

16 A No, he was slow in school. He never been a good
17 student in school.

18 Q What kind of problems did he have at school?

19 A The only problem I know he had in school was a
20 fight at Junior High School with another little boy. That
21 is the only problem that I know he had at school.

22 Q I'm talking about educational problems. Did he
23 have problems with his studies?

24 A Yes. He did not study. He did not like to
25 study. He would go to school. He would come home and put

1 his books down. He did not like to study books.

2 Q All right. Was anybody there to help him study
3 or to make sure that he did his homework?

4 A No, because they was all running around to the
5 T.K. Greg Center and all that. He did not have anybody to
6 just sit down and help him with his homework.

7 Q He did not have a dad or --

8 A No.

9 Q -- someone to help him with his work?

10 A No.

11 Q He did not have an easy time in school?

12 A No, he did not.

13 Q Did he have problems with his speech?

14 A Yes, he had problems with his speech.

15 Q Did he have to go to speech class in school?

16 A Yes, he went to speech class in school.

17 Q Did he repeat any grades?

18 A Yes, he repeated the 8th grade three times.

19 Q Did he repeat the first grade?

20 A (No response.)

21 Q If you don't remember.

22 A I don't remember.

23 Q Now, your other three sons, had separate fathers,
24 right?

25 A Yes.

1 Q Could you tell us about what would happen on
2 weekends with your other boys?

3 A My other two sons, their father would always come
4 and pick them up on the weekend. He would leave Marion.
5 He did not have a father to come pick him and take him to
6 visit him for the weekend because he never did.

7 Q His father never took any interest in anything
8 about Marion?

9 A No.

10 Q How did that affect Marion? How did he react to
11 that?

12 A Marion would get very upset because he did not
13 get to go with his brothers. I always explained to Marion
14 that's their father. Their going to spend the weekend with
15 them. You have to stay with mama.

16 Q How did he react to that?

17 A He cried. He cried because he wanted to go.

18 Q At some point, how old was he when he left the
19 house?

20 A (No response.)

21 Q When he moved out?

22 A When Marion moved out of my house, I think he was
23 about 20 years old.

24 Q Do you know how old he was when he quit school?

25 A I think he was 17.

1 Q What did he do when he quit school?

2 A He went to work.

3 Q Did he help support the family?

4 A He helped. He gave me money and helped me pay
5 bills and stuff. It wasn't very much because he was not
6 making very much, but he did try to help.

7 Q When he talked to you about the fact that he did
8 not have father in house and the fact that he did not have
9 a father to do things with, did he ever talk to you about
10 that?

11 A No, he never talked me about it. But I could
12 see it in him that he wanted a father in his life.

13 Q And at some point, Marion moved out of the house?

14 A Yes.

15 Q Did you know Nell Lindsey?

16 A Yes.

17 Q Okay. Did you know when Marion first meet Nell
18 Lindsey?

19 A I don't know the exact date.

20 Q Can you estimate?

21 A I estimate it would be around '95.

22 Q '95 or '96?

23 A Uh-huh (affirmative).

24 Q All right. And when they first met, did they
25 move in with each other? Was he living with her?

1 A No.

2 Q Was he living by himself?

3 A No, he was living with a girl named Stephanie
4 Petty.

5 Q Eventually did he and Nell move in together?

6 A Eventually, they did.

7 Q And they had a child?

8 A They had a child.

9 Q Do you remember when that child was born?

10 A I am sure that he was born

11 Q He was born before they were married?

12 A Yes.

13 Q You remember where they were married?

14 A I don't remember when they were married because I
15 did not know they had gotten married.

16 Q Marion told you afterwards.

17 A I heard through one of Marion's friends. Marion
18 did not tell me.

19 Q Then they had another child?

20 A Yes, they had another boy.

21 Q When was that little boy born?

22 A That little boy was born

23 Q You remember the year?

24 A 2002, I believe.

25 Q Can you describe Marion's relationship with Nell?

1 **A** The relationship with Nell was good to me. I
2 don't know what they did in their home. But all the time
3 when they was around me, it was good. And Nell, she was
4 like a daughter to me. I loved Nell as a daughter. I
5 always told Nell that she would be the only daughter-in-law
6 that I would have.

7 **Q** You never saw any of the violence or the arguing
8 that has been described here?

9 **A** I saw a little arguing between them. I never
10 saw Marion hit Nell.

11 **Q** During their relationship, did a pattern develop
12 where they would separate and then reconcile?

13 **A** Yes, they would separate. But they would go back
14 together. They would separate. They would go back
15 together. That happened several times.

16 **Q** Can you estimate about how many times?

17 **A** Approximately five.

18 **Q** And how long would the separation last?

19 **A** Not very long. About a month, maybe two months.

20 **Q** Then eventually, they would reconcile?

21 **A** They would reconcile and go back together.

22 **Q** When they would separate, would Nell take the
23 children with her?

24 **A** Yes, she would.

25 **Q** She went to her mother's house?

1 **A** Yes.

2 **Q** Marion would stay with friends or with you or who
3 would he stay with?

4 **A** Yes, he would stay with friends. He would never
5 stay with me. He would stay with friends.

6 **Q** When they would reconcile, who would initiate
7 that? Would it be Marion or would it be Nell or would it
8 be, sometimes be one or sometimes be the other?

9 **MR. GOWDY:** Your Honor, I hate to do this
10 but I have to object. I don't believe this witness
11 is going to be able to answer who is initiated
12 reconciliation.

13 **THE COURT:** Mr. Bartosh, why don't you first
14 ask her whether or not she knows.

15 **BY MR. BARTOSH:**

16 **Q** Ms. Lindsey, do you know when they got together,
17 who would approach them about getting back together?

18 **A** I don't know who approached who.

19 **Q** Okay. But that was the pattern?

20 **A** That was the pattern.

21 **Q** They would separate --

22 **A** Go back together.

23 **Q** -- and stay apart a while then back go back
24 together?

25 **A** Yes.

1 Q It would go back and forth?

2 A Yes.

3 Q What was Marion's relationship with or feeling
4 for his sons?

5 A Marion loved his sons very much. That's all he
6 talked about his sons. He always see that his kids wore
7 the best.

8 Q Did he ever tell you that he was trying to give
9 them what he never had?

10 A He told me he wanted to give them a father that
11 him and Nell neither one had never had. He did not want
12 his kids to grow without a father like him and Nell did.

13 Q Would it be fair to say that his children were
14 probably the most important thing in his life?

15 A His children were the most important thing in his
16 life.

17 Q Did he ever tell you when he was a child what his
18 feelings were for his father?

19 A Yes. He told me he feel like his father did
20 more for his other kids then he did him. He did not need
21 his father. He feel like that he loved his other kids
22 better than he did him. And he didn't want anything to do
23 with his father.

24 Q How many brothers and sisters do you have?

25 A Now, I have four brothers and three sisters.

1 Q Okay. Do you have one sister who is dead?

2 A No, I have a brother who was dead.

3 Q Do you have a sister named Bess Smith?

4 A Bessie Smith.

5 Q Has she ever attempted suicide?

6 A Yes, she have.

7 Q Do she suffer from any kind of mental illness?

8 MR. GOWDY: Your Honor, I hate to object,
9 but I'm going to have to for lack of foundation.

10 THE COURT: Sustained.

11 BY MR. BARTOSH:

12 Q Do you know if she has been treated for anything?

13 A Yes, I do.

14 Q What has she been treated for?

15 MR. GOWDY: I'm going to have to --

16 THE COURT: Sustained.

17 BY MR. BARTOSH:

18 Q Let me go back to, let me ask you one question
19 about when Marion was 15 and was hospitalized for attempted
20 suicide.

21 A Yes.

22 Q Did he ever describe his experiences to you?

23 A About the suicide?

24 Q About his experiences at the hospital.

25 A Yes.

1 Q What did he tell you?

2 A Marion told me that he was very afraid because
3 the man who was in the room with him look like Charles
4 Manson. He was very afraid.

5 Q How long did he stay in the hospital for that?

6 A He stayed in the hospital about four days.

7 Q When Marion was in school, did any of his
8 teachers ever call you and tell you that he was failing?

9 A No. Not as I can remember.

10 Q Let's go back to the incident. How long had
11 Marion and Nell, the last time, been separated?

12 A I cannot remember.

13 Q Would it be weeks or months or can you say?

14 A A few months.

15 Q Okay. During that period of time, had you
16 attempted to contact her to see your grandchildren?

17 A Yes, I did.

18 Q Were you able to see your kids or your
19 grandchildren?

20 A No, I was not.

21 Q Would she not allow you to see the grandchildren?

22 A No.

23 Q Would Marion attempt to contact her?

24 A Yes, he did.

25 Q Was that about seeing his children?

1 A Yes, it was.

2 Q All right. Was he allowed to see his children?

3 A No, he was not.

4 Q How long did that go on before the incident?

5 A Two months.

6 Q Can you tell the jury what affect that had on
7 Marion.

8 A It made him kind of upset because he could not
9 see his kids. His kids were always with him. It made
10 him upset that he could not be with his kids. He wanted
11 to see his kids. I don't think that he should have been
12 kept from seeing his kids.

13 Q Was either he or you able to call Nell or her
14 mother on the telephone?

15 A Yes, I called.

16 Q Was the phone ever blocked?

17 A Yes, it was.

18 Q About how much before this incident?

19 A About four days.

20 Q Okay. What affect during that week or so or
21 those four days, what affect did that have on Marion?

22 A It had an affect on him because he could not get
23 in touch with them to see his kids. He just wanted to see
24 his kids. He said mama, all I want to do is see my kids.
25 That's all I want is to see my kids.

1 Q Did he talk about hurting himself?

2 A Yes, he said if he did not get his family back,
3 he could not live any longer if he could not get his family
4 back.

5 Q Did you, when was the last time you saw Marion
6 before this incident?

7 A The last time I told saw Marion before the
8 incident, it was three days after this -- three days
9 before.

10 Q Had he lost weight?

11 A Yes.

12 Q How did he appear to you?

13 A Worried, upset.

14 Q Did he seem to be depressed?

15 A He was very depressed.

16 Q When did you hear about the incident?

17 A I heard about the incident 15 minutes after 8
18 o'clock on September 18th of 2002.

19 Q I am sure that you will remember that time for
20 the rest of your life?

21 A Yes, I will.

22 Q Ms. Lindsey, I know this is going to be
23 difficult. But I'm asking you if there's anything, this
24 is going to be your only opportunity to talk to the jury.
25 I would ask you if there is anything that you have to tell

1 them about Marion or about your relationship with him?

2 **A** Well, Marion is my son. I love him very much.
3 And I ask the mercy for my son not be sentenced to death.
4 I know I know that somebody else's child life was took.
5 But I don't want my child sentenced to death.

6 **MR. BARTOSH:** That's all I have.

7 **MR. GOWDY:** Your Honor, very brief.

8 **CROSS-EXAMINATION**

9 **BY MR. GOWDY:**

10 **Q** Good evening, Ms. Lindsey. My name is Trey
11 Gowdy. I just want to ask you a couple of questions.

12 **A** All right.

13 **Q** Do you know a man by the name Rod Tillus?

14 **A** Yes, I do.

15 **Q** He is an attorney here in town, right?

16 **A** Yes, he is.

17 **Q** He represented your son?

18 **A** Yes.

19 **Q** Are you familiar with a group of lawyers here in
20 Spartanburg called Legal Aid?

21 **A** Yes.

22 **Q** Did you know that you son had talked to lawyers
23 at Legal Aid?

24 **A** No, I did not.

25 **Q** Do you know whether or not your son made any

1 efforts to talk to a lawyer about getting a court order to
2 be able to see the children that he wanted to see?

3 A No, I don't.

4 MR. GOWDY: That is all I have, Your Honor.

5 THE COURT: You can step down, Ms. Lindsey.

6 BILL BURTON

7 having first being duly sworn testified as follows:

8 DIRECT EXAMINATION

9 BY MR. BARTOSH:

10 Q You are Bill Burton?

11 A I am.

12 Q Do you know Marion Lindsey?

13 A I do.

14 Q Let's start out, what kind of work do you do, Mr.
15 Burton?

16 A I run a chemical company for a German firm.

17 Q Where do you live?

18 A Macon, Georgia.

19 Q Where are you originally from?

20 A Spartanburg.

21 Q Were you born here?

22 A No, I was born in San Diego. But I lived here
23 for the bulk of my youth.

24 Q How old were you when you left?

25 A When I went to college, I suppose I was 18.

1 Q Okay. You know Marion Lindsey?

2 A I do.

3 Q How do you know Marion Lindsey?

4 A When I was in college at the summer job working
5 for the city, I was a lifeguard at a public pool I met
6 Marion as a kid while life guarding.

7 Q How old was Marion when you first met him?

8 A Six and seven, I believe.

9 Q You would see him and his brothers at the pool?

10 A Yes, the public group pool was just behind Vic
11 Bailey near what Marion and this brothers lived on Jolly
12 Street.

13 Q Okay. And you and Marion and his brothers became
14 friends?

15 A Right. The little kids would come to the pool
16 almost every day. That was their major recreation in the
17 summer, to swim. And through swimming lessons and just
18 hanging out with the kids, I met Marion and his brothers.
19 And I guess became attached to them.

20 Q Okay. As a matter of fact, you taught Marion
21 how to swim, didn't you?

22 A I did.

23 Q Would you and Marion and his brothers do things
24 together?

25 A The kids lived in a pretty rough situation. I

1 would take them to Braves, I think it was Spartanburg
2 Braves games. No, maybe it wasn't Braves. Phillies,
3 Spartanburg Phillies games and to Burger King or, I would
4 take them occasionally to my house to go fishing in a pond
5 that we have out in the country.

6 Q That is your parent's home?

7 A Yes.

8 Q And you knew Marion when he and his family were
9 living on Jolly Street, right?

10 A Yes.

11 Q Jolly Street is back by the First National Bank,
12 is that correct?

13 A Jolly Street, their house is where I believe the
14 First National Bank is now. Near just towards Vic Bailey
15 from the Chamber of Commerce.

16 Q Would you go over to their house?

17 A I did.

18 Q To pick the kids up and take them places?

19 A Sure.

20 Q Can you describe that house?

21 A I would have to say it was desperate poverty.

22 Q Do you know how many folks were living in it?

23 A Eight or so, I believe, maybe nine.

24 Q Can you estimate the size of the house?

25 A Probably less than 1000 square feet or 1000

1 square feet maybe or less.

2 Q And the sleeping arrangements. All of the boys
3 slept in one bed?

4 A Right. Ms. Lindsey had a bedroom. Then all
5 of the children slept in the same bed. It was a neat
6 house but it was desperately poor.

7 Q That house, it does not exist anymore, does it?

8 A I believe it was condemned.

9 Q It was pulled down?

10 A Right.

11 Q What was your impression of Marion?

12 A I think Marion was a kid like many other kids
13 from poverty looking for attention. Some adult figure to
14 look up to, to do things with them. Maybe like a father.

15 Q Did you know about his situation as far as --

16 A Yes.

17 Q -- as far as his father?

18 A Yes, I went to the house many times to give him
19 clothes or presents or whatever I could.

20 Q Okay. Did you ever see any of the violence or
21 anger or -- you have heard described, you have been sitting
22 here during the trial, haven't you?

23 A Yes.

24 Q Did you ever see any of that in Marion as a
25 child?

1 A No, I knew Marion until he was about 20, I
2 suppose. Later on, during the period that I knew him on
3 and off for some 13 years, I guess, I never saw any of that
4 kind of behavior from him or his brothers.

5 Q He and his brothers would go out to your parent's
6 home?

7 A Yes. When they are young, of course, I took
8 them. When I was off in school or working later on as
9 they were growing up, they would go out to my house to fish
10 in our lake probably 20 times over that period, I suppose.

11 Q And they would interact with your parents?

12 A Yes, they would always call my mother for
13 permission to come and fish and then show her what they
14 caught and then head back home.

15 Q How was Marion towards your parents? Did you
16 ever see any of the, anything but politeness from him?

17 A No, never. He was the picture of politeness you
18 might say.

19 Q You knew him up until he was about 20?

20 A Yes. When he was 19, I had, of course,
21 graduated from college. I was in a position to get him a
22 job. It seems as though he contacted me. I can't remember
23 through my mother or what. I was in a position with a
24 company where I could get him a job and did so.

25 Q And he went to work for your company?

1 A Yes.

2 Q Okay. Do you know how long he worked for the
3 company?

4 A It's possible that I was transferred to another
5 location during his employment. But I believe it was a
6 year or so. Give or take.

7 Q He had a problem on the job, didn't he?

8 A (No response.)

9 Q Did you know about it?

10 A I only know about it from our discussions. I
11 believe that I was transferred to another facility while he
12 was still employed there. I don't remember the exact
13 circumstances under which he left.

14 Q Okay, let me ask you this, in the company that,
15 you were a plant manager for a company, right?

16 A Correct.

17 Q In the operation of that plant, would it be
18 unusual for there to be friction between supervisors and
19 employees?

20 A From time to time that kind of things happen,
21 sure.

22 Q It is not unusual.

23 A It was not every day. But from time to time,
24 certainly altercations between employees or management to
25 different degrees of occur.

1 Q It usually ended up, when there was a
2 disagreement, it usually ended up with the employee being
3 terminated.

4 A It usually did. Not to say that if the manager
5 was not at fault, it could be the case the other way.
6 Most often that was the case, yes.

7 Q I guess the thrust of my question is while it did
8 not happen every day, it certainly was not unusual?

9 A True.

10 Q This was a manufacturing facility?

11 A True.

12 Q And there was a lot of pressure to get product
13 out.

14 A That's correct.

15 Q Sometimes, tempers can run high?

16 A That is true.

17 Q Is there anything you would like to tell the jury
18 about Marion Lindsey?

19 A I could only say that he grew up in an abject
20 poverty without the benefit of parents like normal
21 families. I knew him until he was 20 years old
22 approximately. I never saw the kind of behavior or
23 violent behavior of any sort during that period.

24 Q Thank you.

25 MR. GOWDY: May it please the Court?

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THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GOWDY:

Q Good evening, Mr. Burton.

A Good evening.

Q My name is Trey Gowdy. I'm with the solicitor's office. I just want to ask you a couple questions.

A Yes, sir.

Q I suppose in your work at that pool and in your travels to the Lindsey household, you saw quite a few little kids that grew up in what you described as abject property, would you not have?

A Yes.

Q Quite a few kids growing up in Spartanburg in 1970 that did not have a father around, weren't there?

A I suppose there are.

Q You saw some of them at the pool. These were not the only --

A I did not know all of the kids. But I'm certainly aware that there were a lots of kids, like Marion situation that grew up without a father, yes.

Q You mentioned that up to the age of 20, you never saw any episodes of violence whatsoever?

A That is true.

Q When did you learn that at the age of 20 that he

1 shot Stanford Wilkins through the windshield with a hand
2 gun?

3 A I'm sorry to say I did not learn it until I came
4 to the trial or maybe with Mr. Bartosh prior to the trial.
5 I guess I lost touch with Marion.

6 Q That is fine. I wasn't trying to trick you.
7 Something obviously changed I suppose is my point, Mr.
8 Burton, didn't it?

9 A It seems to have.

10 Q Mr. Burton, let me ask you this one final
11 question. Actually two final questions. You and I think
12 and agree that if there were a number of children in
13 Spartanburg in the 1970's that grew up poor without a mama
14 or a daddy, do we agree on that?

15 A We agree.

16 Q Mr. Lindsey was lucky to have someone like you in
17 his life that would stopped by and do things with him,
18 wasn't he?

19 A I suppose he was.

20 Q There were plenty of kids that that did not even
21 have that, did they?

22 A That is true I suppose.

23 Q And if Mr. Lindsey had called you in 2002 and
24 said I want to hire a lawyer so I can get visitation rights
25 to see my two kids, you probably would have helped him?

1 A I would have.

2 Q Thank you, Mr. Burton.

3 **REDIRECT EXAMINATION**

4 **BY MR. BARTOSH:**

5 Q One final question, Mr. Burton. Did Marion
6 ever ask you for anything at all?

7 A For money?

8 Q Did he ever ask you for money?

9 A (Shakes head negatively.) Not that I recall
10 ever I think. I might have offered it. But I don't
11 think he ever once asked me for money. Ever.

12 Q That is all.

13 **THE COURT:** You can step down, Mr. Burton.

14 **MR. BARTOSH:** Next witness, Your Honor?
15 Leon McDowell.

16 **LEON McDOWELL**

17 having first being duly sworn testified as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. BARTOSH:**

20 Q You are Leon McDowell?

21 A I am Leon McDowell.

22 Q Mr. McDowell, do you know Marion Lindsey?

23 A Yes, I do.

24 Q How do you know Marion?

25 A He is my son.

1 Q Were you married to Mrs. Lindsey?

2 A No, I'm not married to Mrs. Lindsey. I had a
3 wife when I got Myron.

4 Q You were married at the time --

5 A I was married at the time.

6 Q -- to someone else --

7 A To someone else.

8 Q -- when Marion was born?

9 A When Marion was born. Yes, sir.

10 Q Mr. Lindsey, you and I have had a lot of
11 conversations about your role in Marion's upbringing.
12 What did you do? What part did you play in his upbringing?

13 A I really wasn't a father to Myron. I never been
14 there with him to go with him to a baseball game or to go
15 out to a movie. Like I said, I was working. As far as
16 giving him money and stuff like that, I give his mama money
17 to buy clothes. But as far as being a father to Myron, I
18 was never a father to Myron Lindsey.

19 Q You had never been a force or a factor in his
20 life?

21 A No, I have not. Like I said, I gave him money.
22 If he wanted a bicycle, I gave it to him. But you can not
23 buy love. I never really been a father to Myron.

24 Q You have always been forthright and honest about
25 that?

1 **A** Yes, sir. I told Myron, I said I do what I can.
2 When you grow up, if you become a father, it's all right.
3 If you don't, I can understand that.

4 **Q** That's not something to be proud of, is it?

5 **A** No, it's not something I'm proud of. No, sir.

6 **Q** Is it something you regret?

7 **A** Yes, sir. I regret it.

8 **Q** You would give financial support every now and
9 then?

10 **A** Yes, sir. I sure would.

11 **Q** When it came to going to school functions or
12 baseball games --

13 **A** I was never there.

14 **Q** Mr. McDowell, is there anything you'd like to
15 tell the jury?

16 **A** If they can see fit not to execute Marion maybe
17 he can benefit to his kids somehow.

18 **MR. BARTOSH:** That's all I have, Your Honor.

19 **MR. BARNETT:** I have no questions of this
20 witness, Your Honor.

21 **MR. BRENNAN:** Your Honor, I call Chris Wilkins to
22 the stand.

23 **CHRIS WILKINS**

24 having first being duly sworn testified as follows:

25 **DIRECT EXAMINATION**

1 BY MR. BRENNAN:

2 Q You are Chris Wilkins?

3 A Yes, sir.

4 Q You are related to Marion Lindsey, is that
5 correct?

6 A Yes, sir.

7 Q Tell me about your relationship with Marion
8 Lindsey.

9 A We were like brothers.

10 Q Like brothers?

11 A Yes.

12 Q How were you like brothers? What did you do?

13 A We hung around together. He lived with me part
14 of my life. We raised our kids practically together.
15 Just about everything, we did.

16 Q All right. How long have you known Marion
17 Lindsey?

18 A I know him all my life. We started hanging, I
19 guess, when we was around 13 or 14.

20 Q Did you see Marion Lindsey with his children?

21 A Yes, I did.

22 Q Tell me about his relationship with his children.

23 A He was very close to his kids.

24 Q How did you know that?

25 A Like I said, part of his life, part of Alex life,

1 he stayed with me.

2 Q Was he a loving father?

3 A Yes, he was.

4 Q Did he play with his children?

5 A Yes.

6 Q Was he proud of his boys?

7 A Yes, he was.

8 Q Did you know Ruby Nell Lindsey?

9 A Yes, I did.

10 Q Were there times when Ruby Nell Lindsey lived
11 with you?

12 A Yes, she did.

13 Q That was, she was living with you with Marion, is
14 that correct?

15 A Yes, sir.

16 Q Did that occur on more than one occasion or just
17 one occasion?

18 A More than one occasion?

19 Q Are you aware that during their marriage, they
20 would separate and get back together?

21 A Yes, sir.

22 Q During their marriage, did you ever see Marion
23 Lindsey inflict damage or harm to Ruby Nell Lindsey?

24 A I never did see him hit her. They argued a
25 little bit but I never did see him hit her. No.

1 Q Do you believe that he loved her?

2 A Yes, I do.

3 Q Did you ever hear Marion talk to himself?

4 A He would mumble to himself sometime. He had a
5 habit of playing with quarters or something in his hand.
6 He would be thinking and you see him maybe like chewing on
7 his tongue or whatnot and mumbling something to himself.

8 Q When would he do that?

9 A When he was thinking about something hard or
10 something was on his mind or something, something like
11 that.

12 Q Maybe when he was down?

13 A Yes.

14 Q When, let me ask you this. Before they separated
15 this last time, where was Marion living?

16 A Before they separated this last time?

17 Q Yes.

18 A With Nell and her mother.

19 Q At Ms. Wright's house?

20 A Yes.

21 Q Were you allowed or did you go visit with Marion
22 and Ruby at Carol's house?

23 A Yes, I did.

24 Q You know that he was living there?

25 A Yes, I do.

1 Q Were they getting along?

2 A Yes.

3 Q Do you believe that Marion tried hard to provide
4 for Ruby Nell?

5 A I know he tried hard to provide for his family.

6 Q Would he do whatever it took to care for them?

7 A Whatever it took to care for them.

8 Q Did you ever know Marion to be a hurtful person?

9 A Not as far as hurting anybody. If somebody mess
10 with him, that's anybody. But not just far as just
11 hurting nobody on purpose.

12 Q Okay. Is there anything you want to tell the
13 jury?

14 A Just please take in consideration the kind of
15 father he was. Please have mercy on him. I know what
16 happened was a big tragedy to everybody. But I mean he is
17 a good person.

18 Q Thank you. Please answer any questions that the
19 State may have.

20 **CROSS-EXAMINATION**

21 **BY MR. WILLINGHAM:**

22 Q Mr. Wilkins, you said you were like brothers with
23 him?

24 A Yes, sir.

25 Q If he wanted to have custody of his kids and get

1 a lawyer, you would help him, wouldn't you?

2 A I would help all I could. I have a family of my
3 own.

4 Q I'm sorry?

5 A I have a family of my own. I would help him as
6 much as I could.

7 Q You said you considered him family.

8 A Yeah.

9 Q Like a brother?

10 A Yes.

11 Q If he come to you and said I need help and want
12 to see my kids, I miss them, you would help him?

13 A I would help him.

14 Q That did not happen, did it?

15 A No.

16 Q You said you never knew him to be hurtful. Did
17 you know Myron when he was 20 years old shooting through a
18 windshield at Stanford Wilkins?

19 A Yes, I know about that.

20 Q How about in 2001 when he cold copped Nell in the
21 a parking lot of Applebee's? Did you know him then?

22 A At the time, I was staying in Greenville.

23 Q Pardon me?

24 A I knew him. But at the time, I was staying in
25 Greenville.

1 Q But you learned of that incident?

2 A Yeah. I heard of the incident.

3 Q But you never knew him to be hurtful?

4 A I never knew what happened on that situation, no.

5 Q Thank you.

6 THE COURT: You can step down, Mr. Wilkins.

7 MR. BARTOSH: Steve Pilgrim.

8 THE COURT: Go ahead.

9 MR. BARTOSH: Steve Pilgrim.

10 THE COURT: Let me speak to the lawyers while
11 Mr. Pilgrim is coming up. And we will put this on
12 the record.

13 (WHEREUPON, the following bench conference was held on
14 the record.)

15 THE COURT: That was the last closing argument
16 from the witness that I'm going to allow. I'm not
17 going to allow any other witnesses to answer the
18 question is there anything you want to tell the jury.
19 Okay?

20 MR. BARTOSH: Yes, sir.

21 (WHEREUPON, the bench conference was concluded.)

22 STEVEN PILGRIM

23 having first being duly sworn testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BARTOSH:

1 Q You are Steve Pilgrim?

2 A Yes, sir.

3 Q Mr. Pilgrim, are you working now?

4 A No, sir, I don't.

5 Q Do you know Marion Lindsey?

6 A Yes, I do.

7 Q How do you know Marion Lindsey?

8 A He is my nephew.

9 Q Okay. When Marion was growing up, were you
10 living with Marion and his mother and his brothers?

11 A Yes, I was.

12 Q How long did you live there during that period of
13 time?

14 A I lived with him about seven years.

15 Q You were present when Marion had the automobile
16 accident as a child?

17 A Yes.

18 Q And you were the one that took him to the
19 hospital, right?

20 A Yes, I picked him up and took him to the Inman
21 Emergency Squad. Then they took him to the hospital. I
22 rode with them.

23 Q You stayed at the hospital with him?

24 A I stayed at the hospital with him.

25 Q And you were also present, well, I don't know if

1 you were present. But you knew about the incident when he
2 inhaled kerosene?

3 A That's right.

4 Q Mr. Pilgrim, do you suffer from any illnesses?

5 A Yes, sir.

6 Q What is that?

7 A High blood pressure, panic attack and anxiety
8 attack.

9 Q Do you have a daughter?

10 A Yes, I do.

11 Q Do she suffer from any illness?

12 A Yes, she do.

13 Q What is it?

14 A It's panic attacks.

15 Q And she is being treated for that?

16 A Yes, sir. She is.

17 Q That's all I have.

18 MR. BARNETT: No questions for this witness, Your
19 Honor.

20 THE COURT: You can step down, Mr. Pilgrim.

21 MR. BARTOSH: Bessie Smith.

22 BESSIE SMITH

23 having first being duly sworn testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BARTOSH:

1 Q You are Bessie Smith?

2 A Yes, I am.

3 Q Ms. Smith, are you related to Marion Lindsey?

4 A Yes, I am..

5 Q What is your relationship to him?

6 A I married -- his aunt.

7 Q Did you know Marion when he was growing up?

8 A Yes, I did.

9 Q Did you live with the family or with your
10 husband?

11 A I lived with my husband. I was married. But at
12 one time, I was living in the house with Marion and his
13 mother.

14 Q Okay. Do you remember an incident in Marion's
15 childhood involving a cat?

16 A Yes, I do.

17 Q Would you tell us about that?

18 A Marion had a little old black and white cat. It
19 wasn't really a cat. It was a kitten. It was small.
20 Marion was crazy about this kitten. He just took a liking
21 to it. And one day, my brothers took the cat and threw it
22 in the heat without his knowledge. It hurt him for them to
23 throw his cat in the heat. Marion was very hurt about
24 that. And he talked about it for a long time too. When
25 you do things like that to a child, it tends to --

1 **MR. BARNETT:** Your Honor, I'm going to object.

2 **THE COURT:** Sustained. Sustained.

3 Ma'am, you can tell what happened. But you don't
4 need to be putting any kind of characterization on it.

5 **BY MR. BARTOSH:**

6 **Q** Ms. Smith, did you attempt suicide?

7 **A** Yes, I had a --

8 **MR. BARNETT:** Your Honor, I --

9 **THE COURT:** Sustained.

10 **MR. BARNETT:** -- don't understand the relevance
11 of this.

12 **THE COURT:** Sustained.

13 **MR. BARTOSH:** That's all I have, Your Honor.

14 **MR. BARNETT:** I have no questions for this
15 witness.

16 **THE COURT:** You can step down, ma'am.

17 Let me do this. We've been at this for a little
18 over an hour. It's a good time to take a break.

19 Ma'am, I'm sorry to have brought up here. Would
20 you go back to your seat for a minute please.

21 We will take a short break. And we will be back
22 in about 10 or 15 minutes.

23 (WHEREUPON, the jury exits at about 5:59 p.m.)

24 **THE COURT:** I realize that the scope of relevance
25 is greatly expanded during the penalty phase of the

1 trial but I don't see how the fact that this aunt of
2 Mr. Lindsey's has at one point in time committed
3 suicide has a sufficient connection to this penalty
4 phase to become relevant.

5 There's probably not anybody in this courtroom
6 who doesn't have somebody in their family who hasn't
7 attempted suicide. The same goes for the panic
8 attacks. And I assume that if there was something of
9 that nature in the future, that will be objected to
10 and that will be the basis of my ruling to sustain the
11 objection. And if you want to discuss that with me,
12 if you think I'm mistaken about that, I would like to
13 hear about that now.

14 **MR. BARTOSH:** Well, Your Honor, just for the
15 record to protect our objection. We feel the
16 relevance is to show that there is a strong string of
17 mental illness that runs through the family. They
18 have attacked the validity of Dr. Melikian's
19 diagnosis.

20 **THE COURT:** Well, then you have given me
21 additional basis for sustaining the objection. You
22 are then seeking to introduce a lay diagnosis of
23 mental illness to support Dr. Melikian's opinion of
24 mental illness. I don't believe you can do that. I
25 believe that any diagnosis even in the penalty phase

1 has got to be properly substantiated as an opinion.

2 MR. BARTOSH: Well, Your Honor, as I say out of
3 abundance of caution.

4 THE COURT: Well, I just want to make sure I
5 haven't missed something.

6 MR. BARTOSH: No, sir. You have covered it
7 all.

8 THE COURT: All right.

9 MR. BARTOSH: Out of abundance of caution, we
10 would respectfully object to your ruling on that.

11 (WHEREUPON, a short recess was taken at approximately
12 6:02 p.m.)

13 (WHEREUPON, the Court resumed at approximately 6:26
14 p.m.)

15 THE COURT: Bring in the jury.

16 MR. BARTOSH: Your Honor, do you want to do
17 the --

18 THE COURT: Hold on a minute. Close that door
19 please.

20 Okay. Mr. Bartosh, it is my understanding that
21 you think this is the appropriate time for me to talk
22 to Mr. Lindsey as to whether or not he wishes to
23 testify in the sentencing phase of the trial?

24 MR. BARTOSH: That is correct, Your Honor.

25 THE COURT: All right. Mr. Lindsey, raise your

1 right hand please.

2 (WHEREUPON, Mr. Lindsey was duly sworn.)

3 **THE COURT:** All right. Mr. Lindsey, I know we've
4 been over this before. Do you recall our discussion
5 on Friday about your right to testify, your right to
6 remain silent? Do you recall that?

7 **MR. LINDSEY:** I do.

8 **THE COURT:** Do you still understand everything
9 about the discussion that we had?

10 **MR. LINDSEY:** Yes, I do.

11 **THE COURT:** Now, you recall that you have the
12 right under the Fifth Amendment of the United States
13 Constitution to remain silent and that no one can make
14 you testify in this trial. Do you understand?

15 **MR. LINDSEY:** Yes, I do.

16 **THE COURT:** You understand also that you have the
17 right to testify in this sentencing phase?

18 **MR. LINDSEY:** I do.

19 **THE COURT:** And you heard me say at least once
20 that the things that you could, that there are a lot
21 more you can say during this phase of the trial. I
22 say the scope of relevance is broad. But in words
23 that might be more clear to you, you can say a lot
24 more or a lot of different things if you want to
25 testify during this phase. You understand?

1 **MR. LINDSEY:** Yes, sir.

2 **THE COURT:** All right. Just like in the guilt
3 phase of the trial, if you decide not to testify, then
4 I will instruct the jury that you have a
5 constitutional right to remain silent and that they
6 can not hold that, the exercise of that right against
7 you. If you choose to testify, then you are like any
8 other witness. You are subject to cross-examination
9 on any subject that might be relevant to your
10 testimony. You understand that?

11 **MR. LINDSEY:** Yes, sir.

12 **THE COURT:** Now, just like I told you on Friday,
13 you should consult with your lawyers and you should
14 consult with family or anybody else that you want to
15 consult with. But in the end, the decision as to
16 whether or not you wish to testify comes down to it
17 being your decision. You must make the decision. You
18 understand that?

19 **MR. LINDSEY:** Yes, sir.

20 **THE COURT:** You have any question that you want to
21 ask me or any question that you want to ask your
22 lawyers about your decision as to whether or not to
23 testify?

24 **MR. LINDSEY:** No, sir.

25 **THE COURT:** Keep in mind that --

1 Mr. Bartosh, you have talked to him separately
2 and advised him separately about his decision to
3 testify in this phase as opposed to his decision not
4 to testify in the guilt phase?

5 **MR. BARTOSH:** I have, Your Honor. I told him
6 that this was a separate proceeding and he has the
7 same rights as he does in the first half.

8 **THE COURT:** Right. And you, of course, went over
9 with him the fact that the decision is different in
10 the guilt phase if he had testified. The jury would
11 have found out about the ABWIK conviction and some
12 other convictions perhaps. But now they already know
13 about that. So the factors that he weighs in making
14 that decision are different now then they were in the
15 guilt phase.

16 **MR. BARTOSH:** Yes, sir.

17 **THE COURT:** And he understands all of that?

18 **MR. BARTOSH:** He does.

19 **THE COURT:** And that's true, Mr. Lindsey, you do
20 understand all of that?

21 **MR. LINDSEY:** Yes, sir.

22 **THE COURT:** Now, let me also say this, Mr.
23 Lindsey. We had a discussion on Friday as to whether
24 or not you wish to address the jury in the form of
25 closing argument. And you said that you did not then

1 but that you expected to want to address the jury at
2 the end of the sentencing phase?

3 **MR. LINDSEY:** And I do.

4 **THE COURT:** You do want to address the jury?

5 **MR. LINDSEY:** Yes, I do.

6 **THE COURT:** So we will do that tomorrow morning.

7 But I want to make sure that you understand that when
8 you address the jury, you will not be permitted to
9 testify.

10 **MR. LINDSEY:** Yes, sir. I understand that.

11 **THE COURT:** You can argue concerning the evidence
12 that's already in the record. But if you want to
13 testify, your time to testify is now. So in other
14 words, I'm sure you understand this from your
15 conversations with Mr. Bartosh, if there's something
16 that you want to tell the jury in the way of facts or
17 circumstances or anything about you that has not
18 already been testified to, the only time for you to do
19 that is now. You understand that?

20 **MR. LINDSEY:** Yes, sir.

21 **THE COURT:** If there's something that's already
22 been testified to by another witness or if there's
23 something in the record then you can talk about that
24 in your closing argument.

25 **MR. LINDSEY:** Do you want to examine this, Your

1 Honor, what I'm going to read?

2 THE COURT: No, sir. I don't. I simply want to
3 make sure that you understand that you are not able to
4 testify when you make your closing argument. I simply
5 want to make sure that there was no confusion. I
6 don't want you to think that you will be allowed to
7 testify and that's why you are not testifying today.

8 MR. LINDSEY: Okay.

9 THE COURT: All right. Now, do you want any time
10 to talk to your lawyer about your decision not to
11 testify?

12 MR. LINDSEY: No, sir. We already discussed it.

13 THE COURT: And you are ready to make your
14 decision?

15 MR. LINDSEY: Yes, sir.

16 THE COURT: What is your decision?

17 MR. LINDSEY: I don't want to testify. I just
18 want to address the jury.

19 THE COURT: All right. Mr. Bartosh, are you
20 satisfied that he understands the difference between
21 those two?

22 MR. BARTOSH: I am, Your Honor. We've gone
23 over that.

24 THE COURT: All right. Bring in the jury.

25 I find that his decision not to testify is made

1 voluntarily and knowingly and intelligently.

2 (WHEREUPON, the jury enters at approximately 6:31
3 p.m.)

4 **THE COURT:** Mr. Bartosh?

5 **MR. BARTOSH:** Your Honor, the defense would
6 rest.

7 **THE COURT:** Is there going to be any reply
8 testimony from the State?

9 **MR. GOWDY:** No, there is not, Your Honor.

10 **THE COURT:** All right. Ladies and gentlemen, you
11 have now heard all of the testimony and the evidence
12 that you will hear in this phase. I have some matters
13 of law that I need to take up with the lawyers. That
14 could take a little while. Given the hour of 6:25, I
15 have decided that we will resume tomorrow morning at 9
16 o'clock with closing arguments. I will charge you on
17 the law. Then you will have the case to begin your
18 deliberations some time around mid-morning.

19 So I'm going to send you back to the hotel now.
20 Please have a very nice night. Remember the
21 instructions that you have heard repeatedly throughout
22 this week. You may not discuss this case at all. We
23 look forward to seeing you all in the morning.

24 (WHEREUPON, the jury exits at approximately 6:33 p.m.)

25 **THE COURT:** All right. I want to talk for a

1 second about one matter that was brought up back in my
2 office. That is the placement of security officers in
3 the courtroom when Mr. Lindsey gives his remarks to
4 the jury.

5 Captain, is there anything you want to say about
6 that? I was planning on putting Carl over here in the
7 chair that Mr. Scruggs is sitting in.

8 Any objection to that, Mr. Bartosh?

9 **MR. BARTOSH:** No, sir.

10 **THE COURT:** And I'm sure there is no objection
11 from the State?

12 **MR. GOWDY:** There is none, Your Honor.

13 **THE COURT:** All right. Why don't we just, for all
14 of tomorrow so that it won't look conspicuous, Carl,
15 why don't you sit over there in that chair that Mr.
16 Scruggs is in.

17 All right. We need to talk about the charge.
18 Any special requests? Since I have this in my mind,
19 let me mention it. Mr. Lindsey offered me to look at
20 the remarks that he was going to make, I don't know if
21 they were typed out or whatever. But if they are, it
22 certainly would be helpful if you have advised him on
23 what he can and can't say so that we can avoid having
24 to interrupt his argument with an objection.

25 **MR. BARTOSH:** I have, Your Honor.

1 **THE COURT:** All right.

2 **MR. BARTOSH:** Your Honor, as to the jury
3 charge, are you ready?

4 **THE COURT:** I'm ready.

5 **MR. BARTOSH:** We would ask that the Court
6 charge evidence of prior bad acts or convictions not
7 be used to prove the aggravating circumstance but must
8 be limited to character.

9 **THE COURT:** Well, I was -- I will do that. I have
10 structured it slightly differently to say that the
11 only aggravating circumstance is the one that we've
12 been discussing and specifically they can not consider
13 any prior convictions as an aggravating circumstance.
14 Then explain of course the burden of proof. And if
15 they don't find beyond a reasonable doubt the
16 existence of an aggravating circumstance, they stop
17 right there and their deliberations are over.

18 **MR. BARTOSH:** Yes, sir.

19 **THE COURT:** I was going to then say that if they
20 do find the existence of the aggravating circumstance
21 beyond a reasonable doubt then they can consider all
22 of the other evidence in the record in deciding what
23 punishment to impose with specifically telling them
24 that the prior convictions are limited to character.
25 Is that okay?

1 **MR. BARTOSH:** Yes, sir.

2 **THE COURT:** All right.

3 **MR. BARTOSH:** Also, Your Honor, we ask that the
4 Court charge that following mitigating circumstances,
5 the murder was committed while the defendant was under
6 the influence of mental and emotional disturbance.

7 **THE COURT:** Wait a minute.

8 **MR. BARTOSH:** That's number two, Your Honor.

9 **THE COURT:** All right.

10 **MR. BARTOSH:** And number seven, the age or
11 mentality of the defendant at the time of the crime.

12 **THE COURT:** All right.

13 **MR. BARTOSH:** And also the non-statutory
14 mitigators charge.

15 **THE COURT:** Okay.

16 **MR. BARTOSH:** That would be all, Your Honor.

17 **THE COURT:** Okay. Anything from the State?

18 **MR. GOWDY:** Your Honor, I don't think two is
19 appropriate and seven to the extent that it uses the
20 word mentality. I frankly am not sure what the
21 difference between two and seven is. But I would
22 think out of abundance of caution, we would have no
23 objection regarding seven.

24 **THE COURT:** Okay.

25 **MR. GOWDY:** And of course we want statutory

1 aggravators.

2 **THE COURT:** All right. I am going to have the
3 charge available for you tonight before I leave. And
4 if you would like me to, I will be happy to email it
5 to you.

6 **MR. BARTOSH:** Yes, sir.

7 **THE COURT:** So that you can look at it and make
8 sure that you don't have any objections or give you
9 time to think through whether or not you have an
10 objection. So if you give me the designated email
11 address for both sides, I'll be happy to email it.

12 Approximately how long, Solicitor, do you think
13 your argument will take?

14 **MR. GOWDY:** About 30 minutes, I believe, is
15 generally what it takes.

16 **THE COURT:** All right. I'll give you 15 minutes.

17 **MR. GOWDY:** Thank you, Your Honor. I should
18 have asked for an hour. I'd like to ask you for an
19 hour now.

20 **THE COURT:** All right. Since you have asked for
21 an hour, I will give you an half hour.

22 **MR. GOWDY:** Thank you, Your Honor.

23 **THE COURT:** We were joking in the back about that
24 being the model. We both learned to ask for twice
25 what you need.

1 Mr. Bartosh?

2 MR. BARTOSH: Somewhere between 30 minutes and
3 45 minutes.

4 THE COURT: And let me be clear. I'm just
5 curious. I just kind of wanted that information to
6 plan out the morning. I'm not limiting either one of
7 you. I trust both of you will get it done as
8 efficiently as is necessary. So 30 to 45 minutes you
9 think? Do you have any idea about the time that it
10 will take Mr. Lindsey to do his?

11 MR. BARTOSH: Less than 10 minutes. Probably
12 less than five.

13 THE COURT: Okay. Then we will go Solicitor, then
14 y'all decide in the morning or do you know which one
15 is going to go first now?

16 MR. BARTOSH: No, we need to talk about that.

17 THE COURT: All right. Anything else y'all want
18 to talk about tonight?

19 MR. GOWDY: Not from the State, Your Honor.

20 MR. BARTOSH: You want to discuss the juror?

21 THE COURT: Uh, I'm not ready to rule yet but I've
22 read those cases. I'm pretty satisfied that there is
23 not any problem with that juror. But I was going to
24 hold off on ruling until I have had a chance to think
25 about it over night.

1 **MR. BARTOSH:** Okay. That will be everything
2 from the State, I mean, from the defense.

3 **THE COURT:** All right. We'll be in recess until
4 tomorrow morning. We will be ready to begin closing
5 arguments at 9:00. I'm going to be prompt about it.
6 And I will be here at least by 8:00. If there's
7 anything y'all need to take up whether it relates to
8 the charge or the arguments or anything, bring it to
9 my attention early enough for us to be done discussing
10 it before 9 o'clock. All right. See you tomorrow.

11 (WHEREUPON, the Court adjourned at approximately 6:41
12 p.m.)

13 (WHEREUPON, the Court resumed on May 24, 2004 at
14 approximately 9:04 a.m.)

15 **THE COURT:** All right. Mr. Bartosh.

16 **MR. BARTOSH:** Your Honor, I been over your
17 instructions for the jury. What we would ask you is
18 there is no doubt that this is a public place. We
19 would ask for a definition of what a public place is.
20 I don't believe there's any testimony that this was a
21 public place.

22 **THE COURT:** What do y'all want me to tell them
23 that a public place is?

24 **MR. BARNETT:** Well, that a public place is a
25 place for which the general public has a right to

1 resort. Not necessarily a place run solely to the
2 uses of the public but a place which is a public or
3 prime place of business by many persons and usually
4 accessible to the neighboring public.

5 **THE COURT:** Where did Lockclair happen?

6 **MR. GOWDY:** On a street, Your Honor, if I
7 remember correctly.

8 **THE COURT:** In front of a private residence?

9 **MR. GOWDY:** In a front yard, yes, sir.

10 **THE COURT:** Pass that page up. Do you have any
11 objection to that definition?

12 **MR. BARTOSH:** Is that South Carolina Law, Your
13 Honor?

14 **MR. GOWDY:** I don't think that is out Black.

15 **MR. BARTOSH:** I was informed also, Your Honor,
16 that the case law does cite that definition in South
17 Carolina.

18 **THE COURT:** Well, now, as with so many places
19 where you find the law, a public place is defined by
20 six or eight different ways in this one definition.
21 So I will tinker with it for a minute and come up with
22 one way of defining a definition and I will show it to
23 you and see if you have any objection.

24 **MR. BARTOSH:** Okay, sir. The other, uh, the
25 other issue is --

1 **THE COURT:** Let's go back to the jury charge.
2 You've had a chance to review the entire printed
3 charge that I gave you?

4 **MR. BARTOSH:** I have, Your Honor.

5 **THE COURT:** You have no objection other than that
6 one omission?

7 **MR. BARTOSH:** Yes, sir.

8 **THE COURT:** There is nothing in the charge that is
9 objectionable?

10 **MR. BARTOSH:** No, sir.

11 **THE COURT:** And other than the definition of
12 public place, there is nothing else that you want in
13 there?

14 **MR. BARTOSH:** No, sir.

15 **THE COURT:** All right. From the State?

16 **MR. GOWDY:** Nothing, Your Honor.

17 **THE COURT:** About the charge?

18 **MR. GOWDY:** We have reviewed it. We've had
19 nothing to add or subtract.

20 **THE COURT:** All right. Mr. Bartosh.

21 **MR. BARTOSH:** Your Honor, the next issue I
22 guess, if you want to deal with the issue of the
23 juror.

24 **THE COURT:** Okay. Any further argument on that or
25 any more law you want to give me?

1 MR. BARTOSH: Your Honor, you -- the cases that
2 we found were the same ones that you cited yesterday.
3 Rudy versus Anderson which is a 1940 case and Stone
4 versus the City of Florence which is a 1943 case. And
5 basically, I think what they stand for is that a juror
6 may not perform an experiment, that is, testimony and
7 evidence outside of the trial.

8 Stone describes an experiment. They go the
9 dictionary. It's a trial or special test made to
10 confirm or disprove something doubtful. That's on our
11 page three. I don't know whether that would be yours.
12 So I think that's the holding of the case. If a juror
13 performs an experiment, it's improper.

14 The one in Rudy where they talk about there was a
15 case where, I think it was an escape case. They took
16 the jurors out to the jail. The guy had a hammer and
17 knocked a hole in the wall and got out. They went up
18 to look at it and several of the jurors picked up the
19 hammer and started hitting on the side of the
20 building. They held that was improper and they set
21 aside the verdict.

22 What I would respectfully request, Your Honor, is
23 basically that what that juror did was conduct an
24 experiment under that definition. A trial of special
25 test made to affirm or disprove something doubtful.

1 What he was attempting to determine would be the
2 distances. I would respectfully suggest that that is
3 an experiment. And as an experiment, it is improper.
4 We would say that the only remedy that I can see would
5 be to replace him with an alternate.

6 **THE COURT:** All right. Thank you. I think
7 our mutually finding those cases have made it obvious
8 that nothing the juror did is improper under the law.
9 And I don't really need to explain my answer in
10 denying the motion to strike the juror. All the
11 juror did was to observe. There was nothing that the
12 juror did where the results could be varied. The
13 results of what the juror, everything that we heard
14 that the juror did, the results are going to be what
15 they are.

16 Whereas in the case where they had thrown the
17 hatchet up against the wall, that is something the
18 juror did to see what happens. It could be variable.
19 In other words, if the juror did that experiment in
20 one way, the result might come out a certain way. If
21 the juror did that experiment a different way, it
22 might have come out a different way. If did the same
23 way twice, it might come out a different way.

24 Same with the experiment in the Stone case where
25 the juror asked the sheriff to drive 35 miles and hour

1 around the curve to see what happens. It is a
2 totally different situation. I deny the motion.

3 **MR. BARTOSH:** Your Honor, once again --

4 **THE COURT:** You don't need to accept. I
5 think you are covered.

6 **MR. BARTOSH:** Okay. There's one other item,
7 Your Honor, that we had a brief discussion about.
8 Mr. Lindsey wishes to address the jury. We've
9 reviewed his statement that he was going to read to
10 the jury. Overnight, he added a very brief addition
11 to it. I have read it.

12 **THE COURT:** Let me stop you right there. I
13 did not require that you let me see that or that you
14 discuss that or that you reveal that in any way before
15 he gives his closing statement. However, if in order
16 to avoid the possibility of his train of thought being
17 interrupted by an objection or his being embarrassed
18 by an objection on your just not wanting to have an
19 objection, if you want me to look at it, then I will
20 be glad to look at it.

21 If the State would allow me to do it ex parte, I
22 will do it ex parte. I am not going to require
23 anything here. I will do what you want me to do in
24 terms of looking at that statement.

25 **MR. BARTOSH:** Thank you. Your Honor, in

1 discussing it with Mr. Lindsey, he indicates that he
2 does not want to run the risk of being interrupted.
3 So we would respectfully ask the Court if you would
4 review it ex parte.

5 MR. BARNETT: Your Honor, the State agrees with
6 that request.

7 THE COURT: All right. Pass it up. Pass up
8 the specific portion that you want me to review.

9 MR. BARTOSH: Your Honor, it is handwritten on
10 his statement. It is that portion right there.

11 (WHEREUPON, the Court reviewed the document.)

12 THE COURT: Just the handwritten part is all
13 you want me to look at?

14 MR. BARTOSH: Your Honor, I have now informed --

15 THE COURT: Let me just look at it.

16 MR. BARTOSH: All right. I will allow it.

17 MR. BARTOSH: Okay, sir. There's one
18 point. That paragraph right at the top.

19 (WHEREUPON, the Court reviewed the document.)

20 THE COURT: The only thing in here is that
21 there may be some statements that are not supported by
22 the evidence.

23 MR. BARTOSH: Yes, sir.

24 THE COURT: Wishing that I do have perfect
25 recall of all the evidence, I don't. Let me --

1 (WHEREUPON, the Court reviewed the document.)

2 THE COURT: I suspect that that is not
3 supported by the evidence.

4 (WHEREFORE, a bench conference was held off of the
5 record.)

6 THE COURT: Here is where we are. I have
7 looked at it. I have given you an indication of how
8 I see it. I am not saying that he cannot say that.

9 MR. BARTOSH: Yes, sir.

10 THE COURT: You take the information, you take
11 my response and you advise your client based on that.
12 If you want to make some sort of, I just have to add,
13 that is not a ruling.

14 MR. BARTOSH: Yes, sir. I understand.

15 THE COURT: Even so, if you want to make an
16 offer proof about it, you can do it.

17 MR. BARTOSH: Okay, sir. Can we just discuss
18 that with our client?

19 THE COURT: Yes. One more thing and then I'm
20 going to step out of the courtroom and give you a
21 chance to consult with your client. In the guilt
22 phase, you introduced into evidence State's Exhibit 21
23 and 21(a). You stopped the publication of those
24 exhibits at a certain point. How do we stand now on
25 the admission of that entire exhibit? What is the

1 State's position?

2 MR. GOWDY: Your Honor, we were discussing
3 that this morning. I think the most cautious
4 position for the State to take is that we only
5 introduced that portion of the tape that we actually
6 played for the jury.

7 I am prepared in fact this morning to stop the
8 tape again where I did in the guilt phase and go
9 through the same process if the jury wishes to hear
10 the tape or the CD to just keep track of where the
11 tape ends. In other words, I don't have confidence
12 that we admitted the rest of the document. In any
13 event to avoid that uncertainty, I'm not going to go
14 anything past what I played in the first stage.

15 THE COURT: I assume you have no objection to
16 that, Mr. Bartosh.

17 MR. BARTOSH: No objection.

18 THE COURT: All right. That is good enough.
19 You all have also looked at the forms that I gave you?

20 MR. BARTOSH: Yes, sir.

21 THE COURT: The verdict forms?

22 MR. BARTOSH: Yes, sir.

23 THE COURT: And they are approved then?

24 MR. BARTOSH: Yes, sir.

25 THE COURT: We will be in recess until you let

1 me know that you already.

2 MR. BARTOSH: Thank you, Your Honor.

3 THE COURT: Until you let me know that you are
4 ready, then we will begin.

5 (WHEREUPON, a short recess was taken at approximately
6 9:16 a.m.)

7 (WHEREUPON, the Court resumed at approximately 9:33
8 a.m.)

9 THE COURT: You ready?

10 MR. BARTOSH: Yes, sir.

11 THE COURT: All right. Solicitor's going to
12 go first. And then you two will decide who goes first
13 between the two of you.

14 MR. BARTOSH: Mr. Lindsey will go first, Your
15 Honor.

16 THE COURT: All right.

17 MR. BARTOSH: We have discussed that.

18 THE COURT: You and Mr. Lindsey have?

19 MR. BARTOSH: Yes, sir.

20 THE COURT: I don't know when we will take a
21 break. But we will certainly take a break before I
22 charge.

23 Bring in the jury.

24 (WHEREUPON, the jury enters at approximately 9:34
25 a.m.)

1 (WHEREFORE, a bench conference was held off of the
2 record.)

3 THE COURT: Good morning, ladies and gentlemen.
4 We are now ready to begin the closing arguments phase
5 of the second phase of the trial. We will hear from
6 the Solicitor first.

7 MR. GOWDY: May it please court, Your Honor?

8 THE COURT: Yes, sir.

9 (WHEREUPON, State's Exhibit 21 was played.)

10 MR. GOWDY: Ladies and gentlemen of the jury, this
11 is the last time anyone from the State of South
12 Carolina stands before you in this trial. I would be
13 remiss if I do not thank you just like I did in the
14 guilt phase for sacrificing your service. It was a
15 week ago today that we met in this courtroom. We
16 began the process of being qualified to serve on this
17 jury.

18 You stayed a week in a hotel room and a courtroom
19 away from friends, family and loved ones. I think I
20 speak on behalf of everybody involved in this case.
21 We thank you for your service.

22 You have found this defendant guilty of murder.
23 Now is the time to settle the proper punishment for
24 that crime. And a week ago, you began by sitting in
25 this chair right here where so many witnesses have

1 sat. You told the State and you told the defense and
2 you told the Court that you can give death if you
3 thought that was appropriate sentence and you could
4 give life if you thought that was the appropriate
5 sentence and that you would listen with an open mind
6 and fairly consider both and that you would do what
7 you thought was right.

8 Now comes the time to decide what was right for
9 that crime that you just solved in this case. There
10 are at least three things that you are entitled to
11 consider. I know that it is not easy to sit in
12 judgment of your fellow man. I know that. It is
13 not easy to try pass judgment issues of death. I
14 cannot think of anything more difficult.
15 Nevertheless, that is your task in this case.

16 There are at least three things that you are
17 permitted to consider. I am going to talk about
18 those in just a second. First, I want to tell you
19 that all murder cases are not the same. That is a
20 factual statement. That is a legal statement.
21 Legally, for a case to be eligible for the death
22 penalty, there has to be an aggravating circumstance.

23 The State of South Carolina have alleged in this
24 case that the offender Marion Lindsey by his act of
25 murder knowingly created a great risk of death to more

1 than one person in a public place by means of a weapon
2 or device which normally would be hazardous to the
3 lives of more than one person. So I will begin this
4 morning in talking about the State's aggravator.

5 There are three elements. Public place. I
6 think can scarcely think of anything more public than
7 the parking lot of a government building, a public
8 entity, a police station where citizens can go and
9 come as they like, as they choose for the purpose that
10 they want. There is a back parking lot of this
11 courthouse. There is a back park lot of the
12 Sheriff's Department. There is a back parking lot of
13 a municipal police station like Inman. It is a
14 public parking lot.

15 If you are like me and you were growing up before
16 video games and other things like that, you have
17 played a game called tag. I remember playing it with
18 my three sisters. When we played that, there would
19 always be a place that you can go and be safe. We
20 called it base. When you got to base, people left
21 you alone. They could not tag you. A police station
22 is base. It is base for the entire public. There
23 can be no serious discussion about whether the back
24 parking lot of a police station is a public place.

25 So then we move to a gun. Is a gun capable of

1 killing more than one person? It is hard to imagine
2 a weapon more commonly used to kill more than one
3 person than a gun. This defendant had a gun. He
4 had ten bullets. Is that capable of the killing than
5 one person? The issue is not whether or not he did.
6 The issue is is it capable of doing that. And the
7 answer is a resounding yes.

8 Then we come to the crux of the matter, did this
9 defendant on April, September 18th 2002, did he create
10 a great risk of danger to anyone other than Nell
11 Lindsey. We know what he did to her. You have seen
12 the car. You have touched the car. You have looked
13 in and seen the dimensions in the back seat. If you
14 study that picture, you will see that five foot seven
15 or five foot eight Nell Lindsey took up her share of
16 that back seat.

17 You've got a car seat. You know it took up its
18 share of that seat. Then you've got to make room for
19 a nine-year-old girl in the middle. You think back
20 where that bullet hole is. You think back to her
21 testimony. She was asleep on the arm of Nell
22 Lindsey. When those bullets started firing and you
23 heard her screams just a few moments ago, she ducked
24 her head or she tried to under her sister's car seat.

25 You imagine for a minute if she did the opposite,

1 if she went from the car seat to Nell's shoulder.
2 She would have passed exactly where that bullet
3 passed. Imagine if she had done what we tell our
4 kids to do, sit up straight. She would be dead.

5 I don't have to prove to you that more than one
6 person was injured. She was. She was cut, she was
7 injured physically. She was injured psychologically.
8 I don't have to prove that to you. I have to prove
9 to you that he created a risk by shooting into a car
10 that had five people in it.

11 Tinted windows and he knew that two of those
12 people in that car were children. He knew it. One
13 of them sat up and said Hi, Uncle Ron. He was told
14 the other one was asleep in the back. And he shot
15 through the back window. Then he walked around to
16 the side. And he fired two bullets in the direction
17 of two children.

18 When the defense stands up and tells you that
19 these were point blank shots that really were not
20 going to endanger anybody else you think back to where
21 that bullet hole is in the back seat. You think back
22 to the fact that that is the same man they want you to
23 believe tried to shoot himself. Well, he missed them
24 and he missed when he shot at Nell. And a bullet went
25 straight through the trunk. And it could have gone

1 through a little girl's head or her heart. That is
2 all I have to say on the State's aggravator.

3 It is before you beyond a reasonable doubt. I'm
4 not even going to discuss Benny Godfrey, the police
5 officer, the sixth person in the parking lot who
6 testified he had the gun pointed at him. This is a
7 public place. This is a weapon capable of killing
8 more than one person. And he endangered the lives of
9 others. The State has met its burden on an
10 aggravator.

11 So now we come to what is the proper sentence for
12 what happened on September the 18th, 2002. What is
13 the right sentence for this defendant? There are
14 three things that you can consider. You can consider
15 the circumstances and the context of the crime. You
16 can consider the character of the defendant. You can
17 consider the impact that Nell Lindsey's death has had
18 on others.

19 You know, for the first day of this trial, I bet
20 most of y'all had no idea what Nell Lindsey looked
21 like. You had no idea because we could not show you
22 her face. That is the way the justice system works.
23 The guilt phase is not about the victim. It is about
24 him. Well, I'm tired of talking about him. I want to
25 talk about her. We'll get to him in a minute.

1 Let's talk about Nell Lindsey who was a loving
2 mother by everyone's knowledge. She not only loved
3 her children, she loved other people's children. She
4 taught day care. I cannot help but think as I saw
5 her in the back seat of that car that even as she is
6 dialing 911 in fear for her safety, she's got somebody
7 else's child laying on her shoulder. She was a
8 loving, good kind person.

9 She was industrious. She worked. She had a
10 nursing uniform on the night she was shot. She
11 worked in a day care, a nursery. Her mom, her daddy,
12 her adopted sister Sharon, her best friend Celeste
13 Nesbitt have all created a picture of you, of a woman
14 who was independent and strong at one point in her
15 life until Myron Lindsey walked into it.

16 Then because she wanted a father for children she
17 put up with being called a bitch and being hit in the
18 face, being slapped on family vacation. She listened
19 as one of her sons was called something I am not going
20 to repeat to you. And she listened and watched as
21 another son was given beer at the age of one.

22 Her father told you it was because she wanted a
23 dad for her boys. We can look back in retrospect and
24 say that ain't the kind of dad anybody needs. But
25 she wanted a dad for her sons. She was a good, kind

1 woman. And she did not deserve to die like that,
2 slumped down in the back seat of a friend's car on the
3 phone with a stranger from 911 trying to get that man
4 to finally follow a court order that told him to leave
5 her the hell alone. She did not deserve to die like
6 that. Not on his terms.

7 You know we live in a culture that so-called full
8 of death. It is in the movies. It is in the music.
9 It is in the video games. It is everywhere.
10 Sometimes we become desensitized to the fact that
11 death is the greatest finality of all. When you are
12 dead, it's over.

13 The last things that Nell Lindsey said to her two
14 boys, Alex and Trey, is the last thing she will ever
15 say to them. The last thing that Carol Wright said
16 to her daughter is the last that she will ever say to
17 her. Death is final. There is no retreat from it.
18 You know how much we want to go out on our own terms,
19 but not slumped down in the back seat of a parking lot
20 outside of a police station talking to a stranger
21 trying to get away from a man that beats you. That
22 was Nell Lindsey. That is her character.

23 Stanley Staggs will have to come to the
24 realization that there will be no more Christmases
25 with Nell Alex and Trey playing by the fire. That is

1 over. Mr. Staggs, if he wants to go and see his
2 daughter, he can go to the cemetery. Ms. Wright,
3 you have had, she has had her last conversation with
4 Nell Lindsey. Alex and Trey won't have a mom again.
5 That is the character of Nell Lindsey.

6 I want to tell you about the context of this
7 crime. I want to talk to you about it just briefly.
8 It is important that you remember this. Nell Lindsey
9 had been beaten in private. She had been beaten in
10 public. She was going to divorce Marion Lindsey.
11 She took out a warrant because he hit her in the
12 Applebee's parking lot.

13 When that warrant was served, Mr. Lindsey went
14 before a judge. And he asked for a PR bond. He was
15 told at least four different times, Judge Simmons
16 tells us, to stay away from your wife. It took him
17 less than 24 hours to gun her down. You want to know
18 the context of the crime? I hear from that table
19 over there that he wanted to see his sons. That is
20 the context of this crime. Yet he insures that they
21 will grow up without a mother or a father.

22 I hear he was hellbent on suicide. But he had
23 all day and ten bullets and not one of them wound up
24 in his head. Suicide? She wanted wound up with an
25 autopsy. He gave himself a little nick on the neck.

1 Suicide? Ten bullets? All day to do it. Never
2 got around to killing himself.

3 But in a matter of minutes of seeing his wife or
4 suspecting that she was in the back of the car, she
5 was dead. It has nothing to do with wanting to see
6 boys. Think back to Stanley Staggs' testimony.
7 Since September the 18th, 2002, no cards, no letters,
8 no birthday, no Christmas. The context of this crime
9 was not a father who even though he is familiar with
10 lawyers and even though there are people in his life
11 that would give him the money to go hire one to get
12 whatever visitation he thought he needed, he does not
13 do that.

14 I've got these two images doling in my mind.
15 I've got a woman who follows the system. She
16 believes in the system. She takes out an arrest
17 warrant. He is processed. He is served. A judge
18 tells him to stay away from his wife. That is
19 somebody on that side. Then you've got Marion
20 Lindsey who ignores what a judge tells him and takes
21 justice in his own hands and guns his wife down. You
22 want the context of the crime? There is the context
23 of the crime.

24 Let's talk about Marion Lindsey. September 18,
25 2002, we learned yesterday was not the first time that

1 he shot into a windshield with a gun. He shot
2 Stanford Wilkins. He shot in a car that had Jessica
3 Campbell. He sold drugs. I'm not putting those two
4 crimes on the same bar. But you want to know the
5 character of Marion Lindsey? There is the character
6 of his Marion Lindsey. He's shoots indiscriminately
7 in a car of two people in 1994. He cracks his wife
8 in the jaw at the beach because he thought that -- he
9 could not tell time.

10 You know, Sharon Smith, I think you remember her.
11 She was a adopted sister of Nell Lindsey. She
12 testified that she wanted Nell to fight back, to not
13 sit there and get hit. She says you are bigger than
14 he is. Fight back. She tried to fight back. She
15 tried to fight back through a justice system that let
16 her down.

17 Marion Lindsey has shot indiscriminately in cars
18 before. He has made his living selling crack cocaine
19 while Nell was working at a hospital. He has beaten
20 his wife. He hit her and knocked her over one of his
21 own children. Then he shot her sitting next to
22 somebody else's child. You want to know the
23 character of Marion Lindsey? You've got it.

24 You can be certain that his lawyers will stand in
25 front of you and ask you for mercy. They will ask

1 you to show compassion to a man who has never shown it
2 to anybody else. Now why is it that the people who
3 will ask you for mercy can't show it to anybody else?
4 Where was the mercy for Stanford Wilkins? What had he
5 done? Where is the mercy for Kiera P. who is
6 going to go through life with the scars that she got
7 on her heart right now? Where is her mercy? Where
8 is the mercy for his wife? They will stand in front
9 of you and ask you for mercy for a man who has never
10 shown it to anybody else.

11 You can rest assured that they will talk about
12 his psychiatric problems. They brought Dr. Melikian
13 in here. Here's what I remember from Dr. Melikian.
14 When she was asked about depression, what part of
15 depression will make somebody shoot somebody in the
16 back of the head three times in a parking lot? She
17 said nothing. What part of having cognitive deficits
18 makes you shoot somebody in the back of the head in a
19 parking lot? Nothing.

20 Then we come around to, we come around to a
21 little character called Jimmy. Jimmy was born the
22 day death notice was served in this case. Don't ever
23 forget that. The suicide attempt when he was 15, we
24 know that was just an attempt to manipulate his mom.
25 Dr. Melikian conceded that. That is in the medical

1 records.

2 Then when he shoots Stanford Wilkins, is there
3 one word of mental health? Do we hear Jimmy's voice
4 in 1994 when he shoots Stanford Wilkins? No. Do we
5 hear Jimmy's voice when he's cracking his wife in the
6 jaw? No. We hear about Jimmy the day that the State
7 of South Carolina serves a death notice on him. That
8 is the most incredible coincidence I think I have ever
9 heard.

10 I am not minimizing psychiatric issues or
11 problems. They are real. There are people who
12 suffer from them. And they are real. They should
13 not be trivialized by concocting some character name
14 Jimmy. Well, just like psychiatric problems are
15 real, so are meanness and self-absorption and the
16 unwillingness to let your wife move on. I submit to
17 you those are far more common than any mysterious
18 voices that go tell you to kill somebody.

19 **MR. BARTOSH:** Your Honor, I'm going to object
20 to that. There was never any evidence that a voice
21 told him to kill somebody. There was never any
22 testimony to that.

23 **MR. GOWDY:** I thought that Melikian
24 testified that he heard voices, Your Honor. I am
25 happy to withdraw that.

1 **THE COURT:** Let me say this to the jury. You
2 will recall what the testimony was. The Solicitor's
3 argument is not evidence. Your recall of the
4 evidence is what is important. And the arguments are
5 simply to comment on the evidence.

6 **MR. BARTOSH:** Thank you, Your Honor.

7 **MR. GOWDY:** Thank you, Your Honor.

8 We live in a culture where sometimes we confuse
9 excuses with explanations. Growing up poor can be an
10 explanation. It should never been an excuse. You
11 can walk five miles in any direction in this
12 courthouse and you can find kids that have grown up
13 poor right now. And this is a single-parent family.
14 There may be educational issues. They will grow up
15 to be just as law-abiding as you ever want somebody to
16 do.

17 There are kids growing up that don't have someone
18 like Bill Burton who came from Georgia. There are
19 plenty of people who grew up poor. There are people
20 in this courtroom who grew up poor. Never let that
21 be an excuse for what you saw on that overhead
22 picture. It just cannot be.

23 Let me talk to you for just a second about death.
24 Before I talk to you about death, let me say this
25 about saying good bye. Let me say one more thing to

1 you about good bye. School ends this week in most of
2 Spartanburg County and maybe next week but it is this
3 week for my children. And this fall, the cycle will
4 begin again. There will be parents dropping their
5 kids off at school.

6 You want to see something beautiful if you watch
7 as moms and dads and grandparents say good bye to
8 their kids on the first day of school. That's for
9 one day but you go watch the tears. And that's for
10 one day. Can you imagine saying goodbye to somebody
11 for ever? If you will imagine never being able to
12 say the last thing you wanted to say to your mom or
13 your children or your dad or your friend.

14 Death will visit everyone of us. It is the
15 greatest constant in life. That is not what scares
16 us. We can handle dying. It is the way that we die
17 that scares us. If death would knock gently at the
18 front door of our life and give us all the time we
19 want to prepare, we can walk as slowly as we want to
20 to the front door to open it in the later years or the
21 older years of our life. That is how most of us want
22 to meet death, on our terms, walking slowly telling
23 everybody goodbye as we open that door.

24 Sometimes death can kicks in the front door like
25 a violent intruder and you ain't even got time to say

1 a prayer. Whatever the state your life was when that
2 death knocked in your front door, that is going to be
3 the state of your life forever. It ain't death that
4 scares us. It is how we die.

5 Nell Lindsey died in a way that nobody would
6 pick. Talking on the cell phone to a stranger,
7 trying to get away from an abusive husband. This
8 defendant can say the goodbye to anybody he wants to.
9 If he ever decides that he wants to see his two sons
10 again, he can say goodbye to them. If he wants to
11 say goodbye to his mom or his dad or his friends, he
12 can say what he wants to. He can go out of life on
13 his terms. Not so with Nell Lindsey. Not so with
14 Nell Lindsey.

15 You will have before you the circumstances and
16 the context of this crime. You will have before you
17 the character of Marion Lindsey. You will have
18 before you say impact that life and her death had on
19 her friends and family. I told you earlier.

20 I will tell you again that you've got on one
21 spectrum of life mercy. We all need mercy. We all
22 have tasted mercy. It can come in the form of a one-
23 year prison sentence for shooting somebody. It can
24 come in the form of a man named Bill Burton who took
25 an interest in you as a child. It can come in the

1 form of God blessing you with two children. This
2 defendant has been shown my mercy and it did not take.

3 At the other end of the spectrum, we got
4 vengeance, retribution, an eye for an eye, a tooth for
5 a tooth. I ain't asking you for that either. I'm
6 not asking you to kill Marion Lindsey the way that he
7 killed his wife. I am not asking you to shoot him in
8 the head while he's slouched down in the back of
9 somebody's car talking on the cell phone to a
10 stranger. I'm not asking you to rob him of his
11 goodbyes.

12 I'm going to walk in the middle of mercy and
13 vengeance. And I'm going to stand on a rock called
14 Justice. And I'm telling you that there some crimes
15 in this community that we can not tolerate. You
16 cannot stalk your wife to a police station and shoot
17 her while she is cowering in the back of a friend's
18 car on the phone with 911 and expect this community to
19 accept it.

20 Justice does not require death for all murders.
21 But Justice does demand that there are some crimes
22 that you just cannot ignore. I stand on a rock
23 called Justice. I tell you that the character of
24 this defendant and the circumstances of this crime,
25 the shooting into a car when you know there are two

1 children and you shoot your wife in the head, that is
2 a crime that this society, this community, you as the
3 collective conscience of this community have got to
4 say that is too much. That is not an ordinary
5 murder. That is aggravated.

6 As I told you when I stood up, this will be the
7 last time any of us stands before you in this trial.
8 It is time for me to sit down. I don't want to sit
9 down yet because I can't help but think that I have
10 not done a good enough job in telling you what Nell
11 Lindsey was like. When I sit down, I'm afraid that
12 she is going to sit down with me.

13 Tonight in Spartanburg, there will be a pair of
14 boys and a pair of girls going to bed. A pair of boys
15 are named Alex and Trey. They will go to bed tonight
16 like they have for the past year and a half without
17 the gentle kiss or hug from their mother. They will
18 go to bed tonight with the knowledge that their father
19 killed their mother.

20 Then up in Inman, there will be two little girls
21 that go to bed named Kiera and Keysha. Thank the
22 Lord for young memories because her mama tells us that
23 Keysha is okay. Kiera is not. She's got a little
24 scar on her arm. She's got a big scar on her soul
25 from having had a woman be shot to death right beside

1 her.

2 Those are the circumstances of this crime. That
3 is the character of Marion Lindsey. Nell Lindsey,
4 Nell Lindsey died on the phone with a stranger and the
5 last thing she heard was that going off before three
6 of those went into her head. And one of them missed
7 the back of her neck and went into a car seat. We
8 thank the Lord --

9 MR. BARTOSH: Your Honor, I object to that
10 because it did not going into the car seat.

11 MR. GOWDY: It went into the seat of the car,
12 Mr. Bartosh.

13 THE COURT: I overrule the objection.

14 MR. GOWDY: You decide where it went in.
15 You saw the car. If that is not a car seat, then I
16 apologize to you. It went smack into the center of
17 that car seat. Not that car seat, the one in the
18 parking lot. The last thing that she heard was the
19 sound of that gun going off as three bullets went into
20 her skull and one missed her neck and went into a car
21 seat. Her voice went blank.

22 She went through the system of justice to get her
23 justice. She wound up dead. Now I am back before
24 you asking you through your verdict, may justice be
25 done to Nell Lindsey. Through your verdict forms,

1 may justice roll off the pages of those verdict
2 forms. May you conclude that this is one of those
3 cases where life in prison just isn't enough. Thank
4 you.

5 **THE COURT:** Solicitor.

6 (WHEREFORE, a bench conference was held off of the
7 record.)

8 (WHEREUPON, the following bench conference was held on
9 the record.)

10 **THE COURT:** I ask Mr. Bartosh if I had
11 adequately addressed, did I adequately address the
12 objection that he made during closing argument. He
13 said yes.

14 (WHEREUPON, the bench conference concluded.)

15 **THE COURT:** Let me see you.

16 (WHEREFORE, a bench conference was held off of the
17 record.)

18 **MR. BARTOSH:** Your Honor, Mr. Lindsey would
19 like to make a statement.

20 **THE COURT:** Ladies and gentlemen, we will now
21 hear from the defendant.

22 **MR. LINDSEY:** This is something I want to
23 say. Ladies and gentlemen of the jury, as the
24 Solicitor said, I was scared of the death penalty. I
25 never even cared about the death penalty. First, I

1 really wanted the death penalty. I know you've heard
2 some bad things about me. This is the most bad thing
3 anybody could do.

4 But the issue is not what you care about me and
5 what you think about me. I don't care about that.
6 The issue is my kids. That's how I feel. That's the
7 only concern I have. Ladies and gentlemen of the
8 jury, before you go and deliberate on my life, I would
9 like for you to think about my kids.

10 At first, I felt that they really did not need
11 me. But after thinking, thinking and a lot of things
12 that have been happening with them, I realize that
13 even if I'm locked up for the rest of my life I could
14 still be of some use to my boys. Now I feel like a
15 deadbeat dad, something I always tried not to be.
16 That is how I feel.

17 My kids need me to be here when they get older.
18 So they can ask that question what the hell was daddy
19 thinking about when he took our mother's life. Once
20 my kids get older and experience life and love and
21 heartbreak, they can come and ask me what not to do.
22 Plus they can get fatherly advice from me not to ever
23 be in jail like their father.

24 I don't care what nobody says about me being a
25 good dad. I was the damn best dad that I could ever be

1 to my kids. My kids never went without. If you all
2 take my life today, my kids may feel they have nothing
3 to live for. Their mother will be gone and their
4 father will be gone too. They might be rebel and
5 become a problem child. I know that they have people
6 that love them. There was no love like their mother
7 and father.

8 No matter how close you are to someone, no matter
9 how much people love you, you have people around you
10 that love you, there is some things you just can't go
11 to them and talk about like you can with your mother
12 and dad. I'm sorry for what I've done, all the pain
13 I have caused to the family and everybody who love and
14 miss my wife and especially to my kids because now
15 they'll go without a mother and a father.

16 All I ever want, the only thing I ever wanted for
17 my kids my whole life is to have a mama and dad and
18 not grow up like me and Nell did without a dad and mom
19 around. That's how we both did. I thought of my
20 kids needing me that day. It just made me snap. I
21 lost control, something I cannot take back and I wish
22 that I could.

23 If I could give my life today, ladies and
24 gentlemen, I would do it right now right here in front
25 of you. I would finish what I tried to do and kill

1 myself, as the Solicitor said I did not, without a
2 second thought. If I could bring my wife back to my
3 kids and everybody who loved her and miss her today
4 and give my life, without a second thought I would.

5 Ladies and gentlemen, whatever you decide of my
6 life I can accept that because I have done wrong. I
7 just know that I could still teach my boys to be good
8 college boys and good businessman and to become
9 respectful in life. I never been through college.
10 I would like to see my boys go. Even though I did
11 not finish school, I still have some skills to pass
12 on. Most of all, I would like to teach them to be
13 good fathers and good husbands to their wife and to
14 learn from the mistakes that I made which I have made
15 a lot.

16 I am asking my wife's family to please share my
17 kids with my family because God only knows they need
18 all of that --

19 **MR. GOWDY:** I object to that.

20 **THE COURT:** I sustain the objection.

21 **MR. LINDSEY:** Ladies and gentlemen, that's all
22 have to say to you. I ask that you take that into
23 consideration. If you take my life today, that is
24 what my punishment deserves. But if you spare my
25 life and let me teach my boys some more stuff in life

1 because one day they're going to come to me and they
2 are going to say -- because once they get older,
3 they're going to come to me and they're going to say
4 daddy what the hell was you thinking about.

5 You know what? I'm going to sit down with them
6 if I have that chance and I'm going to talk to them.
7 And I'm going to tell them daddy don't even know what
8 the hell he was thinking about. All he was thinking
9 about was his whole life and many of the things he
10 fought all of his life for --

11 **MR. GOWDY:** Judge?

12 **THE COURT:** Sustained.

13 **MR. LINDSEY:** But you, and, but thank you,
14 ladies and gentlemen. This all I have to say.

15 **MR. BARTOSH:** May we approach, Your Honor?

16 (WHEREUPON, a bench conference was held off the
17 record.)

18 **MR. BARNETT:** Can we take a break right now?

19 **THE COURT:** Uh-huh (affirmative).

20 All right. Ladies and gentlemen, we will take a
21 short break before we hear from Mr. Bartosh.

22 **MRS. LINDSEY:** Lord, please have mercy on my son.
23 Please have mercy on my son. Oh, Lord. Please, God.

24 (WHEREUPON, the jury exits at approximately 10:17
25 a.m.)

1 **MR. GOWDY:** Your Honor, if she's going to
2 continue to speak out, I can understand the cries.
3 That's all across the courtroom. But speaking out
4 asking for a verdict, if she continues to do that I'm
5 going to have to ask the Court just not let her come
6 back in. It is unfair to the State.

7 **MR. BARTOSH:** Your Honor --

8 **THE COURT:** We all know that that is
9 impermissible. And I'm going to ask that she
10 convince me, somebody's going to need to convince me
11 that she can control herself in the courtroom before I
12 let her back in.

13 **MR. BARTOSH:** Yes, sir. I don't think that's
14 possible.

15 **THE COURT:** I want her not only out of the
16 courtroom but I want her far enough away to where she
17 can not be heard inside of this room.

18 **MR. BARTOSH:** Yes, sir.

19 **THE COURT:** We will take about a five minute
20 break.

21 (WHEREUPON, a short recess was taken at approximately
22 10:20 a.m.)

23 (WHEREUPON, the Court resumed at approximately 10:30
24 a.m.)

25 **THE COURT:** Bring in the jury.

1 All right. Let me say this as the jury is
2 coming. Ladies and gentlemen, I expect that everyone
3 in this courtroom will be able to contain themselves
4 within reason. I realize this is an emotional moment
5 for a lot of people, for everybody. But anybody who
6 feels like they can not control their emotions needs
7 to leave the courtroom now.

8 If anybody says anything or makes any kind of
9 communication whatsoever with the courtroom, then I'm
10 going to hold them in contempt of court and put them
11 in jail. If there is anybody who doesn't understand
12 that or who feels they can not control themselves,
13 leave the courtroom now.

14 (WHEREUPON, the jury enters at approximately 10:31

15 a.m.)

16 MR. BARTOSH: Thank you, Your Honor. May it
17 please the Court?

18 THE COURT: Yes, sir.

19 MR. BARTOSH: Ladies and gentlemen of the jury,
20 when we first started this trial, I told you in the
21 beginning that this was a very emotional situation and
22 that you are going to see and hear a lot of tragedy.
23 A lot of horror. And that's the only way I can
24 describe some of these photographs. A lot of human
25 suffering. A family torn asunder.

1 And I ask you at that point, to please put aside
2 any of the sentencing or the wish to punish or the
3 wish to reward any of the folks involved in this.
4 What your job is in this phase of the trial is two-
5 fold. The first thing you have to do is you have to
6 decide whether or not the State has proved beyond a
7 reasonable doubt the sole aggravating circumstance
8 that they are relying on to make this a death penalty
9 case.

10 You have to do that unanimously. All twelve of
11 you have to believe that they have proven each and
12 every element of that aggravating circumstance beyond
13 a reasonable doubt before you can ever consider what
14 the penalty should be. Now, I ordinarily don't use
15 notes. But I was sitting thinking about this last
16 night. I wanted to be sure that I was able to cover
17 everything that I needed to cover. I hope that you
18 will indulge a little bit if I have to refer to some
19 of my notes. I hope that it won't distract you is
20 what I'm trying to tell you.

21 That aggravating circumstance that the State is
22 relying on is that the offender, by his act of murder,
23 knowingly created a great risk of death to more than
24 one person public place or by means of a deadly weapon
25 or device which normally would be hazardous to the

1 lives of more than one person. So what you have got
2 to do is you've got to have consider, first of all,
3 did Marion knowingly create the risk. Second of all,
4 was it a great risk? Not just a risk, but a great
5 risk of death of more than one person in a public
6 place by means of a weapon or device which normally
7 would be hazardous to the lives of more than one
8 person.

9 Now, what I ask you to consider is this. As the
10 solicitor pointed out, this happened in the parking
11 lot of the Inman Police Department. So, I don't
12 think there's any doubt. And no one can contest it
13 was a public place. However, let's look at the other
14 elements of this aggravating circumstance. Beyond a
15 reasonable doubt. I believe the Judge will tell you
16 that if you have a doubt, a reasonable doubt as to any
17 of the elements in this crime or this aggravator, you
18 must resolve that doubt in Mr. Lindsey's favor.

19 So, the first one is knowingly. Now, you've
20 heard testimony both from Dr. Melikian who testified
21 about Mr. Lindsey's cognitive defects, about Mr.
22 Lindsey's depression, about Mr. Lindsey's possible
23 brain damage. Now the defense is in no way trying to
24 excuse or explain away what Mr. Lindsey did. I don't
25 believe that there's any doubt that Mr. Lindsey did

1 what he did and that he was insane at the time that it
2 happened.

3 However, he did have some significant mental
4 issues which affected his decision. I think this is
5 shown in the fact that when he first came upon the car
6 that Ms. Nesbitt was driving that he followed the car
7 to the police department. Now if he had intended or
8 had thought about it rationally, I don't think he
9 would've done something like that. That is the
10 action of a desperate man who isn't thinking about
11 anything.

12 The next element is a great risk of death to more
13 than one person. You've seen the automobile. You
14 have also heard the testimony of the folks who were
15 involved. I think one of the things the judge is
16 also going to instruct you on as he did in the first
17 phase that you can judge the credibility of witnesses
18 by their demeanor, by whether or not they had any bias
19 or prejudice. And I would ask that you look at the
20 folks who testified as to what happened at the police
21 station.

22 Celeste Nesbitt was the only witness other than
23 her daughter who testified about the events in the car
24 at the station. As she said, and you can hear it on
25 that tape, they pulled into the police station. You

1 can hear Ms. Lindsey say roll the windows and lock the
2 doors. And then she says I am not getting out. Then
3 you hear a car. Ms. Nesbitt testified that she got
4 out of the automobile. This was all before you hear
5 the shots.

6 There were four people in the car. There was
7 Ms. Nesbitt's mother who as Ms. Nesbitt says was in
8 the front seat. There was Mrs. Lindsey in the back
9 seat behind the driver. According to Ms. Nesbitt,
10 her two children when the back seat also.

11 You've seen the position of the bullet hole.
12 You have seen also that, Ms. Nesbitt's daughter.
13 This was a little less than two years ago. And I
14 respectfully submit to you, ladies and gentlemen, that
15 if her daughter was sitting in the position that she
16 described at the time that this happened with that
17 bullet hole where it is, that bullet would have struck
18 her. You have also seen the car. I don't believe a
19 child her size could scoot down underneath the car
20 seat. I respectfully suggest that that would be a
21 reasonable doubt as to whether or not she was placed
22 in a great risk of death.

23 Now we come to the means, to the use of weapon
24 and a device that is normally, normally would be
25 hazardous to the lives of more than one person. The

1 State is saying that they are relying on the fact that
2 a .38, a five-shot .38 pistol fits that description.
3 Well, under that definition, just about every hand gun
4 would be, everyone that was shot on the handgun, it
5 would be a device that would normally be hazardous to
6 the lives of more than one person.

7 I don't believe -- I ask you to consider the
8 facts about a gun. It was a five-shot .38. It is
9 not exceptionally powerful. It's not like a .34
10 Magnum or anything like that. It does not spray like
11 shot gun. It is less likely pass through the body of
12 one person and go through another. It has a small
13 number of rounds in its capacity. It is not a 9 or a
14 12 or a 16-shot pistol.

15 It is a fairly low velocity weapon. It is not
16 an automatic. It is not even a semiautomatic. It
17 is a double action revolver that is slow to fire as
18 compared to the other automatics. There's been no
19 evidence of any kind of armor piercing bullets or any
20 any ammunition. It was a .38 bullet.

21 I would respectfully suggest, ladies and
22 gentlemen, that in your review this that you think
23 about that, as to whether or not a 5-shot .38 revolver
24 would come under the definition of a device which
25 would normally be hazardous to the lives of more than

1 one person.

2 As I said, if you have a reasonable doubt as to
3 any of the elements of the aggravator, aggravating
4 circumstance, then you must resolve that doubt in
5 favor of Mr. Lindsey. If you find the State has not
6 proving its burden of proving beyond a reasonable
7 doubt beyond a reasonable doubt. Deliberation stops.
8 You don't go any further.

9 If you do you think that this sole aggravating
10 circumstance has been proven beyond a reasonable
11 doubt, and all twelve of you agree do that, then you
12 move on to determine what the appropriate penalty is.
13 In doing that, you can consider the aggravating
14 circumstances of the crime, the character of the
15 defendant, of Mr. Lindsey. You can also consider the
16 mitigating circumstances. His mental state, his
17 cognitive deficit and any other factor that you may
18 consider appropriate.

19 You can find for life or you can find for death
20 for a reason or for no reason. It is entirely up to
21 you. It is an individual decision. You have to
22 decide whether or not to execute Marion Lindsey. It
23 is an individual decision, ladies and gentlemen. You
24 each have to make that decision on your own.

25 You have heard about Marion's, you heard from his

1 mother. She talked about the incidents in his early
2 life and how he was injured in an automobile accident
3 and that he ingested kerosene, that he's slow, was
4 poor in school. He had speech problems. Yes, he
5 was poor. Yes, he was lucky that he had a friend
6 like Bill Burton. A lot of kids don't have that.
7 That is true.

8 A lot of kids grew up the way Marion grew up and
9 don't end up sitting in the courtroom with their life
10 hanging in the bounds. But Marion did. We are all
11 given talents. Some greater talents, some lesser
12 talents. Some of us are stronger. Some of us are
13 weaker.

14 But in no way are we offering any of this
15 testimony or any of the background that Marion grew up
16 in to excuse what he did. It is not an excuse. What
17 we are trying to do is trying to explain to you how
18 Marion Lindsey can end up sitting at that table.

19 He had no father in his life. That was the one
20 biggest regrets in his life growing up. His step-
21 brothers, their dads would come and get them on the
22 weekends and take them out. And he would stay. You
23 heard from Mr. McDowell who said that he played no
24 part of Marion's life. You also heard testimony that
25 this was, as I said, he swore, Marion swore that once

1 he got to be a father that his kids would never have
2 the environment and the lack of a father that he had.

3 You heard about the relationship of Bill Burton
4 and how they naturally seem to kind of mesh. Marion
5 viewed, came and viewed Mr. Burton as he told you,
6 almost as a dad. His dad was never in his life.
7 Bill Burton told you that he knew Marion Lindsey from
8 the age of six or seven until about 19 years old.
9 And he never ever in all of those years saw any of the
10 conduct or any of the incidents or any of the violence
11 or any of the anger that you've heard described from
12 the witness stand.

13 As I said, Marion had trouble in school. Dr.
14 Melikian believes that a lot of it stemmed from his
15 problems as a child, the injuries he received as a
16 child, receiving a head injury by an automobile,
17 inhaling kerosene. They all went to contribute to his
18 problems in school. As I said, he had speech
19 problems. He repeated the eighth grade three times.

20 When he got old enough, he quit school. And he
21 went to work to support his family. You have heard
22 about the condition that they lived in. Once again,
23 ladies and gentlemen, as Solicitor Gowdy said, there
24 are plenty of people who would be within a half-mile
25 of this courtroom, we could find people who had grown

1 up in worst situations than Marion did and have not
2 come to the point that Marion has.

3 As I said, we all go through different talents,
4 we all are given different strengths. None of us can
5 sit here and say how we view the situations like
6 Marion did with his handicap.

7 He and Nell Lindsey were together about 10 years.
8 They had two children. The most important thing in
9 Marion's life were his kids. You heard about the
10 pattern of the relationship. They would separate for
11 a month or two. Then they would reconcile and get
12 back together. It was back and forth and back and
13 forth over those years of marriage. But they always
14 got back together. Marion could always see his kids.
15 And his kids always came home along with his wife.

16 Then we have that faithful time, that last
17 separation when she left and took the children. And
18 she told Marion that he would never see his kids
19 again. His mother testified that they put a block on
20 the telephone so they could not call Nell or her
21 mother where the children were. Nell was ending the
22 relationship.

23 The Solicitor has made a great deal about the
24 fact that there were alternatives available for Marion
25 to handle the problem of custody with his children.

1 I ask you to consider this, given Marion's education,
2 his upbringing, his situation in life, I don't know
3 whether or not he really knew about those that you go
4 and get a lawyer. And you go up to Family Court and
5 you get your kids. I don't know if that ever entered
6 his mind that that was an option to him.

7 We have heard about the week before, how he was
8 depressed, suicidal, how he lost weight during this
9 last separation. And on that faithful day, when he
10 met Celeste Nesbitt on the street, where they turned
11 and talked, he talked to Celeste. And according to
12 Celeste, he talked to the younger daughter. And then
13 he asked to see who was in the backseat. According
14 to Ms. Nesbitt, she said the window was broken and
15 she could not run the window down.

16 You folks have seen the automobile. You see the
17 tinting on the other windows. I will leave it to your
18 judgment as to whether someone can see through that
19 tint to see whether someone was there. I think the
20 evidence demonstrates that Mr. Lindsey knew that his
21 wife was in the automobile.

22 And as he told you just a few minutes ago and as
23 you heard it from Dr. Melikian, it all came together
24 at that point. All of the frustration, all of the
25 depression, all of loss of his children all came

1 together when the car pulled off. As Ms. Nesbitt
2 turned and headed toward the police station, he
3 followed.

4 You have seen the photographs. There's no doubt
5 in the world that if he were thinking clearly, it
6 would not had been like that. He was not thinking
7 clearly. Ms. Nesbitt pulled up next the police car
8 and got out of the car. Marion pulled up on Ms.
9 Nesbitt's car and got out and walked around to a back
10 window and shot twice. He hit Ms. Nesbitt, Mrs.
11 Lindsey both times in the back of the head.

12 If you look at the autopsy photographs, you will
13 see the bullets. One is above the other. He walked
14 around to the side and shot twice more. One went
15 into the left side of Mrs. Lindsey's head. You're
16 going to see that on the autopsy photographs. And the
17 other bullet, were it not were not that way, we
18 probably would not be sitting here talking about that.
19 But what that bullet did was grazed the back of this
20 of her neck and went into the backseat and into the
21 trunk. That is what they are relying on for you to
22 kill Marion Lindsey. The misplacement of that
23 bullet.

24 What did Mr. Lindsey do after that? He walked
25 around to the front of the police car. Officer

1 Godfrey said he pointed a gun at him, but he put the
2 gun to his head. There has been a great deal of
3 testimony, there's been a great deal of argument that
4 this was not a sincere attempt. It was a graze. It
5 was a nick.

6 You heard Dr. Melikian testify. There was an
7 entrance of the wound and there was an exit wound in
8 his head. The bullet went into his head and came
9 out. Now, if you can somehow figure that Marion
10 figured well, I need to put the gun at this particular
11 angle in this particular place and pull the trigger so
12 that the bullet would go in through my head and come
13 out but it won't kill me. I just don't think that is
14 possible, ladies and gentlemen. That was a sincere
15 attempt at suicide. He shot himself in the head. And
16 then Officer Godfrey shot him. Then he was arrested
17 and went to the hospital. He's been in jail every
18 since.

19 Now the solicitor also said no phone calls, no
20 cards nothing at Christmas. During this entire
21 almost two year period, Mr. Lindsey has had this
22 legal problem. He is charged in this death penalty
23 case that is hanging over his head. And he acted on
24 legal advice to have no contact with Mrs. Lindsey's
25 family or with his children. Not because he did not

1 want to. I'm sure that every --

2 **MR. GOWDY:** Your Honor, I object to that.
3 There's been no testimony about that.

4 **THE COURT:** Sustained.

5 **MR. BARTOSH:** The solicitor has talked about
6 justice. What I would ask each and every one of you
7 to consider in deciding whether or not to execute
8 Marion Lindsey is this, you have heard what Mr.
9 Lindsey said to you at the beginning of the case.
10 Which would be the worst punishment?

11 I suggest to you, ladies and gentlemen, that it
12 is waking up every day of your life, and Mr. Lindsey
13 is 30 years old, every day of your life in a prison.
14 And you have heard from a representative of the
15 Department of Corrections about what life is like in a
16 prison. Mr. Lindsey is more than likely to go to a
17 maximum-security prison. When he is not working or
18 when he is not going to school, he is in his cell.
19 He can have 8 visits a month. That will be his
20 routine for the rest of his life. He would never
21 ever get out again until he dies.

22 Would that be Justice? I suggest to you that it
23 is ample justice. Killing Marion Lindsey is not
24 going to bring back Nell Lindsey. Killing Marion
25 Lindsey is not going to help his kids. If you can

1 imagine knowing that your father's on death row going
2 down there to visit him if you do and then getting the
3 word to execute, that you two are now orphans. Which
4 is the most just punishment? I would suggest to you,
5 ladies and gentlemen, it is life in prison because
6 life means life.

7 Once again, I want to thank you for your patience
8 with us. This is the eighth day that we have been
9 involved in this. Some of you have been qualified
10 earlier and have been here longer. Some you have been
11 here shorter. I know it has been difficult. It is
12 difficult being away from your family. It has been
13 difficult being in a hotel room. It has been
14 difficult being minded by folks who watch you all the
15 time. I want you to know that Marion and the rest of
16 us that represent him have been grateful to you.

17 As the Solicitor also said, each and every one of
18 you were picked because you said you could be fair and
19 that you could listen to both sides and make your
20 decision based upon what you heard, not upon some
21 emotion, not upon sympathy, not upon wanting to punish
22 somebody but based on what you've heard and then
23 taking that back into the jury room.

24 And if you decide that the aggravating
25 circumstance has been proven beyond a reasonable

1 doubt, then you have to decide what is the fair thing
2 to do, what is the just thing to do. I disagree with
3 the Solicitor on that this is about is revenge. That
4 is what this is. Nell Lindsey was killed. And
5 Marion Lindsey gets to die for it. That is what
6 they're asking you to do is to execute Merion Lindsey
7 for that on that basis.

8 Ladies and gentlemen, I have a tendency to
9 sometimes get a little emotional. And perhaps during
10 this trial, I appeared to show my emotions a little
11 bit much. If there's anything that I said has
12 offended any of you then I am asking you to not hold
13 it against Marion. That is just the way I am. I'm
14 trying to work on it. That is me. If you want to
15 hold it against somebody, hold against me.

16 Once again, I want to thank you for your time.
17 And I want to thank you for your consideration. I
18 want to ask you not so much for mercy although I am
19 asking you not to kill Marion Lindsey. I'm asking you
20 to give him the punishment that would be fair and
21 would be just, that he spend the rest of his life in
22 prison. Thank you.

23 **THE COURT:** Mr. Bartosh and Mr. Gowdy, just
24 very briefly let me see y'all at the bench please.
25 (WHEREUPON, the following bench conference was held on

1 the record.)

2 THE COURT: The objection as to when you started
3 saying not that he did not contact the boys not
4 because he didn't want to.

5 MR. GOWDY: Yes, sir.

6 THE COURT: There's no testimony in the record
7 that he wanted to. I think that what I thought you
8 were headed towards is a statement along the lines
9 that he wanted to disobey your advice. If that is
10 where you were headed, then my objection, my ruling
11 was clearly correct.

12 But if he was simply going to argue based on the
13 visitation evidence and things that he has done with
14 his kids that he is the kind of person who would have
15 wanted to do that, then I think that would be a fair
16 argument. So I give you the opt -- I don't know if
17 you want to go back.

18 MR. BARTOSH: No, sir.

19 THE COURT: I don't think I really stopped
20 you --

21 MR. BARTOSH: No, sir.

22 THE COURT: If you want to go back --

23 MR. BARTOSH: No.

24 THE COURT: You are satisfied that you done
25 everything you wanted to do?

1 **MR. BARTOSH:** Yes, sir.

2 **THE COURT:** One more question. You eventually
3 conceded that it's a public place. You still want me
4 to charge it?

5 **MR. BARTOSH:** Yes, sir.

6 **THE COURT:** All right.

7 (WHEREUPON, the bench conference concluded.)

8 **THE COURT:** Ladies and gentlemen, now that you
9 have heard all the evidence and the arguments of both
10 the State and the defendant in this phase, it again
11 becomes my responsibility to tell you the law that is
12 applicable to this phase of the trial.

13 Just as I told you during the first phase, only
14 the jury can make the findings of fact in this case.
15 I am not permitted to indicate to you how I might feel
16 about the testimony and evidence that is been
17 presented. If I have said anything or if I have done
18 anything during the course of this phase of the trial
19 that might indicate to you how I may feel about the
20 facts or that may indicate to you how I feel about the
21 penalty, then you must disregard that because both of
22 those questions must be answered exclusively by the
23 jury.

24 Also as I told you in the first phase, I am the
25 exclusive judge of the law. If you have some idea as

1 to what the law is or what the law should be and if
2 that differs from that what I now tell you the law is,
3 then you are obligated under the oath that you have
4 taken as jurors to set your notion of the law aside
5 and to accept and apply the law precisely as I now
6 state it to you.

7 Let me remind you of some of the factors that you
8 may wish to consider as you evaluate the credibility
9 of the witnesses who have testified. The matter and
10 appearance of the witnesses who testified; was he or
11 she straightforward or hesitant in answering
12 questions; was the testimony of the witness consistent
13 or inconsistent; how did the witness come to know the
14 facts that he or she was testifying to; what is that
15 witness' ability to know those facts; is there some
16 reason that a witness might want to give testimony
17 that may hurt help or hurt one side of the other, in
18 other words, was the witness biased either towards or
19 against the State or the defendant; is the testimony
20 of a witness strengthened or weakened by other
21 testimony and evidence?

22 As members of the jury, you can believe as much
23 or as little of each witness' testimony as you think
24 it is appropriate to do. You can believe the
25 testimony of one witness against all of the rest of

1 them or you can do just the opposite. You are not
2 required to accept testimony as true even if it is
3 uncontradicted.

4 Let me tell you the difference between direct
5 evidence and circumstantial evidence. Direct
6 evidence means the testimony of a person who has
7 perceived facts by means of his or her own senses and,
8 therefore, has actual, personal knowledge that an
9 event has occurred or not occurred or that a fact does
10 or does not exist.

11 Circumstantial evidence, on the other hand,
12 involves testimony or evidence of a chain of facts or
13 circumstances from which one may infer that an event
14 has occurred or that a fact has been established.
15 The law makes no distinction between the weight or
16 value to be given to either direct or circumstantial
17 evidence. Nor is a greater degree of certainty
18 required of circumstantial evidence than that of
19 direct evidence.

20 You have heard the testimony of several expert
21 witnesses during this phase of the trial. As I told
22 you during the first phase, expert witnesses are those
23 witnesses who of special knowledge, skill, experience
24 training or education in a particular profession or
25 occupation. Because of those special qualifications,

1 experts are allowed to give opinions as to matters
2 within their area of expertise.

3 In determining the weight to be given opinions
4 given by experts, you should consider qualifications
5 and the credibility of the expert and the reasons
6 given for his own opinion. You are not bound by the
7 opinion of an expert. Give it the weight, if any,
8 that you believe it is entitled to receive.

9 Ladies and gentlemen, just as in the first phase
10 of this trial, I emphasize to you that the fact that
11 the defendant did not testify must not be considered
12 by you in any way during your deliberations. A
13 defendant has a constitutional right to remain silent
14 and the exercise of that right cannot and must not be
15 held against him.

16 Under the oath that you have just taken as
17 jurors, you are to draw no inference and no conclusion
18 whatsoever from the fact that the defendant did not
19 testify. Do not even discuss this in the jury room.
20 The defendant is not required to prove anything.
21 Ladies and gentlemen, your first task in the second
22 phase of this trial is to determine whether the State
23 has proven beyond a reasonable doubt the existence of
24 a statutory aggravating circumstance.

25 Now let me go over for you reasonable doubt.

1 Reasonable doubt is a doubt which makes a honest,
2 sincere, conscientious juror in search of the truth in
3 the case to hesitate to act. Proof beyond a
4 reasonable doubt must therefore be proof of such a
5 convincing character that a reasonable person would
6 not hesitate to rely on it and act on it in the most
7 important of his or her own affairs. Proof beyond a
8 reasonable doubt can also be described as proof that
9 leaves you firmly convinced. There are very few
10 things in this world that we know with absolute
11 certainty. In criminal cases, the law does not
12 require prove that overcomes every possible doubt.

13 Now, back to the statutory aggravating
14 circumstance. South Carolina Code Section 16-3-20
15 says the following as a statutory aggravating
16 circumstance. The offender by his act of murder
17 knowingly created a great risk of death to more than
18 one person in a public place by means of a weapon or a
19 device which normally would be hazardous to the lives
20 of more than one person. That is the statutory
21 aggravating circumstance that the State seeks to
22 prove.

23 Let me define for you what a public place is
24 under South Carolina Law. A public place is a place
25 to which the general public has a right to resort.

1 Not necessarily a place devoted solely to the uses of
2 the public but place which is in point of fact public
3 rather than private. A place visited by many persons
4 and usually accessible to the neighboring public. A
5 public place is a place in which the public has an
6 interest as effecting the safety, health, morals and
7 welfare of the community.

8 Now ladies and gentlemen, this is the only
9 statutory aggravating circumstance that you may
10 consider. Specifically in determining whether or not
11 the State has proven an aggravating circumstance, you
12 may not consider the defendant's prior criminal
13 record. If you unanimously find that the State has
14 failed to prove the existence of this aggravating
15 circumstance beyond a reasonable doubt, then you
16 deliberate no further. You will notify the bailiff
17 that you have reached a verdict. And we will get you
18 back out into the jury room to receive your verdict.

19 If you unanimously find that the State has proven
20 the statutory aggravating circumstance beyond a
21 reasonable doubt, then you would move on to consider
22 the sentence that should be imposed on the defendant
23 for the murder. You would not need to notify the
24 bailiff that you have reached a verdict on the
25 aggravating circumstance in that event but only after

1 you have determined what the penalty should be to
2 notify the bailiff.

3 Ladies and gentlemen, from this point forward
4 everything I tell you will relate to the determination
5 as to whether or not you would impose a life or death
6 sentence after finding that the State has proven the
7 aggravating circumstance. A life sentence means that
8 the defendant would be imprisoned until the death of
9 the defendant without the possibility of parole. The
10 death penalty means that the defendant will be put to
11 death or executed as punishment for the murder. You
12 must choose between these two possible sentencing
13 options.

14 The death penalty is never mandatory to you.
15 But you must understand that if you recommend the
16 death penalty, it is mandatory and the Court will
17 follow your recommendation. In deciding what penalty
18 to impose, you should consider all of the evidence in
19 the case including the aggravating circumstance and
20 any evidence of mitigating circumstances.

21 Aggravating circumstances are facts, incidents or
22 details of an occurrence that South Carolina Law
23 declare will aggravate or make worse the crime of
24 murder. An aggravating circumstance increases the
25 severity of the crime of murder and adds to the injury

1 resulting from the crime.

2 Mitigating circumstances are facts, incidents or
3 details of an occurrence that South Carolina Law
4 declares will reduce the severity of the crime of
5 murder. Mitigating circumstances serve to extenuate
6 or to reduce the degree of moral culpability or
7 responsibility for murder.

8 There are two mitigating circumstances that you
9 should consider that are set forth in the South
10 Carolina code. Ladies and gentlemen, you will have
11 this form with you in the jury room. I'm going to
12 show it to you on the overhead in just a minute that
13 will tell you what the aggravating circumstance that
14 is alleged by the State is. And it also tells you the
15 aggravating circumstance that are at issue -- I'm
16 sorry. The mitigating circumstances that are at issue
17 from the statute. I'm going to go over these
18 mitigating circumstances with you right now.

19 The first says the murder was committed while the
20 defendant was under the influence of mental and
21 emotional disturbance. The second is the age or
22 mentality of the defendant at the time of the crime.
23 Now ladies and gentlemen, by giving you this form, I
24 am not telling you that the aggravating or mitigating
25 circumstances do exist. That is for you to determine.

1 You must also consider whether the evidence
2 supports the existence of any non-statutory mitigating
3 circumstance. Non-statutory mitigating circumstances
4 are not written out in the statute but are
5 circumstances which you might find to serve the same
6 purpose and that is to reduce the severity of the
7 crime of murder.

8 I have instructed you that you must find the
9 existence of the aggravating circumstance beyond a
10 reasonable doubt. However, you need not find any
11 mitigating circumstance beyond a reasonable doubt.
12 You need not even be unanimous in finding a mitigating
13 circumstance. You may impose a life sentence for any
14 reason or for no reason. It is not necessarily that
15 you find a mitigating circumstance before you impose a
16 life sentence.

17 Now, can you fire that thing up for me please?
18 Are you ready?

19 Ladies and gentlemen, I have prepared verdict
20 forms to use in your rendering your verdict. First I
21 want to talk about your verdict as to whether or not
22 the State has proven beyond a reasonable doubt the
23 existence of the statutory aggravating circumstance.
24 Here is the verdict form that you will use if you find
25 the State has failed to meet that burden of proof.

1 It says we, the jury, unanimously find the State
2 has failed to prove beyond a reasonable doubt the
3 existence of the statutory aggravating circumstance.
4 And if that is the verdict of the jury, then the
5 foreperson would sign that verdict form. Return it to
6 the bailiff. And that would be the end of your
7 deliberations in this case.

8 If the jury finds that the State has proven the
9 existence of the statutory aggravating circumstance,
10 then this would be the verdict form that you would
11 use. It says we, the jury, unanimously find that the
12 State has proven beyond a reasonable doubt the
13 following statutory aggravating circumstance. And it
14 sets forth the circumstance. And it has a signature
15 line for each member of the jury to use. And if that
16 is your verdict, then each member of the jury would
17 have to sign that verdict form.

18 You would at that time not notify the bailiff
19 that you have reached the verdict but keep going. And
20 you would move then into consideration of the penalty
21 to impose. If the jury decides that the appropriate
22 penalty to impose is a life sentence, then you would
23 use this verdict form which says we, the jury,
24 unanimously recommend to the Court that the defendant
25 Marion Alexander to be sentenced to life in prison.

1 If that is your verdict, only the foreperson would
2 need to sign that verdict form.

3 If the jury determines that the appropriate
4 sentence is the death penalty, you would use this
5 verdict form. And it says we, the jury, having found
6 beyond a reasonable doubt the existence of the
7 following statutory aggravating circumstance, and it
8 cites the aggravating circumstance the State seeks to
9 prove, now recommend to the Court that the defendant
10 Marion Alexander Lindsey be sentenced to death.
11 Again, that verdict form has a signature line for each
12 member of the jury. That verdict form actually
13 carries over to the second page.

14 Now, ladies and gentlemen, when you return to
15 deliberate or consider and weigh the evidence using
16 your good judgment and your common sense, you must
17 deliberate fairly and impartially. You must make
18 your decision without bias or prejudice towards or
19 against the State or the defendant. You must honor
20 the oath that you took on Friday morning. You must
21 carefully and impartially consider all of the
22 evidence. And you must follow the law as I have given
23 it to you.

24 Your verdict on the existence of the aggravating
25 circumstance must be unanimous. Also your verdict as

1 to what the sentence should be, if you get to that
2 point, must be unanimous. In just a second, I'm going
3 to send you back into the jury room. I'm going to
4 ask you not yet to begin your deliberations because I
5 may have some matters of law that I need to take up
6 with the lawyers.

7 As I told you during the, at the end of the first
8 phase of the case, you will have all the exhibits in
9 the jury room with you. You will have the jury
10 instruction on statutory and, I'm sorry, on
11 aggravating and mitigating circumstances. You will
12 have the four verdict forms that I just went over with
13 you. And you will have all of the evidence. Let me
14 speak to you again about the weapons that are in
15 evidence.

16 The ammunition would not be back there in the
17 jury room. Those weapons have been secured. They
18 are not in a position to be fired. If anybody on the
19 jury needs to see the ammunition that is in evidence,
20 you simply let us know that. We'll make it available
21 to you under conditions that will satisfy us that it
22 is safe to do so. Also you will have with you in the
23 jury room or you have in evidence at least --

24 Is it 21?

25 MR. GOWDY: 21 and 21(a).

1 **THE COURT:** All right. State's Exhibit 21 and
2 21(a) which is an audio recording. If you want to
3 hear that recording, you would need to let us know and
4 we will play that for you in the courtroom because
5 only a portion of the recording is admitted into
6 evidence.

7 I would like for the three alternates to remain
8 in their seats. The twelve members of the jury can
9 go to the jury room now but do not yet begin your
10 deliberations. When we are ready for you to begin,
11 the bailiffs will bring you the evidence, the four
12 verdict forms and the jury instruction on aggravating
13 and mitigating circumstances and tell you at that time
14 to begin.

15 (WHEREUPON, the jury exits at approximately 11:27
16 a.m.)

17 **THE COURT:** Mr. Scruggs, would you take the
18 alternates into the alternate jury room.

19 Gentlemen, do not discuss the case while you are
20 back there in the Jury room, please.

21 (WHEREUPON, the alternate jurors exit at approximately
22 11:27 a.m.)

23 **THE COURT:** Any exceptions to the charge?

24 **MR. GOWDY:** No objections, no exceptions.

25 **MR. BARTOSH:** No objections to the

1 instructions, Your Honor. But as to the foreperson,
2 has one been picked? I know there was some
3 discussion about it.

4 **THE COURT:** From the discussion that I raised,
5 I decided to leave it alone --

6 **MR. BARTOSH:** Okay.

7 **THE COURT:** -- and assume that Ms. Driscoll is
8 still the foreperson.

9 **MR. BARTOSH:** Okay.

10 **THE COURT:** Do you want me to do anything
11 different than that?

12 **MR. BARTOSH:** No, sir. The only reason I
13 mention this is because she was sitting in the back
14 row.

15 **THE COURT:** The bailiffs will make sure that she
16 sits in the appropriate seat from this point forward.
17 You don't have any objection to that, did you?

18 **MR. BARTOSH:** No, sir.

19 **THE COURT:** No objections to the charge?

20 **MR. BARTOSH:** No, sir.

21 **THE COURT:** All right. I want you all to come up
22 here and go through the evidence and make sure the
23 proper set of exhibits is in evidence. And
24 particularly let's make sure that those court exhibits
25 that I looked at, the photographs of the body are not

1 in the set of evidence that goes back to the jury.

2 (WHEREUPON, the attorneys reviewed the exhibits.)

3 **THE COURT:** All right. The jury is back from
4 their smoke break and their walk outside. It's my
5 understanding that you all have agreed on what it he
6 proper set of exhibits.

7 **MR. BARTOSH:** That's correct, Your Honor.

8 **THE COURT:** You don't need the indictment to go
9 back?

10 **MR. BARTOSH:** Your Honor, I don't think it
11 would be necessary for that to go back.

12 **THE COURT:** Okay.

13 **MR. GOWDY:** I don't know that there is a
14 legal requirement. I don't know what the harm would
15 be. I never had that issue come up. I can't say
16 whether it's ever gone back before. It's never come
17 up.

18 **THE COURT:** The verdict form and the statutory
19 charge on the aggravators and mitigators are in the
20 group. And y'all have examined everything and agree
21 that it is the proper set of exhibits and verdict
22 form?

23 **MR. BARTOSH:** Yes, sir.

24 **MR. GOWDY:** Yes, sir.

25 **THE COURT:** All right. Send it back and instruct

1 them to begin their deliberations.

2 (WHEREUPON, the jury begin deliberation at
3 approximately 11:48 a.m.)

4 **MR. BARTOSH:** Your Honor, have they been
5 instructed that if the whole group is not present,
6 they are not. --

7 **THE COURT:** No, sir. They are all together right
8 now. I can either do it now or I can do it the first
9 time they ask for a break.

10 **MR. BARTOSH:** Okay. When they ask for a break.

11 **THE COURT:** Does that suit you?

12 **MR. BARTOSH:** Yes, sir.

13 **THE COURT:** Okay. All right. Anything we need to
14 take up right now? One thing that we need to do to at
15 some point is to put on the record S.L.E.D.'s
16 accounting of their custody of the jury over the last
17 three days or four days. It doesn't matter when we do
18 that.

19 **MR. BARTOSH:** No, sir.

20 **THE COURT:** We'll do it in a few minutes. All
21 right.

22 (WHEREUPON, a recess was taken at approximately 11:50
23 a.m.)

24 (WHEREUPON, the Court resumed at approximately 12:39
25 p.m.)

1 **THE COURT:** I'm going to play those two witnesses
2 testimony and then I am going to play the audiotape or
3 the Solicitor is. And then I'm going to answer the
4 two questions. What's the exhibit number?

5 **MR. GOWDY:** 39.

6 **THE COURT:** And you agree with me just to tell
7 them that?

8 **MR. BARTOSH:** Yes, sir.

9 **MR. GOWDY:** They have the exhibits in the
10 back.

11 **THE COURT:** We will send the bailiffs to get it.
12 (WHEREUPON, the jury enters at approximately 12:41
13 p.m.)

14 **THE COURT:** All right. We have several questions
15 from the jury. The jury request to see the testimony
16 of the Kiera the child that was in the middle seat.
17 It's marked as Court's Exhibit 7. The jury request to
18 see the testimony of Benny Godfrey. That's Court
19 Exhibit 8. Both signed by the forelady.

20 Ladies and gentlemen, we can play that testimony
21 for you. It's not been prepared into a transcript.
22 We can play it for you. We are prepared to do that
23 now.

24 (WHEREUPON, the testimony of Kiera P. and Benny
25 Godfrey was played at approximately 12:43 p.m.)

1 (WHEREUPON, the play back testimony concluded at
2 approximately 1:10 p.m.)

3 **THE COURT:** Okay. Ladies and gentlemen, the
4 question, the jury request to view the live ammunition
5 that was not fired from Marion Lindsey's revolver.
6 Now, that -- the answer to that question is found in
7 State's Exhibit 39 which is a photograph I believe.

8 The jury request to hear the audiotape of the
9 incident. We're going to play that for you now.
10 Question, what is the legal matter relating to why we
11 can not hear the rest of the 911 recording. The
12 answer to that question is because it's not in
13 evidence.

14 **MR. GOWDY:** Your Honor, if the Court would
15 like me to make this available to the Court or play
16 the tape, I will do it at the Court's direction.

17 **THE COURT:** You do it.

18 **MR. GOWDY:** Yes, sir.

19 (WHEREUPON, State's Exhibit 21 was played at
20 approximately 1:12 p.m.)

21 **THE COURT:** All right. Ladies and gentlemen,
22 those of you who are on the jury, you may return to
23 the jury room.

24 The alternates, if you will be seated for a
25 second, we will take you into the other jury room.

1 (WHEREUPON, the jury exits at approximately 1:14 p.m.)

2 **THE BAILIFF:** Gentlemen, follow me please.

3 (WHEREUPON, the alternate jurors exit at approximately
4 1:15 p.m.)

5 **THE COURT:** Okay. Any objections?

6 **MR. BARTOSH:** No.

7 **THE COURT:** We will have the bailiff take that CD
8 back into the jury when he comes back.

9 Mr. Scruggs, would you take State's Exhibit 21
10 to the jury room please.

11 (WHEREUPON, the jury resume deliberation at
12 approximately 1:17 p.m.)

13 (WHEREUPON, a recess was taken at approximately 1:17
14 p.m.)

15 (WHEREUPON, the Court resume at approximately 2:55
16 p.m.)

17 **THE COURT:** All we need is the defendant. We
18 don't need Trey and Barry in here. Just get the
19 defendant.

20 (WHEREUPON, the defendant enters at approximately 2:57
21 p.m.)

22 **THE COURT:** Bring in the jury.

23 Now, stay at this door for just a second, Carl.

24 Make sure they don't come in.

25 All right. They can come in.

1 (WHEREUPON, the jury enters at approximately 2:58
2 p.m.)

3 **THE BAILIFF:** Do you need the alternates?

4 **THE COURT:** Nah, I don't need the alternates.

5 Ladies and gentlemen, I understand that some of
6 you would like to go outside and take a little break.
7 I'm going to allow you to do that of course. Before
8 you did that, I wanted to explain to you that you may
9 not discuss the case. You may not deliberate unless
10 all twelve of you are together in the same room.

11 So when all twelve of you are in the jury room as
12 you have been up until now, it was not necessary for
13 me to give you that instruction. But since you have
14 asked for a break to go outside, there may be two or
15 three of you that walk off and have one little
16 conversation. In that conversation, you may not
17 discuss the case. You can only discuss the case when
18 all twelve of you are together in the same room.

19 So have a nice break. When you are done with the
20 break, they will take you back in the jury room. You
21 can resume your deliberations then.

22 (WHEREUPON, the jury exits at approximately 3:02 p.m.)

23 **THE COURT:** Anything further at this time?

24 **MR. GOWDY:** No, sir.

25 **MR. BARTOSH:** No, sir.

1 **THE COURT:** All right.

2 (WHEREUPON, deliberation resumes at approximately 3:14
3 p.m.)

4 (WHEREUPON, a recess was taken at approximately 3:14
5 p.m.)

6 (WHEREUPON, the Court resumes at approximately 3:27
7 p.m.)

8 **THE COURT:** Let me see y'all for a second please.

9 (WHEREUPON, a bench conference was held off the
10 record.)

11 **THE COURT:** All right. Bring in the jury please.

12 The S.L.E.D. officers can stay where they are.

13 Now, Jack, keep that door closed for just one
14 second please.

15 Now, ladies and gentlemen, as I said a little
16 while earlier, I realize this is an emotional moment
17 for everybody particularly for some people. If you
18 don't think you can control your emotions when this
19 verdict is announced, I'm instructing you to leave
20 this courtroom now. If there's anybody who has any
21 kind of outburst as a result of this verdict, I
22 assure you that you will spend the night in jail at
23 the detention center tonight.

24 **THE BAILIFF:** You ready, Your Honor?

25 **THE COURT:** Yes, sir.

1 (WHEREUPON, the jury enters at approximately 3:29
2 p.m.)

3 THE COURT: Ms. Driscoll, has the jury reached
4 the verdict?

5 THE FOREPERSON: We have, Your Honor.

6 THE COURT: Would you pass all the verdict forms
7 to the bailiff please.

8 (WHEREUPON; the verdict forms were passed to the Court
9 and the Court reviewed the documents.)

10 THE COURT: All right. The verdict as to the
11 aggravating circumstances, we, the jury, unanimously
12 find the State has proven beyond a reasonable doubt
13 the following statutory aggravating circumstance, the
14 circumstances is printed. And there are twelve
15 signatures on the verdict form.

16 The verdict as to the sentence. We, the jury,
17 having found beyond a reasonable doubt the existence
18 of the following statutory aggravating circumstance,
19 and the circumstance is printed, now recommend to the
20 Court that the defendant Marion Alexander Lindsey be
21 sentenced to death. And there are twelve signatures
22 on the verdict form.

23 Now, ladies and gentlemen, I'm going to ask each
24 one of you whether or not the verdict that I just
25 announced on both the aggravating circumstance and as

1 to what the sentence should be was your verdict at the
2 time the verdict form was filled out and is still your
3 verdict now. When I call your name, if it was your
4 verdict then and if it is still your verdict now,
5 please say yes.

6 Is that satisfactory, Mr. Bartosh?

7 MR. BARTOSH: Yes, sir.

8 THE COURT: Ashley Driscoll.

9 MS. DRISCOLL: Yes.

10 THE COURT: James Gedroic.

11 MR. GEDROIC: Yes.

12 THE COURT: Martha Sallis.

13 MRS. SALLIS: Yes.

14 THE COURT: Danny Gomes.

15 MR. GOMES: Yes.

16 THE COURT: Brenda Smith.

17 MS. SMITH: Yes.

18 THE COURT: Larry Mauldin.

19 MR. MAULDIN: Yes.

20 THE COURT: Donald Ray.

21 MR. RAY: Yes.

22 THE COURT: Dean Israel.

23 MR. ISRAEL: Yes.

24 THE COURT: Jeffrey Rhineberger.

25 MR. RHINEBERGER: Yes.

1 **THE COURT:** Samuel Barnwell.

2 **MR. BARNWELL:** Yes.

3 **THE COURT:** Marvin Smith.

4 **MR. SMITH:** Yes.

5 **THE COURT:** Jackie Barham.

6 **MR. BARHAM:** Yes.

7 **THE COURT:** All right. Ladies and gentlemen, I
8 have a few matters of law that I need to take up. I
9 need for you all to bear with me. I would like for
10 you to go back in the jury room for just a few
11 minutes. I will be back with you as soon as I can get
12 to it.

13 (WHEREUPON, the jury exits at approximately 3:37 p.m.)

14 **THE COURT:** All right. The verdict forms appear
15 to me to be proper on both the aggravating
16 circumstance and on the recommendation of death
17 penalty. Mr. Bartosh and Mr. Gowdy, I would like
18 for you both to come up here now and examine the
19 verdict forms. Make sure they are proper.

20 And then Mr. Bartosh, I will hear your motions.

21 (WHEREUPON, the attorneys reviewed the documents.)

22 **THE COURT:** The forms appear to be proper?

23 **MR. BARTOSH:** Yes, sir.

24 **MR. GOWDY:** Yes, sir, Your Honor.

25 **THE COURT:** I am going to instruct the Clerk to

1 file these forms. I'm also filing the jury
2 instructions on aggravating and mitigating
3 circumstances and the blank forms that were not filled
4 out.

5 **MR. BARTOSH:** Your Honor, may it please the
6 Court, we would first make a motion for a new trial.
7 Taking the evidence that was presented to the jury on
8 the aggravating circumstance in the light most
9 favorable to the State, we would suggest that no
10 reasonable juror could find that the State had carried
11 its burden of proving beyond a reasonable doubt that
12 aggravating circumstance.

13 **THE COURT:** Motion is denied.

14 **MR. BARTOSH:** Your Honor, also out of abundance
15 of caution, we would renew all of our prior objections
16 on the various rulings during the trial that the Court
17 had made based on the arguments that were made at the
18 time of the objections, Your Honor.

19 **THE COURT:** All right. Those motions are denied.
20 Anything further at this point?

21 **MR. BARTOSH:** No, sir.

22 **THE COURT:** Anything regarding the form of verdict
23 or the deliberation of the jury or anything?

24 **MR. BARTOSH:** No, sir.

25 **THE COURT:** All right. We'll take a very short

1 break. Then we will have a sentencing hearing.

2 (WHEREUPON, a short recess was taken at approximately
3 3:39 p.m.)

4 (WHEREUPON, the Court resumed at approximately 3:40
5 p.m.)

6 **THE COURT:** Let me see the legal department from
7 each side up here.

8 (WHEREUPON, a bench conference was held off the
9 record.)

10 **THE COURT:** Bring in the jury and the
11 alternates.

12 (WHEREUPON, the jury enters at approximately 3:42
13 p.m.)

14 **THE COURT:** Martha, file that please.

15 Bring the defendant around, please.

16 (WHEREUPON, the defendant approaches the bench.)

17 **THE COURT:** All right. As required by statute, I
18 find that the evidence in this case warrants the
19 imposition of the death penalty and that its
20 imposition is not as a result of prejudice, passion or
21 any arbitrary factor.

22 Mr. Lindsey, is there anything you want to say?

23 **MR. LINDSEY:** No.

24 **THE COURT:** Mr. Bartosh?

25 **MR. BARTOSH:** No, sir.

1 **THE COURT:** The defendant has been found by the
2 jury to be guilty of the offense of murder. The jury
3 has recommended that the defendant should be sentenced
4 to death.. It is therefore the judgment and sentence
5 of the Court that the defendant, Marion Alexander
6 Lindsey, be taken to the Spartanburg County Detention
7 Center and thence to the State Department of
8 Corrections henceforth to be kept in close and safe
9 confinement until the 26th of July, 2004 upon which
10 day between the hours of 6 o'clock p.m. and 6 o'clock
11 a.m. or upon an order of execution issued by the South
12 Carolina Supreme Court, the defendant, Marion
13 Alexander Lindsey, shall suffer death in the manner
14 provided by law. It is so ordered.

15 (WHEREUPON, the defendant exits the courtroom at
16 approximately 3:43 p.m.)

17 **THE COURT:** All right. Let me say to the lawyers
18 on both sides as I have said in private, I certainly
19 appreciate the very fine effort that both of you put
20 in this case and the way that you handled yourselves
21 during the course of the trial. It's been a pleasure
22 to try this case with you. We are adjourned.

23 Ladies and gentlemen of the jury, you are
24 excused. I will speak to you in the jury room about
25 your rights and responsibilities following this trial.

1 (WHEREUPON, the jury exits at approximately 3:45 p.m.)
2 (WHEREUPON, the Court adjourned at approximately 3:45
3 p.m.)

4 **END OF VOLUME 4**

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END OF PROCEEDINGS

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CERTIFICATE

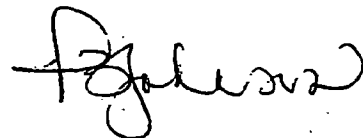
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1 I, the undersigned, Teresa B. Johnson, Official Court
2 Reporter for the Thirteenth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete Transcript of Record of all
5 the proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Spartanburg County, South Carolina, on
8 the 17th through 24th days of May, 2004.

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

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February 8, 2005



Teresa B. Johnson
Official Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

THE STATE,

vs.

MARION ALEXANDER LINDSEY,

Defendant.

COURT OF GENERAL SESSIONS

02-GS-42-4753

AGGRAVATING CIRCUMSTANCES
VERDICT FORM

We the jury unanimously find the State has proven beyond a reasonable doubt the following statutory aggravating circumstance:

The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

CLERK OF COURT
CLERK OF COURT
CLERK OF COURT

2004 MAY 24 PM 3:51

MARC KITCHENS

Ashley Briscall
Foreperson
Maurice Smith
Juror
James Hedrair
Juror
Tary L. Mauldin
Juror
Samuel H. Barnwell
Juror
Deann T. Isaac
Juror
Brinda Smith
Juror
Jackie Perkins
Juror
Martha J. Sallie
Juror
Donald E. Ray
Juror
Dannye Jones
Juror
Jeff Kuehner
Juror

Dated: 5-24-04

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

COURT OF GENERAL SESSIONS

THE STATE,)

02-GS-42-4753

vs.)

MARION ALEXANDER LINDSEY,)

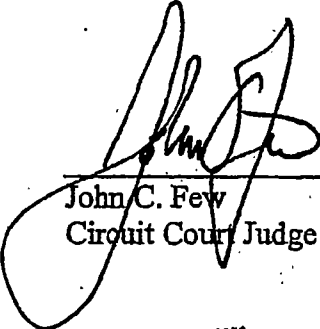
DEATH SENTENCE

Defendant.)

Defendant has been found by the jury to be guilty of the offense of murder. The jury has recommended that Defendant should be sentenced to death.

It is, therefore, the judgment and sentence of the court that Defendant, Marion Alexander Lindsey, be taken to the Spartanburg County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 26th of July, 2004, upon which day between the hours of six o'clock p.m. and six o'clock a.m. on _____, or upon an Order of Execution issued by the South Carolina Supreme Court, Defendant, Marion Alexander Lindsey, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.


John C. Few
Circuit Court Judge

Spartanburg, South Carolina
May 24, 2004

MARC KITCHENS
15:3 PM 24 MAY 2004

A CERTIFIED COPY
Marc Kitchen
CLERK OF COURT
SPARTANBURG COUN.
BY: Paul M. Hefley, D.C.
DATED 6/4/04

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

THE STATE,

vs.

MARION ALEXANDER LINDSEY,

Defendant.

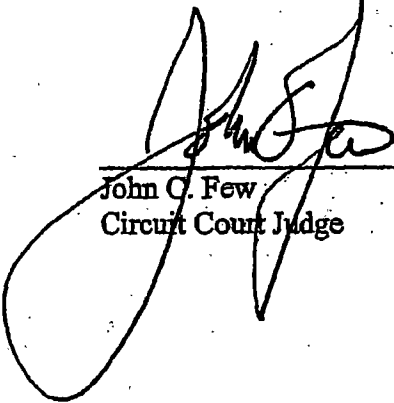
COURT OF GENERAL SESSIONS

02-GS-42-4753

AFFIRMATION OF
DEATH SENTENCE

I find that the evidence of this case warrants the imposition of the death penalty
and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

IT IS SO ORDERED.


 John C. Few
 Circuit Court Judge

Spartanburg, South Carolina
 May 24, 2004

MARCO KITCHENS

15:3 PM 24 MAY 2004

A CERTIFIED COPY

Marc Kitchens

CLERK OF COURT
 SPARTANBURG COUNTY
 BY: Paul M. G. D.C.
 DATED 6/4/2004

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR SPARTANBURG COUNTY,

SOUTH CAROLINA

The State v. Marion Alexander Lindsey

Docket No. 02-GS-42-4753

A. Data Concerning the Defendant

1. Name Lindsey Marion Alexander 2. Date of Birth _____
 Last First Middle Mo. Day Yr.

3. Social Security Number [] [] Unknown

4. Sex: M ☒
 F ☐

5. Race: W ☐
 B ☒

Other (Specify): _____

6. Education – Highest Grade Completed:

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
 (Circle One) (College)

7. Do you have an opinion as to the defendant's intelligence level?

Yes ☒ No ☐

If so, is it

- a. Below Average ☒
 b. Average ☐
 c. Above Average ☐

8. Was a psychiatric evaluation performed? Yes ☒ No ☐

a. If performed, by whom? Pratap Narayan, Margaret Melikian

b. If performed, is defendant

(1) Able to distinguish right from wrong? Yes ☒ No ☐

(2) Able to cooperate intelligently in his
 own defense? ☒ ☐

c. If performed, were character or behavior
 disorders found?

(If answer is yes, please elaborate)

malingering and borderline intellectual functioning determined by
 Pratap Narayan

depression, cognitive deficits, and low intellectual functioning
determined by Margaret Melikian

9. Does the defendant have a record of prior convictions?

Yes ☒

No ☐

a. If so, either attach hereto a record manifesting such prior conviction(s) or list the offense(s), the date(s) of the offense(s) and the sentence(s) imposed:

	<u>Offense</u>	<u>Date of Offense</u>	<u>Sentence Imposed</u>
1.	See attached rap sheet		
2.			
3.			
4.			
5.			
6.			

10. Was the defendant a resident or nonresident of the county in which trial was held?

Resident ☒

Nonresident ☐

B. Data Concerning Pre-Trial Matters

1. The defendant was arrested on September 18, 2002
2. Was a preliminary hearing requested? Yes ☐ No ☐ unknown
3. Was a preliminary hearing conducted? Yes ☐ No ☐ unknown
4. The defendant was indicted at the October 7, 2002 Term of Court of General Sessions for Spartanburg County, South Carolina.
5. List each charge alleged in the indictment.

- a. Murder
- b. _____
- c. _____

- d. _____
- e. _____
- f. _____

6. The defendant was arraigned on _____, 20 .
If not arraigned, did the defendant waive arraignment?
Yes ☒ No ☐
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?
Yes ☒ No ☐
- a. If not, did the defendant waive this right to a three-day sight of the indictment?
Yes ☐ No ☐
8. Did the Solicitor notify the defendant at least thirty days before trial that the State would seek the imposition of the death penalty upon the defendant?
Yes ☒ No ☐
9. Did the Solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?
Yes ☒ No ☐
10. Did the defendant move for a change of venue?
Yes ☐ No ☒
- a. If so, was the venue changed?
Yes ☐ No ☐
- (1) If so, designate the county _____.

C. Data Concerning the Trial

1. The defendant was brought to trial in the Court of General Sessions for Spartanburg County, South Carolina, on May 17, 2004 during the May 17, 2004 Term of that Court.
2. How did the defendant plead? Guilty ☐ Not Guilty ☒
3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

a. The offense(s) of which the defendant was convicted:

(1) Murder

(2) _____

(3) _____

(4) _____

(5) _____

b. The offense(s) of which the defendant was acquitted:

(1) N/A

(2) _____

(3) _____

(4) _____

(5) _____

4. On what date and at what time did the conviction(s) occur?

May 21, 2004, at 4:30 o'clock, p.m.

D. Data Relating to Sentencing Proceeding

1. Before whom was the defendant's sentencing proceeding conducted?

the trial jury ☒ the trial judge ☒

a new jury ☐ a new trial judge ☐

a. If conducted before the trial jury,

(1) On what date and at what time was the sentencing proceeding held?

May 22, 2004, at 4:30 o'clock, p.m.

(a) If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes ☐ No ☐

b. If conducted before the trial judge or a new trial judge,

(1) And if the defendant was convicted by a jury,

- (a) Did the defendant and the State waive having the trial jury recommend sentence?

Yes ☐ No ☒

"1" If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?

Yes ☐ No ☐

- (b) On what date and at what time was the sentencing proceeding held?

May 22, 2004, at 4:30 o'clock, p.m.

"1" If such proceeding was conducted less than twenty-four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?

Yes ☐ No ☐

- (2) And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

N/A, 2004.

- c. If conducted before a new jury,

- (1) On what date was the sentencing proceeding held?

N/A, 2004.

- (2) Was such proceeding conducted by the same judge who presided over the defendant's trial?

Yes ☐ No ☐

2. Which of the following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found, irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

	<u>Instructed</u>	<u>Found</u>
a. Murder was committed while in the commission of:		
(1) Rape	☐	☐
(2) Assault with intent to ravish	☐	☐
(3) Kidnapping	☐	☐
(4) Burglary	☐	☐
(5) Robbery while armed with a deadly weapon	☐	☐

	<u>Instructed</u>	<u>Found</u>
(6) Larceny with use of a deadly weapon	☐	☐
(7) Housebreaking	☐	☐
(8) Killing by poison	☐	☐
b. Murder was committed by a person with a prior record of conviction for murder.	☐	☐
c. The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☒	☒
d. The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	☐	☐
e. The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	☐	☐
f. The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	☐	☐
g. The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	☐	☐
3. Was (were) the aggravating circumstance(s) found supported by the evidence?		
	Yes ☒	No ☐
4. Was there evidence of mitigating circumstances?		
	Yes ☒	No ☐

5. If so, which of the following mitigating circumstances was in evidence?

- a. The defendant has no significant history of prior criminal activity involving the use of violence against another person. []
- b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [X]
- c. The victim was a participant in the defendant's conduct or consented to the act. []
- d. The defendant was an accomplice in a murder committed by another person and his participation was relatively minor. []
- e. The defendant acted under duress or under the domination of another person. []
- f. 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. []
- g. The age or mentality of the defendant at the time of the crime(s). [X]
- h. The defendant was provoked by the victim into committing murder. []
- i. The defendant was below the age of eighteen at the time of the crime(s). []
- j. Other. []

Please explain if (j) is checked.

6. If tried with a jury, was the jury instructed to consider the circumstances in 5 as mitigating circumstances?

Yes [X] No []

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes [X] No []

8. As trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes ☒ No ☐

E. Data Relating to Offense(s)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes ☐ No ☒

b. Under the influence of narcotics or other dangerous drugs? Yes ☐ No ☒

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes ☒ No ☐

- a. If so, check each weapon used

(1) Poison	☐
(2) Pistol	☒
(3) Rifle	☐
(4) Shotgun	☐
(5) Blunt instrument	☐
Describe _____	
(6) Sharp instrument	☐
Describe _____	
(7) Motor vehicle	☐
(8) Other	☐
Describe _____	

3. Cause of death. Gunshot wounds to the head

4. County in which the body was found. Spartanburg

5. County in which the murder occurred if different from county in which the body was found. _____

Data Relating to Victim

1. What was the victim's age? 27
2. Was the victim related by blood or marriage to the defendant/
Yes ☒ No ☐
a. If so, what was the relationship? spouse
3. Was the victim the same race as the defendant? Yes ☒ No ☐
4. Was the victim the same sex as the defendant? Yes ☐ No ☒
5. Was the victim physically harmed or tortured? Yes ☒ No ☐

If yes, state nature of harm or extent of torture:

Four gunshot wounds to the head and neck

G. Data Concerning Defense Counsel

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?
 - a. N. Douglas Brannon, 175 Magnolia Street, Suite 101, Spartanburg, SC 29306
 - b. J. Michael Bartosh, 258 North Church Street, Spartanburg, SC 29306
 - c. Karen Quimby, 258 North Church Street, Spartanburg, SC 29306
 - d. _____
2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by defendant	☐
Appointed by court	☒

 - a. Specify for each such counsel, the date retained or appointed, the number of years as a licensed attorney and the number of years of actual felony trial experience.

<u>Name</u>	<u>Date retained Or appointed</u>	<u>Years experience as attorney</u>	<u>Years felony trial exp.</u>
(1) <u>N. Douglas Brannon</u>	3/9/04	3 ½	3
(2) <u>J. Michael Bartosh</u>	3/9/04	17	15
(3) <u>Karen Quimby</u>	mid-March 2004	6	3+
(4) _____			

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

J. Michael Bartosh

Karen Quimby

4. Did each counsel serve throughout the trial? Yes ☒ No ☐

a. If not, explain in detail. _____

H. General Considerations

1. Was race raised by the defense as an issue in the trial? Yes ☐ No ☒
2. Did race otherwise appear as an issue in the trial? Yes ☐ No ☒
3. Were members of the defendant's race represented on the petit jury? Yes ☒ No ☐
4. Were members of the defendant's race represented on the jury venire? Yes ☒ No ☐
5. Was there any evidence that members of the defendant's race were systematically excluded from the jury? Yes ☐ No ☒
6. Was the jury instructed to exclude race as an issue? Yes ☐ No ☒
7. Was there extensive publicity in the community concerning this case? Yes ☒ No ☐

8. Was the jury instructed to disregard such publicity? Yes ☒ No ☐
9. Was the jury sequestered? Yes ☒ No ☐
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes ☒ No ☐
11. Your general comments concerning the appropriateness of the sentence imposed in this case.
I believe the death penalty is appropriate given the horrific nature of the crime and the defendant's prior record of similar crimes.
12. If the defendant is a female, is she currently pregnant? Yes ☐ No ☐
- a. If so, the anticipated delivery date is _____.
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
- a. His (their) comments are attached ☐
- b. He (they) stated he (they) had no comments ☐
- c. He has (they have) not responded ☐

I. Chronology of Case

		Elapsed Days
1. Date of offense	<u>9/18/02</u>	_____
2. Date of arrest	<u>9/18/02</u>	_____
3. Date trial began	<u>5/17/04</u>	_____
4. Date sentence imposed	<u>5/24/04</u>	_____
5. Date post trial motions ruled on	<u>5/24/04</u>	_____
6. Date trial judge's report completed	<u>6/04/04</u>	_____
7. *Date received by Supreme Court	_____	_____
8. *Date sentence		

review completed

9. *Total elapsed days

* To be completed by Supreme Court

Judge, Court of General Sessions

Spartanburg County, South Carolina

Date

Mg 8/16/07.

ORIGINAL

STATE OF SOUTH CAROLINA) In the Court of Common Pleas
)
 County of Spartanburg)

MARION ALEXANDER LINDSEY. #6015

Full name and prison number, if any, of applicant.

2007 CP 00 2848
 APPLICATION FOR

v.

POST-CONVICTION RELIEF

THE STATE

Name of Respondent

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg County Court of General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 02-GS-42-4753
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May, 2004 - Death Sentence
 - (b) _____

9B

- (c) _____
5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty yes _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. Supreme Court _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed conviction and sentence _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. February 20, 2007 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007) _____
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) n/a _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel in derogation of the Sixth Amendment to the United States Constitution. _____

2007 AUG 14 PM 10:34
MARC MITCHELL

(b) _____

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in

(a) Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this application

(b) Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the state to petitioner's detriment

(c) Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

None other than the mandatory appeal to the State Supreme Court

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. n/a
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. n/a
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. n/a
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

2007 AUG 14 11:13:34
MARC KITCHENS

- (b) _____
 (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
 (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

- (a) the name and address of each attorney who represented you
- i. Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211 - 1589
 - ii. Spartanburg County Public Defenders Office, Michael Bartosh, Doug Brennan and Karen Quimby, Attorneys at Law, 258 N. Church Street, Spartanburg, SC 29306
- (b) the proceedings at which each such attorney represented you:
- i. Trial and Direct appeal
 - ii. _____
 - iii. _____

18. State clearly the relief you seek in filing this application.

New Trial

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF _____) VERIFICATION

I, Marion A. Lindsey, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Marion A. Lindsey

Sworn to and subscribed before me

This 10th day of August, 2007

2007 AUG 14 PM 10:35
 MARC KITCHENS

Walter J. Ferguson L.S.
 Notary Public for South Carolina

My Commission Expires Sept. 22, 2008.

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Marion A. Lindsey
 Applicant

Sworn to and subscribed before me

This 10th day of August, 2007

Walter J. Ferguson L.S.
 Notary Public for South Carolina

My Commission Expires: Sept. 22, 2008.

PCR ATTACHMENT

10.

- (d) Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the state's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.
- (e) Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution.
- (f) Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the state's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.
- (g) Defense counsel was ineffective for failing to offer evidence appellant's was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.
- (h) Defense counsel was ineffective, in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate voir dire, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected.

MAL.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015)

C/A No. 07-CP-42-2848

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN OF RESPONDENTS TO
 APPLICATION FOR POSTCONVICTION
 RELIEF AND RULE 12(e) REQUEST
 FOR SPECIFICITY

5
H

The Respondents, above-named, hereby make a return to the application for state postconviction relief filed on August 14, 2007. The death penalty sentence is currently stayed upon the filing of a petition for writ of certiorari in the United States Supreme Court. Lindsey v. South Carolina, 07-5444. This application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. Respondents would note at the outset that they have requested under S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity. The Respondents would show this court the following:

I.

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey

Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann. § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction for assault and battery with intent to kill. Both were served on Lindsey and counsel Michael Bartosh personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. the Petitioner was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby. The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p. 1718, l. 14 - p. 1719, l. 5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person." R., Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.

2. Age or mentality of the defendant at the time of the crime.

R. Tr.2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. R., Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice, or arbitrary factor. R., Tr. p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. R., Tr. p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. In the appeal, he raised the following questions presented:

1.

Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.

Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3.

Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief,

State v. Lindsey, __ S.C. __, 642 S.E. 2d 557 (2007). A petition for rehearing was made through

appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. Lindsey v. South Carolina, 07-5444. In the petition, Lindsey raised the following question:

Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition, p. 2. The Respondents made a Brief in opposition on August 20, 2007. According to the Docket, the matter is distributed for the September 24, 2007 conference.

RESPONDENT'S VERSION OF THE CASE

In the opinion of the South Carolina Supreme Court, the Court summarized the facts in the following manner:

Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C.Code Ann. § 16-3-20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim--Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three

days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car. [FN1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

FN1. Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a \$1,000 bond; one of the conditions of bond was that he have no contact with Victim.

State v. Lindsey, supra. App.p. A1-A2.

II.

In his initial application for post-conviction relief filed August 14, 2007, Lindsey makes the following allegations:

- I. Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this Application. 10 (A).
 1. Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the State to petitioner's detriment. 10(b). (EVIDENCE OF FAMILY COURT VISITATION AND SEEKING LEGAL ASSISTANCE).
 2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c) . (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).
 3. Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the State's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10 (d). (EVIDENCE IN MITIGATION THAT WIFE WAS ADULTERESS AND PARTIALLY AT FAULT IN RELATIONSHIP).
 4. Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. 10(e).

(APPELLANT'S CHILDHOOD AND MENTAL CAPACITY AS EVIDENCE IN MITIGATION).

5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY EMPLOYMENT).
6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).
7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

III.

Sixth Amendment claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984), which "qualifies as clearly established Federal law, as determined by the Supreme Court of the United States." To prevail, a defendant must show that counsel's performance was deficient, and that this prejudiced the defense. *Strickland*, 466 U.S. at 687. Trial counsel's representation must fail to satisfy an objective standard of reasonableness, considering all the circumstances. *Id.* at 688. Courts must assess the reasonableness of counsel's conduct on the facts of the particular case, and as of the time of counsel's conduct. *Id.* at 690. Counsel's strategic choices made after full investigation are "virtually unchallengeable," but

choices made after limited investigation are reasonable only to the extent that the limited investigation itself was reasonable. *Id.* at 690-91. Moreover, courts may look to the defendant's statements or actions in determining the reasonableness of counsel's conduct. *Id.* at 691. *Strickland's* prejudice prong requires a defendant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his petition, he claims that counsel was ineffective in seven specifications; particularly failing to present in the penalty phase mitigation that Lindsey had attempted to proceed in family court and hire counsel concerning visitation rights, that he failed to adequately argue against inclusion of the great risk of death aggravator when death was caused by a single shot at close range,¹ failed to present evidence that his wife was an adulteress and therefore partially

¹ This underlying issue was briefed and argued in the direct appeal. In denying relief the South Carolina Supreme Court stated:

3. *Directed verdict on aggravating circumstance*

[10] Appellant moved for a directed verdict on the statutory aggravator provided in § 16-3-20(C)(a)(3) which states:

That the offender by his act of **murder** knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

Appellant contends that because he shot Victim at close range and no other person was endangered, this aggravator should not apply as a matter of law.

[11] The trial judge should submit a statutory aggravator to the jury if there is any evidence, direct or circumstantial, to support it. *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000). Here, the police department parking lot is clearly a public place and a gun is a weapon hazardous to more than one person. *Id.* (shooting in church parking lot). Further, appellant knew there were other occupants in the car with Victim when he shot multiple times into the confined space of the car's interior--conduct a reasonable person would know presents a great risk of harm to more than one person. Appellant also pointed his gun at Officer Godfrey in the parking lot.

responsible for the domestic problems, failed to present unstated evidence of his childhood and mental capacity, and "steady employment record as mitigation, failed to offer evidence that Lindsey was on the ground when shot by the police, and during the jury selection counsel failed to adequately voir dire unnamed jurors and failed to strike for cause unnamed jurors.

These issues present matters which may not be resolved by the record (other than the "great risk of death aggravator issue which should be summarily dismissed) and asserts vague matters not adequately identified about omitted evidence by defense counsel. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Pursuant to SCRCR, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used. In addition, Respondent would request Petitioner what juror(s) should have been struck for cause and what unasked questions made the voir dire inadequate. Should the Applicant satisfy the needed specificity, the allegation of ineffective assistance of counsel would probably then raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests a hearing to fully resolve this issue and demand adequate specificity of the individual claims. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

This evidence supports the submission of the statutory aggravator to the jury.

State v. Lindsey, supra. In light of this ruling, the Petitioner cannot satisfy Strickland's prejudice prong since the Court addressed the single shot at close range issue as argued by appellate counsel Dudek. This specification must be dismissed.

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed or, in the alternative, that the Court should direct the Applicant to timely serve and file an Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e). Respondents also request this Court to hold a status hearing within thirty (30) days pursuant to Section 17-27-160 and establish a final hearing date.

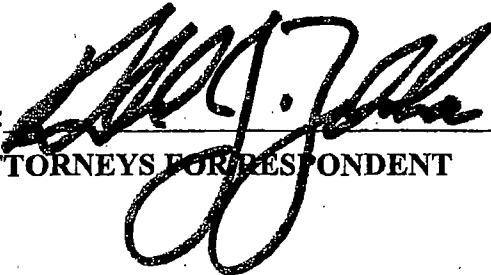
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
(Counsel of Record)

P. O. Box 11549
Columbia, SC 29211
(803) 734-3601

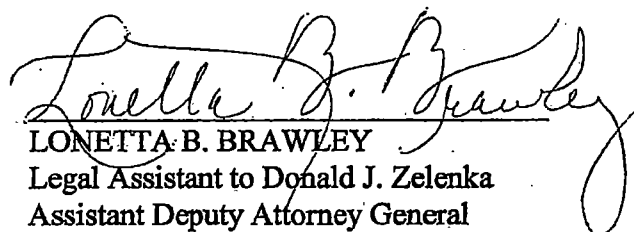
By: 

ATTORNEYS FOR RESPONDENT

September 24, 2007

CERTIFICATE OF SERVICE

I, **Lonetta B. Brawley**, hereby certify that I have served the *Return of Respondents to Application for Post-Conviction Relief and Rule 12(e) Request for Specificity* in the foregoing action by depositing two (2) copies in Inter Agency Mail to Robert M. Dudek, Deputy Chief Attorney for Capital Appeals, South Carolina Commission of Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 24th day of September, 2007.


LONETTA B. BRAWLEY
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Marion Alexander Lindsey #6015)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

ATTORNEY GENERAL'S OFFICE

RECEIVED

8-7-09

ADMINISTRATIVE DISTRICT

IN THE COURT OF COMMON PLEAS

Case No.: 2007-CP-42-2848

AMENDED

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Spartanburg County, General Sessions Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 02-GS-42-4753 for 1 count of Murder
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May, 2004 - death sentence

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CLERK OF COURT
SPARTANBURG COUNTY
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JARC KITCHENS

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Supreme Court
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction was affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. February 20, 2007
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Lindsey, 372 S.C. 185, 642 S.E.2nd 557 (2007)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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STANFORD COUNTY
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MARC KITCHENS

(a) Applicant was denied the effective assistance of counsel during the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Applicant's adaptability to confinement.

(b) Defense counsel was ineffective for failing to present available evidence that Applicant was attempting to proceed in Family Court over the child visitation dispute.

(c) Applicant had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel.

(d) Counsel failed to properly present the entire theme of the Applicant's life.

(e) Counsel failed to produce a family historian to allow the jury to know the seriousness of his family history.

(f) The Applicant's only expert was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate.

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Applicant filed the original application for Post Conviction Relief on August 14, 2007 in the Court of Common Pleas for Spartanburg County. This Application is an amendment of the original Application, which is still pending. Applicant has not otherwise previously filed a petition for a writ of habeas corpus or post-conviction relief in State or Federal Courts from this conviction and sentence. Other than the petitions, motions, or applications addressed here and already specified in paragraph 8, Applicant has not filed any other actions related to his conviction and sentence.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no

(d) any other petitions, motions or applications in this or any other Court? no

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SPARTANBURG COUNTY
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MARC KITCHEN

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

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 STANTBORG COUNTY
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 MARC KITCHENS

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) The grounds set forth in paragraphs 10 and 11 have not previously been presented to any Court, State or Federal, because these grounds rely on additional facts outside the record which was before the previous Courts and, under State law, applicant could not assert the claim of ineffective assistance of counsel on direct appeal.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Robert M. Dudek, Esq. S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211

ii. Spartanburg County Public Defender's Office, Michael Bartosh, Doug Brannon and Karen Quimby, Attorneys At Law, 258 N. Church Street, Spartanburg, SC 29306

iii. _____

MARC KITCHENS

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SPARTANBURG COUNTY

(b) the proceedings at which each such attorney represented you:

i. trial and Direct appeal

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

The vacation of his conviction and/or sentence

20. Are you now under sentence from any other court that you have not challenged?

no

Respectfully Submitted,

RICHARD W. VIETH
HENDERSON, BRANDT & VIETH, P.A.
360 E. HENRY STREET, SUITE 101
SPARTANBURG, S.C. 29302-2646
PHONE: 864-582-2962

DAVID M. COLLINS, JR.
SINCLAIR & COLLINS, LLC
302 E. ST. JOHN STREET
SPARTANBURG, SC 29302
PHONE: (864) 573-7575

BY: Richard W. Vieth

COUNSEL FOR APPLICANT

August 6, 2009

MARC KITCHENS

2009 AUG -6 PM 3:24

FILED
CLERK OF COURT
SPARTANBURG COUNTY

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Marion Alexander Lindsey, #6015)

Applicant,)

CERTIFICATE OF SERVICE

vs.)

State of South Carolina,)

C.A. No.: 2007-CP-42-2848

Respondent.)

PERSONALLY APPEARED BEFORE ME, Kimberly Washburn, who being duly sworn, deposes and says that she is employed in the law office of Henderson, Brandt & Vieth, 360 E. Henry Street, Suite 101, Spartanburg, South Carolina 29302-2646 and is a person of such age and discretion as to be competent to serve papers.

On 8-6-09, she mailed the AMENDED APPLICATION FOR POST-CONVICTION RELIEF concerning the above entitled matter to the below named:

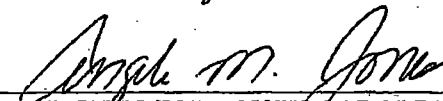
ADDRESSEE:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211



Kimberly Washburn
Legal Assistant for Richard W. Vieth, Esq.

SWORN to and subscribed before me this
6th day of August, 2009.

 (SEAL)

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 9/3/18

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF SPARTANBURG)

MARION ALEXANDER LINDSEY, #6015)

C/A No. 07-CP-42-2848

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN OF RESPONDENTS
 AMENDED APPLICATION
 FOR POSTCONVICTION
 RELIEF

13
#1

The Respondents, above-named, hereby make a Return to the application for state postconviction relief filed on August 14, 2007, as amended August 6, 2009. The death penalty sentence is currently stayed upon the filing of a petition for writ of certiorari in the United States Supreme Court. Lindsey v. South Carolina, 07-5444. The initial application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Respondents made an initial Return and requested under S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity on September 24, 2007. The Applicant, through appointed PCR counsel Richard Vieth and David Collins made an Amended Application for Post-Conviction Relief on August 6, 2009. The matter is currently set for an evidentiary hearing on July 19, 2010 before the Honorable Paul Burch, Presiding Judge. The Respondents would show this court the following:

I.

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann. § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction for assault and battery with intent to kill. Both were served on Lindsey and counsel Michael Bartosh personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. the Petitioner was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p.

1718, l. 14 - p. 1719, l. 5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person." R., Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. Age or mentality of the defendant at the time of the crime.

R. Tr. 2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. ROA., Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice, or arbitrary factor. ROA., Tr. p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. ROA p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

1.
Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.
Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting

his own measurements or experiments during a jury view was improper?

3.

Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

State v. Lindsey, Final Brief of Appellant, p. 2. The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, made its *Final Brief of Respondent*. On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. *State v. Lindsey*, 372 S.C. 185, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. *Lindsey v. South Carolina*, 07-5444. In the petition, Lindsey raised the following question:

Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under *Wainwright v. Witt*, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition, p. 2. The Respondents made a Brief in opposition on August 20, 2007. The United States Supreme Court denied certiorari on October 1, 2007. *Lindsey v. S.C.*, 552 U.S. 917, 128 S.Ct. 274, 169 L.Ed. 2d 200 (2007).

RESPONDENT'S VERSION OF THE CASE

In the opinion of the South Carolina Supreme Court, the Court summarized the facts in

the following manner:

Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C.Code Ann. § 16-3-20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.

FACTS

Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim--Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.

Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.

Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at

appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car. [FN1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

FN1. Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a \$1,000 bond; one of the conditions of bond was that he have no contact with Victim.

File
State v. Lindsey, supra. App.p. A1-A2.

II.

In his initial application for post-conviction relief filed August 14, 2007 by appellate counsel Dudek, Lindsey made the following allegations:

- I. Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this Application. 10 (A).
 1. Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the State to petitioner's detriment. 10(b). (EVIDENCE OF FAMILY COURT VISITATION AND SEEKING LEGAL ASSISTANCE).
 2. Defense counsel was ineffective for failing to properly argue the "great

risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c) . (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).

3. Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the State's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10 (d) . (EVIDENCE IN MITIGATION THAT WIFE WAS ADULTERESS AND PARTIALLY AT FAULT IN RELATIONSHIP).
4. Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. 10(e). (APPELLANT'S CHILDHOOD AND MENTAL CAPACITY AS EVIDENCE IN MITIGATION).
5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY EMPLOYMENT).
6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).
7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury

that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

On August 6, 2009, received August 7, 2009, the Applicant, through current state PCR appointed counsel Vieth and Collins, made the following amended allegations:

- 10(a) Applicant was denied the effective assistance of counsel during the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments of the United States Constitution.
11. (A). Counsel failed to adequately investigate, develop and present mitigation evidence including, but not limited to, evidence of Applicant's adaptability to confinement. [Adaptability to Prison Evidence].
- (B). Defense counsel was ineffective for failing to present available evidence that Applicant was attempting to proceed in Family Court over the child visitation dispute. [Evidence of Applicant's Attempt to Proceed in Family Court on Visitation].
- (C). Applicant had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel.
- (D). Counsel failed to properly present the entire theme of the Applicant's life. [Failure to Present Theme].
- (E). Counsel failed to produce a family historian to allow the jury to know the seriousness of his family history. [Failure to Present Family Historian].
- (F). The Applicant's only expert was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate. [Failure to Present Dr. Margaret Melikian with sufficient background information].

Amended Application, ¶ 10, 11, page 3.

III.

Sixth Amendment claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984), which "qualifies as clearly established Federal law, as

determined by the Supreme Court of the United States." To prevail, a defendant must show that counsel's performance was deficient, and that this prejudiced the defense. *Strickland*, 466 U.S. at 687. Trial counsel's representation must fail to satisfy an objective standard of reasonableness, considering all the circumstances. *Id.* at 688. Courts must assess the reasonableness of counsel's conduct on the facts of the particular case, and as of the time of counsel's conduct. *Id.* at 690. Counsel's strategic choices made after full investigation are "virtually unchallengeable," but choices made after limited investigation are reasonable only to the extent that the limited investigation itself was reasonable. *Id.* at 690-91. Moreover, courts may look to the defendant's statements or actions in determining the reasonableness of counsel's conduct. *Id.* at 691. *Strickland's* prejudice prong requires a defendant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his amended petition, he claims that counsel was ineffective in six (6) specifications; particularly that counsel Bartosh, Brannon and Quimby failed to adequately investigate, develop and present mitigation evidence including, but not limited to, evidence of Applicant's adaptability to confinement, failing to present available evidence that Applicant had sought legal assistance and was attempting to proceed in Family Court over the child visitation dispute, failed to properly present the entire theme of the Applicant's life, failed to produce a family historian to allow the jury to know the seriousness of his family history and that Applicant's only expert [Dr. Margaret Melikian was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate.

These amended issues present matters which may not be resolved by the record and

continue to assert vague matters not adequately identified about omitted evidence by defense counsel. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Pursuant to SCRPC, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used and to what "theme" he is complaining about. Should the Applicant satisfy the needed specificity, the allegation of ineffective assistance of counsel would probably then raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests a hearing to fully resolve this issue and demand adequate specificity of the individual claims. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits that the claims, as stated, will be insufficient to show entitlement to relief under Strickland v. Washington based upon the record before the court.

A.

- (A). **Counsel failed to adequately investigate, develop and present mitigation evidence including, but not limited to, evidence of Applicant's adaptability to confinement. [Adaptability to Prison Evidence].**

In his first specification, he makes a general challenge to counsel concerning a failure to investigate and present evidence in mitigation and specifically adaptability to prison life evidence. A review of the sentencing phase record contradicts this general assertion. However, there is no evidence concerning the basis for not presenting evidence of adaptability to prison

life. Although lead defense counsel Public Defender Michael Bartosh died April 5, 2006, prior to the date of the application, Respondent submits that the record suggests that there cannot be a Sixth Amendment violation under *Strickland* because the second "prejudice" prong cannot be satisfied by the Applicant who has the burden of showing the existence of a reasonable probability that the result of the proceeding would have been life rather than the death sentence.

WHAT THE JURY HEARD AND KNEW

In the penalty phase, the defense called a series of mitigation witnesses. Ann Howard, Special Services Coordinator with the Spartanburg County Mental Health Center testified that she had seen the Applicant on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. ROA 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug - Zyprexa, and was currently on Celexa - and anti-psychotic, a drug for depression - and a mood stabilizer - Abilify. ROA 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. ROA 1989.

On cross-examination, she testified that on his intake interview that the Applicant told her that he did not remember anything about shooting and killing his wife. ROA 1992.

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Applicant on May 4. She stated that she had reviewed:

1. His medical records.
2. The records from a psychiatric hospitalization when he was a teenager.

3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

ROA 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH] evaluation. ROA 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. ROA 2004. She also reported that Lindsey was in an accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, 1. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by

their objective testing , it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering . ROA 2005-06. She stated that the issue of malingering came up because Lindsay reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

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She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She

opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.¹ She stated that

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¹Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. In the written report she opined Lindsey's self-report of memory problems since childhood, the fact of the car accidents at age two, another car accident in 1987-88, several blows to the head, three motorcycle accidents with head blows, his self-inflicted gunshot wound to the head in the incident and that he had migraine headaches since 2001. Dr. Brawley further noted that his social history revealed a chaotic childhood, a stepfather who was a heavy drinker and a mother who worked most of the time. Lindsey had reported to Dr. Brawley that he was responsible for his younger sibling and taking care of the home and meals. She reported that when he was incarcerated he had been separated from his wife of 87 years and living with a cousin. He had two children - age 4 and 8.

Dr. Brawley reported that he had difficulties in school, had to repeat the first grade and seventh grade. Also that he was in speech therapy and learning classes from 2nd to 6th grade.

It was reported by history that his first suicide attempt was at age 12 and he reportedly had four other attempts, including the gunshot wound. Although denying suicide ideation, he reported to having an imaginary friend - Jimmy. By history, Dr. Brawley learned that several relatives also had depression.

Dr. Brawley tested the Petitioner and found severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontational naming, below average simple manual speed on right, severely impaired manual dexterity on the left, below average immediate verbal memory. Below average delayed visual memory, severely impaired verbal learning ability and impaired ability to copy and recall a complex figure.

Testing by the WAIS III, resulted in Full scale IQ of 85, Verbal IQ 80, Performance IQ of 92. She analyzed that the 12 point difference was due to superior performance on the matrix reasoning subtest. All others were average to below average.

She found that there was no indication of an attempt to fabricate or exaggerate symptoms. She found some scattered neuropsychological deficits. Some of the scores that were below average were likely consistent with educational history and premorbid levels of functioning.

Dr. Brawley noted to Dr. Melikian that it would be beneficial to obtain medical and school records, as well as to speak with collateral sources. *Letter from Dr. Brawley to Dr. Melikian, May 20, 2004. [Copies of medical material were FedEx to Dr. Melikian on April 30, 2004 and school records were faxed to Dr. Melikian on May 4, 2004 after it was requested and*

"I would not have made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his

received by Lenora Topp, the defense mitigation investigator.]

mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

Lindsey described to her his weight loss from 225 pounds to 160 pounds. ROA 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-laws and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA 2013. He then stated that he just snapped. ROA 2013, 1. 25. Lindsey told her that he followed them, but did not remember that he shot his wife until the EMS people told him ROA 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA 2014.

She stated that he had a gunshot wound to the head. The wound exited, but did not penetrate the brain. He was shot multiple times by the police. ROA 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA 2018. She denied that this was evidence of malingering. ROA 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to say it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2003 report. ROA 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. ROA 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stanford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW

application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey1, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA 2041-42. She asserted that these should be considered mitigating factors. ROA 2042. She opined that on September 2002 he was suffering from acute depression. ROA 2043.

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Virginia Lindsey, the Applicant's mother, testified that Marion was 30 years old at that time. ROA 2044. She stated that she had four sons, but one died in a drowning. Id. She also had a daughter that had been killed in a car accident in 1969 when she was 7 months old. ROA 2045. She stated that she was never married to Lindsey's father, Leon McDowell, Sr. and raised him by herself. His only male influence was his uncle Steve.

She described living in a two bedroom home with the boys all in one room sharing beds and herself in another room. ROA 2046. She stated that she worked at the Howard Johnson Motel from 8 am to 4 PM. She stated that Uncle Steve was with them when she went to work. ROA 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had

poured kerosene all over his face and down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it.

ROA 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars. She stated that he was treated at the hospital that night and returned home that date. ROA 2048.

She described that her son as slow in school. She stated that he had one fight in junior high school. She stated that her son did not study and did not like to study, but would go to school. ROA 2048-49. She stated that he had problems with his speech and had to go to speech class. ROA 2049. She said he repeated the eighth grade, but did not recall if he repeated first grade. Id.

Ms. Lindsey stated that her sons each had different fathers. She said that while the fathers would pick them up, Marion did not have his father visit him which caused him to get upset because he could not go with his brothers.

She said that he moved out when he was 20 and quit school when he was 17. ROA 2050. She said that he went to work and gave her money to help pay the bills. ROA 2051. Id.

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go back together several times. She stated that Nell would go to her mother's house during the

separations. ROA 2053-54. She said that Lindsey would stay with friends then. Id.

She stated that Marion loved her sons and saw that they were the best. He told her that he wanted to give them a father and did not want them to grow up without a father. They were the most important thing in his life. ROA 2055. She said that he did not want anything to do with his own father.

Ms. Lindsey stated that she had four brothers (one of whom is dead) and three sisters. ROA 2056. She stated that her sister Bessie Smith had attempted suicide. ROA 2056. She stated that she had been treated. Id.

She said that Marion was 15 and was hospitalized for attempted suicide. She said he stayed in the hospital for four days and was afraid of the man in his room because he looked like Charles Manson. ROA 2057.

She said that while he was in school she never had any teacher call and tell her that he was failing.

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither her or Marion were allowed to see them. ROA 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked 4 days before the incident. ROA 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not get his family back that he could not live any longer. She said that last time she saw Lindsey was three days before the incident. She noted that he had lost weight and appeared worried and upset

and was very depressed. ROA 2059.

She stated that she heard about the incident at 8:15 on September 18, 2002. She stated that "Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But I don't want my child sentenced to death." ROA 2060.

On cross-examination, Solicitor Gowdy pointed out that Rod Tullis, a lawyer, represented her son. Solicitor Gowdy further inquired whether her son had contacted legal aid. She stated that she did not know whether or not her son had taken efforts to talk to a lawyer about getting a court order to be able to see the children he wanted to see. ROA 2061.

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Bill Burton testified that he knew Lindsey and ran a chemical company for a German firm. ROA 2061. He said he met Lindsey while he was a lifeguard. Lindsey was 6-7 at the time. He said the kids would come to the pool. He said he taught Lindsey how to swim.

Burton described the fact that Lindsey lived in a pretty rough situation. He stated that he would take them to Spartanburg Braves/Phillies baseball games and then to Burger King. On occasion, he would take them to his house to go fishing. He said that he visited Lindsey's home and described it a "desperate poverty." ROA 2063, l. 21. He said that house was about 1000 square feet with 8 people living in it. Id. He said all the children slept in a single bed. He said that house had since been condemned and was torn down. ROA 2064.

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for 13 years. He said they came over to his house to fish over 20 times and would always call his

mother and seek permission. ROA 2065. He described Lindsey as "the picture of politeness" toward Burton's parents. ROA 2065.

Burton stated that after he graduated from college, he became in the position to offer Lindsey a job. Lindsey then went to work for his company. ROA 2064. He stated that Lindsey worked for his company for about a year. ROA 2066.

He stated that Lindsey: "grew up in abject poverty without the befits of parents like normal families. I knew him until he was 20 years old approximately. I never saw the kind of behavior or violent behavior of any sort during that period." ROA 2067.

On cross-examination by Solicitor Gowdy, Burton stated that he had not learned of the incident when Lindsey at age 20 had shot Stanford Wilkins through the windshield with a handgun until he came to trial. ROA 2069.

Leon McDowell, Marion's father, declared he was not a father to Marion. ROA 2070-71. He stated that he was married to someone else when Marion was born. He said he was never there with him to go to a baseball game or go to a movie. However, he said he gave them money for clothes and declared if not executed "maybe he can benefit his kids somehow". ROA 2072

Chris Wilkins, a friend like a brother to Marion, hung out together since 13 and lived together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. ROA 2073-74. He stated that he saw Lindsey with his sons and that he was a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

Wilkins stated that he would hear Lindsey mumble to himself and appear to be chewing his tongue. ROA 2075. He stated that Lindsey tried hard to provide for his family. He never saw Lindsey hurt anyone on purpose. He asked the jury to take into consideration the kind of father he was and have mercy on him. He felt what happened was a big tragedy for everyone, but that Lindsey was a good person. ROA 2076.

On cross-examination by Deputy Solicitor Willingham, he confirmed that he would have helped him if he wanted to have custody of his kids and get a lawyer. ROA 2076-77. He admitted that he was aware of the incident when Lindsey shot through the windshield at Stanford Wilkins. ROA 2077. However, he was not aware of the 2001 incident at Applebee's when he cold-cocked Nell in the parking lot, but has heard of it. ROA 2077.

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#13. Steven Pilgrim, Lindsey's nephew testified that he lived with him for 7 years. ROA 2078-79. He stated that he was present at car accident with Lindsey as a child and personally took him to Inman Emergency. ROA 2079. He said that they took him to hospital and stayed with him. Id. He said that he was also knew about when Marion inhaled kerosene . ROA 2080-81. He stated that he suffered from high blood pressure and has a daughter that suffers from panic attacks. ROA 2080.

Bessie Smith, Marion's aunt, testified that she lived at one time in house with Marion. ROA 2081. She described a kitten being thrown by her brother into the heat. She said that Marion was hurt by this action. ROA 2081. She also testified that she had attempted suicide. ROA 2082.

The Applicant waived his right to testify in the penalty phase of the trial. ROA 2084-

2089.

The State's Case Against Lindsey

Any understanding of the facts of the case and the propriety of the harshest punishment must begin with a review of State Exhibit 21, the 911 tape, made on September 18, 2002. Within that tape reveals that this act was more than a single victim incident, although only one victim died. Within that tape reveals unique violence and blatant disregard of societal laws where Lindsey, ordered to avoid contact with the victim due to his prior criminal actions, tracks down the victim and kills the victim in cold blood whole she is seeking respite at the Inman S.C. Police Station, in front of law enforcement.

State Exhibit 21, the tape of the 911 telephone call from Ruby Nell Lindsey to the Dispatcher revealed the following:

Dispatch: Spartanburg 911, what is your emergency?

Lindsey: Yes, I just got off work and my sister was going to drop me off and my husband, they signed a warrant on him last night and told him to stay away from me, now he's calling us, and I'm in Inman City. I'm on my way to the police station because he's behind us following us. He's coming down Main Street.

Dispatch: Okay, so you're ma'am! Wait a minute, don't hang up on me!

Lindsey: I'm not gonna hang up on you.

Dispatch: And he's "wanted" you said?

Lindsey: They already picked him up and the judge told him to stay away

from me and here he is behind us and now following us.

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

Dispatch: Yes ma'am, your cell phone number.

Lindsey: 978-xxxx. He's coming down right beside us.

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

Lindsey: I'm in a gray car; I'm pulling into Inman City Police Station right now.

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

State Exhibit 21, 21(a) (tape, enhanced CD).

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The evidence of this horrific scene at the sanctuary of the police station parking lot further reveals that the driver, Celeste Nesbitt, after driving them into the parking lot exited the vehicle and tried to get the decedent to leave but she was talking on the telephone to 911. Unsuccessful, Nesbitt saw the Appellant pull into the lot, jump from his car, and run toward the back of the car. [Earlier, he had stopped them and Celeste told him, when he was unable to see through the tinted windows, that her daughters were in the back seat, but denied that there was anyone else there when he declared that somebody else id back there. Tr.p. 1526.] Celeste saw Lindsey pull out a gun and stick it to the rear passenger window and fire into the car. Celeste then crawled into the nearby police car for her own safety. After the shooting she was advised that they (the police) had got him and she was confronted with her oldest daughter screaming that Nell was dead. Tr.p. 1536.

Inman officer Godfrey described hearing about a "rolling domestic dispute" from the dispatcher. He stated that he saw the cars pull into the parking lot and saw Nesbitt jump out of the car and come running toward him and state that "he's going to get her. . .". He then saw the

Appellant with a handgun point at the back glass. When Godfrey reached for his gun and hollered "don't," Lindsey ignored the demand and fired two shots into the back glass. Tr.p. 1567.

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. ROA. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit by him according to Godfrey and went down.²

Ruby Nell Lindsey suffered four separate gunshot wounds. Three bullets entered and remained in her head. The first was to the back of the head, 3 1/4 inches from the top and 3/4 of an inch to the left of the midline. The second was to the left temporal region. The third was near the nape of the neck. The fourth wound grazed the lower postural neck midline. ROA p. 1654-1657.

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In processing the scene, evidence revealed that shots went through the backside of the back window from the rear drivers side' and also from the driver's side rear window where Mrs. Lindsey was seated. ROA Tr.p. 1588-1590. As thoroughly set out in the prior arguments, it was by fortuity that the children seated in the back seat were not killed or injured beyond the cuts and emotional trauma they received.

As Applicant recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously. ROA Tr.p. 1775-1781, 1823. [Penalty Phase Testimony of Celeste Nesbitt, Sharon Smith]. The victim had made calls contacting lawyers concerning a divorce. ROA Tr. p. 1782. The Applicant referred to his wife as

²Lindsey stated to the paramedics that he had shot himself in the head. Tr.p. 1674. Lindsey sustained wounds to his hip and legs. ROA p. 1669.

"bitch" and threatened to kill her if "I catch you doing anything." ROA Tr.p. 1782. Testimony was received about an assault by Applicant on his wife at Applebee's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. ROA Tr.p. 1918-1921, 1924-1926.

Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. ROA. p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Applicant on a criminal domestic violence charge the night before the victim's murder. ROA p. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. ROA p. 1933 - 1936.

Concerning other violent incidents in Lindsey's past, there was evidence presented that on February 20, 1994, Lindsey blocked the vehicle being driven by Stanford Wilkins with Jessica Cannon as a passenger in the middle of the road. Lindsey then got out of his car and shot twice through his windshield, striking Wilkins in the arm. ROA. p. 1943, 1950-51. Lindsey was convicted of assault and battery with intent to kill after a no contest plea on December 14, 1996 and received a two year sentence, suspended to one year and one year probation with restitution. ROA .p. 1953.

At the sentencing proceeding for this case, victim impact evidence , in addition to the testimony concerning the effect of the trauma on Kiera, include testimony from Stanley Staggs, the victim's father. ROA Tr.p. 1954-1965. This testimony concerned the impact on his life and her children's lives. ROA Tr.p. 1961-1965.

The picture the prosecution and evidence revealed was harsh. A violent tempered criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun shooting through windshields. It painted a picture of the type of person for which the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his violence or disrespect for the law.

The Defense Proposed Witness List

Prior to trial, the defense, through appointed counsel Michael Bartosh made notice of potential witnesses in the case. Particularly, counsel identified the following in his written notice:

LAY WITNESSES

Bill Burton*
Pat Burton
Beth Gregg
Alex L.
Trey L.
Virginia Lindsey*
Amu Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

EXPERT WITNESSES

John Absher, Neurologist
Tora L. Brawley, M.D, USC School of Medicine

Margaret Melikian, D.O. , MUSC Institute of Psychiatry*

Lenora Topp, Mitigation

Rod Tullis, Attorney at Law³

J. Benjamin Stevens, Attorney at Law

Counsel Bartosh also indicated at that time that additional witnesses may be called in his written notice. [Those marked with * testified].

The Prison Life Evidence

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The State presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. ROA 1909-1910. There could also have contact visitation up to 8 visits a month. ROA 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23, 500 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. ROA 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. ROA 1916. This will initially be done at the Reception

³Rod Tullis was an attorney in Spartanburg. On September 19, 2002, Tullis wrote Sheriff Coffey and hand delivered a letter stating that he was Lindsey's attorney and that "Lindsey is asserting his Fifth Amendment right to remain silent." He further wrote that this will not be waived by Lindsey in the absence of his counsel. *Letter, Tullis to Sheriff Coffey, September 19, 2002.*

and Evaluation Center. ROA 1916. There will be testing then for academic level, mental health issues and security level. ROA 1917.

No questions were asked concerning Lindsey adaptability to prison by either side.

ANALYSIS

First, there has been no showing that the Applicant would have been "adaptable to prison in the future or was adaptable in the past." Second, the record reveals a series of violent assaults and threats by the Applicant toward loved ones and others, despite the fact he was under orders to avoid them. Finally, it reveals he was a player in a drug dealing outfit. Further, the Petitioner presented a thorough case in mitigation about the Applicant's background and family, albeit with any evidence concerning prison adaptability.⁴

⁴ It is unclear from the allegation whether this is an issue related to the Defendant's mental capabilities, attitude or the prison system's ability to confine the Applicant. There may have been a strategic reason for the decision not to pursue this line of mitigation. Recently, the U.S. Supreme Court addressed strategic claims on deciding not to present mental health evidence. In addressing the decision, the Court stated :

Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left school because of educational difficulties. 542 F.3d, at 1305-1306. **Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of**

The Applicant may be relying upon *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear whether Lindsey suggests that his suggested evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In *Gardner*, 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362, 97 S.Ct. 1197.

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In *Skipper*, 476 U.S. at 3, 8, 106 S.Ct. 1669, the United States Supreme Court held that the trial court erred in excluding evidence that the defendant was well-behaved in jail between the time of his arrest and trial and that such behavior was probative of his future adaptability in prison. The Court stated, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7, 106 S.Ct. 1669.

In *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187, the United States Supreme Court held that the defendant was denied due process because the trial court excluded from evidence the fact that the defendant was ineligible for parole if sentenced to life in prison. The Court concluded, based upon evidence in the record, that the jury likely misunderstood the meaning of sentencing the

"happenstance, inattention, or neglect," *post*, at ----.

Wood v. Allen, 558 U. S. ___, 130 S.Ct. 841 (U.S. 2010) (emphasis added).

defendant to life in prison. *Id.* at 159-62, 114 S.Ct. 2187. The Court stated that the exclusion of evidence that the defendant was ineligible for parole "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id.* at 161, 114 S.Ct. 2187. The Court was particularly focusing upon the fact that the jury was misled as to the sentencing options. *See id.* at 159-62, 114 S.Ct. 2187.

Lindsey may suggest that *Skipper* and *Simmons* dictate that he has a constitutional right to present evidence concerning prison life. However, the South Carolina Supreme Court has previously addressed this argument. The United States Constitution does not limit the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. ⁵ *State v. Burkhardt*, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (S.C.,2007).

The South Carolina Supreme Court has declared that it has long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the

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While we do not dispute that Lindsey's "future adaptability" in terms of his disposition to adjust to prison life is relevant to the future dangerousness inquiry, the Applicant may be seeking to present general testimony from an expert like James Aiken, former Warden at S.C.D.C. who has been qualified previously as an expert in prison operations and classification. The testimony that Lindsey may seek to introduce through the expert concerned the conditions of prison life and the kind of security features utilized in a maximum security facility. That is the same kind of evidence that we have previously rejected as not relevant to the future dangerousness inquiry or otherwise. *See, State v. Burkhardt*, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (S.C.,2007). . Accord, *See Burns v. Commonwealth*, 261 Va. at 340, 541 S.E.2d at 893. Nor is such general evidence, not specific to Lindsey, relevant to his "future adaptability" or as a foundation for an expert opinion on that issue. In light of the inadmissibility of the evidence that Lindsey may seek to introduce through the expert, he also failed to establish how he would be prejudiced by the lack of the expert's assistance. *See id. Accord, Porter v. Com.* 276 Va. 203, 250-251, 661 S.E.2d 415, 439 (Va.,2008).

circumstances of the crime. *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). "Such determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury." *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added). Based on this reasoning, the Court declared that it had disallowed defense evidence regarding the process of electrocution, *State v. Plath (Plath I)*, 277 S.C. 126, 284 S.E.2d 221 (1981), and expert testimony regarding the deterrent effect of capital punishment. *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).

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In *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although we found the issue was not preserved for review, we cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387.

This case was tried in May 2004, before the South Carolina Supreme Court decision in *Bowman* (2005); however, the Court has applied in a direct appeal situation that reasoning because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. The Court stated that it was aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible,⁶ and this restriction on the admission of

⁶See generally *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); *State v. Shafer*, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior

evidence regarding prison life *in general*. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those.

Here, Respondent submits that the thorough presentation of the horrific evidence in aggravation and the alleged omission of prison adaptability evidence would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included evidence about his criminal character would that there is a reasonable probability that the result of the proceeding would have been different under *Strickland*. The allegation must be dismissed.

B. Attempting To Proceed In Family Court Over Visitation .

- (B). Defense counsel was ineffective for failing to present available evidence that Applicant was attempting to proceed in Family Court over the child visitation dispute. [Evidence of Applicant's Attempt to Proceed in Family Court on Visitation].**

In his second specification of ineffective assistance, Lindsey asserts that counsel failed to present evidence, apparently in mitigation, that he was seeking to proceed in Family Court over his request for visitation of his children. The record shows that evidence, if it exists on this issue, was not presented at the trial. As noted previously, his mother testified that they had been denied visitation with the children by the mother and grandmother for a two month period prior to the incident. ROA 2057-58. On cross-examination, Solicitor Gowdy had pointed out that Rod Tullis had represented her son and questioned whether the Applicant had contacted legal aid. ROA

in prison relevant to future dangerousness); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case)

2061. Further, the defense counsel witness list had included Rod Tullis and J. Benjamin Stephens as potential expert witnesses.

In the guilt phase testimony, Celeste Nesbitt testified that she had discussed with the victim events that had occurred a few days before September 18. Nesbitt said that she was aware that the Applicant was not supposed to have any contact with Nell Lindsey. She also stated that Nell Lindsey's state of mind was that she interpreted that court order to mean that Lindsey was not supposed to come around her or the children based upon what Nell said. ROA 1557, l. 12-15, p. 1561, l. 5-12..

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In the defense case, Virginia Lindsey, the Applicant's mother, testified that Lindsey was not allowed to see his children the weeks leading up to the incident. ROA 1675-76. She stated that Marion would buy groceries and bring them to her home and that she would call Nell's house. She stated that Nell's mother would declare that she was not at home and then later on Nell came by her home around 11 PM and pick up the groceries. ROA 1676. These were groceries that Lindsey had bought for the children, according to Virginia. ROA 1676. His mother testified that after he purchased the groceries (apparently a one time event), it became hard or impossible for her to contact her grandchildren "because they did not want them to be around their daddy." ROA 1676, l. 8-14. She stated that she was unable to talk to the children and subsequently, her telephone was blocked. ROA 1677.

Christopher Wilkins testified that Lindsey was close to his children. ROA 1677-78. He stated that there was a specific time that he was prevented from seeing his children. ROA 1679, l.

2-5.⁷

More clearly is the fact that at the time of the incident, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Applicant on a criminal domestic violence charge the night before the victim's murder and that she directed

⁷During the motion hearings, counsel Bartosh asserted that the evidence that she had blocked the telephone so that his family could not contact the children was evidence in support of sufficient legal provocation. ROA 1686-91.

Judge Few noted that in denying the charge of voluntary manslaughter that a family court system existed to resolve orderly disputes regarding children. As he stated: "it would make absolutely no sense to say that if two people get together and have a dispute about visitation of their children when all they have to do is walk or drive down to Spartanburg and go see a family court judge to resolve that dispute that they can take to guns and violence and killing each other and that it be sufficient [legal] provocation. ROA 1692.

In the closing statement of Solicitor Gowdy, he pointedly stated that:

I am tempted not to even address this notion about this defendant not being able to see his children or the other notion that the EMS worker coming in to testify that Myron Lindsey tried to shoot himself in the head. I got two things to say about that and then I will be quiet.

There are courtrooms all across this state to deal with child custody issues. There are courtrooms down this hall that deal with child custody disputes. Men and women go down there everyday. You do not shoot your wife in the back of the head three times. You go to court....

ROA 1702, l. 3-14.

During his guilt phase closing argument, defense counsel Doug Brannon argued that the parties had separated before, "but in the past Mrs. Lindsey let the two boys go see their Dad or let him see the boys...This time it was different. It wasn't going to be any back together this time. It was different. He was still trying to provide for his children. He bought them groceries. The only way he could get them to see the boys was through his mom. That's how they had to work. Then there came a time that even mom could not call anymore. They were completely excluded. The boys were completely excluded from Mr. Lindsey's life.

On that night, he sees Celeste. They stop and talk. He asks her do you know when I am going to see my boys. And its about the time that he realizes that Nell is in the back seat ..." ROA 1704, l. 10-24. Defense counsel claimed that he snapped because "he leaned that he wasn't going to see his babies." ROA 1705. He argued that "he loved his children. He wanted to see his children. That's all he wanted. He wanted to see his babies. He could not do it. He snapped." ROA 1705, l. 12-18. "Mr. Lindsey wanted to see his kids. He was being prevented from seeing his boys. He snapped." ROA 1706.

Lindsey that "there was to be no contact with the victim who is Nell Lindsey. ROA p. 1933 - 1936. On cross-examination, Magistrate Simmons testified that her order did not address the visitation of the children and did not have anything to do with that. ROA 1939.

The victim's father, Stanley Staggs testified that he had custody of the Applicant's two sons with the victim. He stated that they stayed with him during the week and stayed with their grandmother, Ms. Wright, on the weekend. ROA 1959-60. He stated that he got formal custody after he picked up the children the night that the victim was killed. ROA 1960. He stated that he took them to Roebuck so they could be normal kids. He stated that he went to Court shortly after that and the Applicant was there. ROA 1960. He stated that in the two years that he had custody of the boys, he never had received a letter or anything from the father. He disputed that the Applicant had any passion for the children. ROA 1964.

On cross-examination, Staggs testified that Lindsey had agreed after the incident to sign over custody to him. ROA 1967.

ANALYSIS

Respondents submit that the Applicant will fail in his burden of proof. First, there is no evidence in this record that the Applicant ever filed any matters in the Family Court seeking to revise the custody arrangement with his estranged wife prior to the killing. To the contrary, it appears that the failure to do so became an issue in the guilt phase of the trial.

While this evidence, if it exists, may have resolved a collateral factual issue in the case, it would have been contrary to the defense theory that the sudden realization of his denial of access to his children caused him to snap and therefore was the provocation for the killing. His belated

and revised theory similarly would have developed even more probative value to the State's closing theory whereby the State urged that Lindsey was acting differently than portrayed because of this alternative manner of resolving his access to his children. Respondents respectfully submits that the Applicant will be unable to show either deficient performance or prejudice under Strickland concerning this specification. It should be dismissed.

C. *Seeking Legal Assistance.*

(C). *Applicant had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel.*

Respondents incorporate the immediate proceeding section. Assuming arguendo that the Applicant had sought legal assistance and that trial counsel was aware of it, Respondent fails to see how this omission can be either deficient performance or prejudice under *Strickland*. To the contrary, it would highlight the dichotomy in the fact that the day before, his personal violence toward his wife caused a charge of criminal domestic violence to be made with a direction by the magistrate judge to avoid contact with his wife, yet rather than following up on legal assistance that day, he chased his wife toward the hope for sanctuary of a police station and then shot her in cold blood and risk the death of others in doing so. His allegation must be denied.

D. *Theme of Applicant's Life.*

(D). *Counsel failed to properly present the entire theme of the Applicant's life. [Failure to Present Theme].*

In his fourth specification, Lindsey asserts that the defense failed to present the entire theme of the defendant's life. As stated above, significant mitigation evidence was presented. Further, the defense team utilized mitigation investigator Lenora Topp to assist in the preparation of the mitigation. The record disputes the bare allegation.

The Applicant has failed to show how there was any deficiency in the theme of the Applicant's life that was presented through family and expert witnesses at the trial. Pursuant to SCRPC, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what evidence the Applicant now claims existed at the time of trial that should have been used. In addition, Respondent would request Petitioner what juror(s) should have been struck for cause and what unasked questions made the voir dire inadequate. Should the Applicant satisfy the needed specificity, the allegation of ineffective assistance of counsel would probably then raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests a hearing to fully resolve this issue and demand adequate specificity of the individual claims. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

E. Failure to Present a Family Historian.

(E). Counsel failed to produce a family historian to allow the jury to know the seriousness of his family history. [Failure to Present Family Historian].

In his fifth allegation, he contends that Lindsey failed to present a "family historian."

Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian, a forensic psychiatrist, testified. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter.

To show prejudice, it must be established that, but for counsel's unprofessional performance, there is a reasonable probability the result of the proceeding would have been

different. See Strickland, 466 U.S. at 694, 104 S.Ct. 2052.... "It is not enough for the [petitioner] to show the errors had some conceivable effect on the outcome of the proceeding ..., " because "[v]irtually every act or omission of counsel would meet that test." Id. at 693 [104 S.Ct. 2052].... Nevertheless, a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693 [104 S.Ct. 2052].... Rather, where, as here, a petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695 [104 S.Ct. 2052]. see also *Ferguson v. Sec'y for Dep't of Corr.*, 580 F.3d 1183, 1198-99 (11th Cir.2009) (noting that Strickland asks if a different result is "reasonably probable," not if it is "possible"). Thus, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. at 534, 123 S.Ct. 2527 (emphasis added). In so doing, we presume a reasonable sentencer. See *Williams v. Allen*, 542 F.3d 1326, 1342 (11th Cir.2008) (citing Strickland, 466 U.S. at 695, 104 S.Ct. 2052 ("[T]he idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency[,] ... are irrelevant to the prejudice inquiry.")).

F. Failure to Present Dr. Margaret Melikian with sufficient background information.

- (F). The Applicant's only expert was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate. [Failure to Present Dr. Margaret Melikian with sufficient background information].

In his final specification, he contends that counsel failed to provide Dr. Melikian with sufficient information. As stated above and restated, Dr. Margaret Melikian, a forensic

psychiatrist retained by the defense [Program Director of Forensic Psychiatry at M.U.S.C.]

testified that she saw Applicant on May 4. She stated that she had reviewed:

1. His medical records.
2. The records from a psychiatric hospitalization when he was a teenager.
3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

ROA 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH] evaluation. ROA 2003.

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Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. ROA 2004. She also reported that Lindsey was in an accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he

was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, 1. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing, it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering. ROA 2005-06. She stated that the issue of malingering came up because Lindsay reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.⁸ She stated that

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⁸Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. In the written report she opined Lindsey's self-report of memory problems since childhood, the fact of the car accidents at age two, another car accident in 1987-88, several blows to the head, three motorcycle accidents with head blows, his self-inflicted gunshot wound to the head in the incident and that he had migraine headaches since 2001. Dr. Brawley further noted that his social history revealed a chaotic childhood, a stepfather who was a heavy drinker and a mother who worked most of the time. Lindsey had reported to Dr. Brawley that he was responsible for his younger sibling and taking care of the home and meals. She reported that when he was incarcerated he had been separated from his wife of 87 years and living with a cousin. He had two children - age 4 and 8.

Dr. Brawley reported that he had difficulties in school, had to repeat the first grade and seventh grade. Also that he was in speech therapy and learning classes from 2nd to 6th grade.

It was reported by history that his first suicide attempt was at age 12 and he reportedly had four other attempts, including the gunshot wound. Although denying suicide ideation, he reported to having an imaginary friend - Jimmy. By history, Dr. Brawley learned that several relatives also had depression.

Dr. Brawley tested the Petitioner and found severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontational naming, below average simple manual speed on right, severely impaired manual dexterity on the left, below average immediate verbal memory. Below average delayed visual memory, severely impaired verbal learning ability and impaired ability to copy and recall a complex figure.

Testing by the WAIS III, resulted in Full scale IQ of 85, Verbal IQ 80, Performance IQ of

“I would not have made a diagnosis of borderline intellectual functioning” because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them

92. She analyzed that the 12 point difference was due to superior performance on the matrix reasoning subtest. All others were average to below average.

She found that there was no indication of an attempt to fabricate or exaggerate symptoms. She found some scattered neuropsychological deficits. Some of the scores that were below average were likely consistent with educational history and premorbid levels of functioning.

Dr. Brawley noted to Dr. Melikian that it would be beneficial to obtain medical and school records, as well as to speak with collateral sources. *Letter from Dr. Brawley to Dr. Melikian, May 20, 2004. [Copies of medical material were FedEx to Dr. Melikian on April 30, 2004 and school records were faxed to Dr. Melikian on May 4, 2004 after it was requested and received by Lenora Topp, the defense mitigation investigator.]*

again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

Lindsey described to her his weight loss from 225 pounds to 160 pounds. ROA 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tired and wanted to drive to his mother-in-laws and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA 2013. He then stated that he just snapped. ROA 2013, l. 25. Lindsey told her that he followed them, but did not remember that he shot his wife until the EMS people told him ROA 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA 2014.

She stated that he had a gunshot wound to the head. The wound exited, but did not penetrate the brain. He was shot multiple times by the police. ROA 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA

2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA 2018. She denied that this was evidence of malingering. ROA 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to say it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2003 report. ROA 2021.

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Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. ROA 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stanford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either

repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey¹, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA 2041-42. She asserted that these should be considered mitigating factors. ROA 2042. She opined that on September 2002 he was suffering from acute depression. ROA 2043.

Analysis

Recently, the United States Supreme Court further clarified what *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires in the context of investigation and preparation of penalty phase mitigating evidence:

The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel" "--that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one.... Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, --- U.S. ---, ---, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (citations omitted). The Court held the Circuit Court erred in applying 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court reiterated *Strickland*'s emphasis that such bar standards are " 'only guides' to what reasonableness means, not its definition." *Id.*, at 17 (quoting *Strickland*, at 688).

Wiggins did not establish a new federal constitutional rule or standard by which to judge counsel's stewardship in investigation and preparation of mitigating evidence; they simply applied the well-settled *Strickland* ineffectiveness standard to later cases involving the specific question of counsel's duty to investigate mitigating evidence in a capital case. The standard they upheld is a general one, and must be flexible enough to take into account the prevailing professional norms at the time of counsel's performance. See *Strickland*, at 689 ("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.").

Here, defense counsel investigated and presented Dr. Melikian whose testimony revealed her access to significant data to form her opinion, in addition to reviewing other experts reports and assessment. The Petitioner has failed to overcome the presumption of reasonably effective counsel in this presentation. Pursuant to SCRCRCP, Rule 12(e), Respondents herein move this Court for a more definite statement in a timely manner or to strike the allegation because it is too vague and ambiguous. The Respondents cannot be expected to reasonably respond to the broad claim without a precise statement as to what background information the

Applicant now claims existed at the time of trial that should have been used by Dr.

Melikian .

CONCLUSION

Each and every allegation in the Application, as amended not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed or, in the alternative, that the Court should direct the Applicant to timely serve and file an Second Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e).

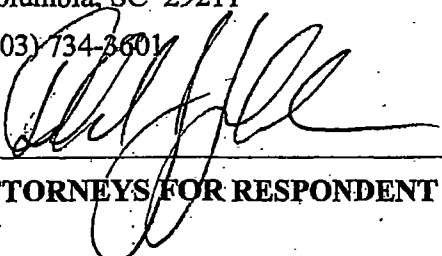
Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

June 17, 2010

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
		SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey, #6015	)	
	)	
Plaintiff,	)	
	)	PRETRIAL ROADMAP
	)	
vs.	)	
	)	
State of South Carolina,	)	C.A. No.: 2007-CP-42-2848
	)	
Defendant.	)	

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction of assault and battery with intent to kill. Both were served on Lindsey and counsel Michael Bartosh, personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

That the Defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. The Petitioner was present and represented by Spartanburg County Public Defender, Michael Bartosh, Doug Brannon and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p. 1718, 1.14 - p. 1719, 1.5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person when at a public place." R., Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the Defendant was under the influence of mental and emotional disturbance.
2. Age or mentality of the Defendant at the time of the crime.

R. Tr. 2155-56. On May 24, 2004, the jury found the existence of the statutory mitigating circumstances and recommended a sentence of death. ROA., Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice or arbitrary factor. ROA., Tr.p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. ROA p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

- 1.

Whether the Court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2.

Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3.

Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?

4.

Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

State v. Lindsey, Final Brief of Appellant p. 2. The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, made its *Final Brief of Respondent*. On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. *State v. Lindsey*, 372 S.C. 185, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. *Lindsey v. South Carolina*, 07-5444. In the petition, Lindsey raised the following questions:

Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reason to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition p.2. The Respondents made a Brief in opposition on August 20, 2007. The United States Supreme Court denied certiorari on October 1, 2007. *Lindsey v. S.C.*, 552 U.S. 917, 128 S.Ct. 274, 169 L.Ed 2d. 200 (2007).

In Marion Lindsey's Application for Post Conviction Relief, the Applicant will raise several issues in the area of failing to present adequate mitigation; some of the matters to be addressed were raised in the sentencing phase, but not adequately presented; and some areas of mitigation were never raised in the mitigation phase that should have been raised. Accordingly, the failure to adequately explore all of the mitigation that was available, coupled with the extremely short time that the defense team was assembled, will show that the Applicant's Sixth Amendment right to have effective assistance of counsel was denied. In accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), the Applicant will show that:

- 1) Trial counsel's performance was deficient and;
- 2) There is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.

The witnesses to be presented at the PCR hearing and a brief summary of their testimony is outlined below. In addition, the Court is urged to review and apply, as applicable in this case, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel and a careful review of the cases addressing the necessity of a complete mitigation investigation and

presentation at trial. *Council vs. State of South Carolina*, 528 U.S. 1050 (1999) and *Sears vs. Upton*, 2010 WL 2571856 (U.S.Ga.), 79 USLW 3002, 10 Cal. Daily Op. Serv. 8482, 2010 Daily Journal D.A.R. 10,093.

The witnesses to be presented by the Applicant are as follows:

- 1) **Defense attorney, Doug Brannon:** in summary, the Applicant is informed and believes that Mr. Brannon will testify that he was appointed by Judge Few on March 5, 2004, which was only 73 days prior to the commencement of the trial. While attorney Brannon began working on the case prior to the actual appointment, his first involvement in the case, indicated by his "Timesheet" was March 12, 2004. Mr. Brannon submitted his timesheet to indicate that he had 88.5 hours in the case prior to jury selection commencing on May 17, 2004.

Attorney Brannon was primarily instructed by Spartanburg County Public Defender, Mike Bartosh, now deceased, to develop the guilt phase of the trial and that he did not spend any significant amount of time in preparing for mitigation. Further, this was his first death penalty case and he was not familiar with the types of experts potentially to be utilized in the mitigation phase of trial.

While certain testimony will be elicited from attorney Brannon relative to the sentencing phase in order to cover the record of this case, we do not believe he had sufficient time or knowledge in 2004, to adequately develop a mitigation case for Mr. Lindsey. (See ABA Guidelines)

- 2) **Rod Tullis:** In regards to fact mitigation as to the state of mind of Mr. Lindsey in the days, and even hours, leading to the death of Mrs. Lindsey. Mr. Tullis is, in the

opinion of Mr. Lindsey's PCR attorneys, one of the most important witnesses NOT called in the trial of the case with regards to "fact" mitigation. Mr. Tullis was a long time attorney for Marion Lindsey. He had represented him in the past on both domestic matters as well as prior criminal offenses. Mr. Tullis was the initial attorney for Marion Lindsey on these particular charges. Immediately after the shooting, Mr. Tullis went to visit Mr. Lindsey at the hospital and shortly thereafter gave notice of appearance on these charges. He was subsequently released as the attorney of record for Mr. Lindsey prior to the service of the notice of the death penalty. Mr. Tullis had in his possession, as a result of his initial representation, suicide notes written by Mr. Lindsey to his family members and his wife, Ruby Nell Lindsey. In addition to the suicide notes, Mr. Tullis was also in possession of a telephone message left by Mr. Lindsey on Mr. Tullis' telephone a few hours prior to the shooting which showed Mr. Lindsey to be very distraught over the current situation and displayed his state of mind just prior to the shooting. Mr. Tullis attempted to turn over the suicide notes and recording to the Public Defender's Office which was at that point representing Mr. Lindsey. The suicide notes were turned over to the Public Defender's Office, but were not used during the trial of this case nor were they provided to any expert witnesses. Mr. Bartosh who was the primary counsel for Mr. Lindsey told Mr. Tullis that he did not want the recording of the telephone message. Mr. Bartosh did not listen to the message nor did he ever take it into possession. As a result, that message was destroyed prior to the trial and was no longer available as a result it was not provided to any of the witnesses nor

used at the trial to demonstrate Mr. Lindsey's state of mind.

- 3) **Lenora Topp:** Will testify that she was contacted for the purpose of gathering records and assisting in the capacity of a mitigation investigator for the preparation of Marion Lindsey's capital trial. According to the final invoice submitted for payment for assisting in the preparation of Mr. Lindsey's trial, Ms. Topp's initial involvement in the case was April 16, 2004, 30 days prior to the commencement of the trial. Her time involved in the case prior to trial totaled 53 hours. It is recognized that from Lenora's home in Asheville, North Carolina to Spartanburg is approximately a one hour drive. Providing for two hours for a round trip drive, this reduces the actual time spent on the case by 14 hours thus resulting in a total amount of available work time to be 39 hours prior to trial. While Lenora was able to perform admirably in the amount of time that she had, she did not have sufficient time to adequately develop a family chronology, environmental factors related to Marion Lindsey, have sufficient time with Mr. Lindsey to learn of every potential witness, such as Dr. Barry Henderson, who might have been of invaluable assistance to Mr. Lindsey's mitigation case.

In addition, Lenora contacted the Public Defender's Office the day following the sentencing of Mr. Lindsey to indicate that she really did not feel that she did enough for him and can Dr. Barry Henderson do anything to help post trial. Dr. Henderson is now deceased and unavailable to testify in this case. However, Dr. Henderson informed Lenora that in addition to being his doctor, Marion used to play with the Dr's children, that Dr. Henderson thought Marion was a fine person and knew he

loved his children. He told Lenora that every time he saw Marion out, the kids were with him. The Applicant feels this information could have been vital in the case involving Mr. Lindsey and, further, most likely would have been information given to Lenora had she had sufficient time over a period of months to work with the Defendant. The coroner's "cause of death" on Dr. Barry Henderson will be provided to the Court.

It is clear from *Council vs. State of South Carolina* 528 U.S. 1050 (1999), that you must adequately investigate and present mitigating evidence during the penalty phase. This could not have been accomplished in approximately 39 hours of work by a mitigation investigator, through no fault of her own. Also, see *Sears vs. Upton*, 2010 WL 2571856 (U.S.Ga.), 79 USLW 3002, 10 Cal. Daily Op. Serv. 8482, 2010 Daily Journal D.A.R. 10,093, wherein the Court states "The proper prejudice standard for evaluating a claim of ineffective assistance in the context of a penalty phase mitigation investigation requires a PROBING AND FACT - SPECIFIC ANALYSIS that considers the totality of the available mitigation evidence, both adduced at the trial and the evidence adduced in post conviction proceedings, in order to assess whether there is a reasonable probability that Defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

- 4) **Joseph Stewart/Vincent Bell:** When Marion Lindsey was shot by both a self-inflicted gunshot wound and by officers at the scene, EMS was contacted. Joseph Stewart and Vincent Bell were two of the EMS workers dispatched to the scene.

Joseph Stewart testified in the first trial. (ROA Volume 4, pg. 1668) The defense called Mr. Stewart and elicited testimony from him to the effect that he was a paramedic, that he responded to an emergency call at the Inman Police Department, that he rendered assistance to Marion Lindsey, that Mr. Lindsey had gunshot wounds and that one of the wounds included a head wound. He was then asked, "Did Mr. Lindsey say anything to you?" See ROA 1669 line 19 - 20. At this point there was an objection and a colloquy ensued between the bench and the defense attorney as to whether this would be permissible evidence. The Solicitor withdrew the objection when it was agreed upon that the witness could testify that Mr. Lindsey said he shot himself, but not go into why he shot himself. It is our opinion that this was ineffective in that testimony should have been proffered at that time as to the entire conversation Mr. Lindsey gave to the EMS paramedics, which would have shown the state of mind of the Defendant and not offered for the truth of the matter or, alternatively, for paramedics to know how to treat the defendant.

In this regard, the testimony of the paramedics will be that Mr. Lindsey said that he shot himself in the head, as well as having shot his wife. Vincent Bell asked, "Why did you do it?" and he said, "My wife was fooling around with another man!" (See voluntary statement of Vincent Bell)

With regards to Joseph Stewart, he heard Mr. Lindsey say, "He had shot himself and to leave me alone and let me die. I was trying to kill myself". He said, "Just let me die I was trying to kill myself".

This is important mitigation evidence in that it corroborates what Margaret Melikian

had to testify about without any corroboration at all. Further, it corroborates the suicide notes that could have been submitted by Rod Tullis, as well as the testimony of Rod Tullis as to the content of the voice message. The state of mind of the Defendant was extremely important in the mitigation phase.

- 5) **Patsy Burton:** Patsy is the mother of Bill Burton, a long time friend of Marion Lindsey during his early years who testified in the first trial. Mrs. Burton wrote a letter to Judge Burch, which was forwarded to the attorneys for both sides in this PCR case, indicating her concerns that her son had not been given sufficient opportunity to testify about Marion. As a result, we contacted Mrs. Burton and will elicit the following information from her: Mrs. Burton has known Marion when he was growing up as a result of a friendship that he had established with her son, Bill Burton. Bill had served as a life guard at the city pool and that the friendship resulted in Marion coming to the residence of Mrs. Burton on several occasions. She always found him to be polite, never had a problem with him and loved having him come to the house at any time.

We believe that Patsy Burton makes a very creditable witness who could have been very persuasive to a jury or any member of the jury panel simply by observing her demeanor, her sincere manner and the very fact that she would testify for Marion.

- 6) **Bill Burton:** Bill testified in the first trial, but indicated that he had only met with the defense attorney for a few minutes before putting him on the stand and that he was not sure what he could have done to help Marion based upon the limited time with the defense attorneys. The Court may find Bill's testimony to simply be a

recitation of his prior testimony, but in an abundance of caution, the Applicant will call him as a witness to testify to any new matter not elicited during the first trial. In accordance with the amount of time spent with the defense attorneys in the first trial by Bill Burton's testimony, we have evaluated, as best we can, the amount of hours spent in preparing lay witnesses for testifying in the mitigation phase. We anticipate that less than 8 hours was spent in totality in talking to mitigation witnesses. (See *Sears*) Unsurprisingly, the State Post Conviction Trial Court concluded that *Sears* had demonstrated his counsel's penalty phase investigation was constitutionally deficit....in it's view, the cursory nature of counsel's investigation into mitigation evidence limited to one day or less, talking to witnesses selected by *Sears* mother, was "on its face".....constitutionally inadequate.

- 7) **Jim Aiken:** Is an expert in prison management, prison classification, as well as future dangerousness and ability to adapt to the prison system. He will be offered as an expert in the field of prison adaptability. The defense, while having notes in their file about prison adaptability, elected not to call any expert in this field to give a jury an alternative reason not to invoke the death penalty. We feel the absence of a person of Jim Aiken's expertise and testimony is ineffective assistance of counsel in and of itself. We submit that most jurors have no idea about inmates and whether or not some inmates can conform to prison life based upon an examination of a particular defendant. Given that a lifetime sentence, without possibility of parole, is a severe punishment, the jury could find an alternative to the death penalty simply by knowing that this person was prison adaptable. Mr. Aiken will testify in

accordance with his expertise and his evaluation of Mr. Lindsey's pretrial detention records. Certain inmates are gang members, antisocial personality disorder findings or any other malady that could render them to be a danger to the population, be it outside the prison system or within the prison walls. Given that an inmate can adapt to prison life and, coupled with the fact that a lifetime sentence is a severe punishment, the jury could find an alternative to the death penalty simply on knowing that this person was prison adaptable. Mr. Aiken will testify in accordance with his expertise and his evaluation of Mr. Lindsey's pretrial detention records.

- 8) **Attorney Karen Quimby (Hatcher):** Attorney Quimby became involved in the Marion Lindsey death penalty trial while working on two other death penalty cases. She only became aware that she was expected to assist in this case approximately 30 days prior to trial. There was a death penalty case involving a defendant Morgan. That case ended sometime in March 2004 and within a week after her ordeal in a death penalty case in Morgan, she was assigned to help in the Lindsey case. (See ABA Guidelines) Since lead counsel, Mike Bartosh, deceased prior to this PCR case, only Attorneys Quimby and Brannon can testify about the case and the decisions made. Part of the defense mitigation would typically be to present mitigation through a life historian or social history witness. This was not done in this case. Jan Vogelsang will testify in the PCR hearing regarding this issue.
- In the time to work on the case, Attorney Quimby had minimal opportunity to meet with witnesses and develop a complete mitigation examination. Questions as to why Rod Tullis was not called, why Dr. Brawley was not called, why a prison

adaptability was not called, why they did not choose to follow up on a Rusty Clevenger note concerning the fact that a person called the Solicitor's Office to inform him that he had been having an affair with the deceased and so forth will be elicited from Attorney Quimby.

The defense's potential witness list provided that, among others, Rod Tullis and Tora Brawley would be considered expert witnesses. General questioning of Attorney Quimby will be about the preparation of the case.

- 9) **Dr. Margaret Melikian:** The psychiatrist retained by the defense, will testify as to the fact that she had insufficient time to properly prepare for her testimony; that she had insufficient social and family history (basically none) in order to evaluate and corroborate information provided by Marion Lindsey. Marion was the only person that she was able to interview. She will further testify that as a result of a much broader and thorough mitigation investigation that her testimony would have been different and that she would have been able to testify to the extreme depression that the Defendant was in at the time. In addition, she did not have the benefit of suicide notes or testimony from Rod Tullis.

Dr. Melikian will also testify to the fact that she was so concerned with the amount of time that she had to prepare for the case that she had a telephone call with Judge Few to affirmatively seek a continuance, which was left for her to communicate rather than the defense attorneys.

- 10) **Piedmont Legal Services:** The Defendant would offer into evidence a letter to Marion Lindsey dated May 7, 2002, from the SC Centers for Equal Justice,

commonly referred to as Piedmont Legal Services in Spartanburg, to show that Marion Lindsey had made application for assistance from legal aid. The relevance of this is that in cross-examination of most lay witnesses for Mr. Lindsey in the mitigation phase, Solicitor Gowdy continuously asked whether or not people who were friends of his would have helped him obtain the services of a lawyer if he was truly interested in seeing his children. The thrust of this communication was to show that Marion really had no intention of seeing his children or care about his children as a reason for being depressed, which ultimately led to Mrs. Lindsey's death. This document, coupled with Rod Tullis' testimony, the suicide notes and testimony from family members that was not brought out in the trial of the case, would be corroboration to his state of mind and another consideration as to why life in prison would be an appropriate alternative sentence.

- 11) **Janet Vogelsang - Licensed social worker/mitigation expert:** Jan will testify to the complete family and social history of the Defendant, including complete historical background not developed in the first trial. In addition to her testimony, there were a couple of instances in the trial of the case where Judge Few did not allow testimony from family members regarding family history in that they were not qualified to testify. A mitigation expert would have been able to provide this vital information.
- 12) **Dr. Tora Brawley:** briefly testify as to her testing of Marion Lindsey.
- 13) **Virginia Lindsey:** is the mother of Marion Lindsey. Although Mrs. Lindsey testified during the original trial of this case she is expected to testify that she had

very limited contact with Marion Lindsey's trial counsel prior to the trial and was unprepared to adequately testify during the sentencing phase of the trial. At this hearing, Mrs. Lindsey is expected to testify regarding her personal history, events and influences during Marion Lindsey's childhood and Marion Lindsey's actions and state of mind during the weeks preceding the shooting.

Regarding the influences and events in Marion Lindsey's life, Mrs. Lindsey's testimony is expected to include a description of the families' poverty and dysfunctional home life, the patterns of family violence and criminal activities, specific problems experienced by Marion Lindsey during his childhood, his relationship with Nell Lindsey and the events of the weeks preceding the shooting. Specifically she is expected to testify about the trauma experienced by Marion Lindsey when he ingested kerosene at a young age, the trauma he experienced when he was run over by an automobile, his lack of a relationship with his father, his academic difficulties, his exposure to extreme acts of violence by his family members and previous mental health issues including prior suicide attempts.

Regarding the weeks preceding the shooting of Nell Lindsey, Mrs. Lindsey is expected to testify about Marion Lindsey's rebuffed attempts to see his children, the effect on Marion Lindsey of being unable to see his children and an evening during which Marion Lindsey expressed an intention to commit suicide.

- 14) **Bessie Smith:** is the maternal aunt of Marion Lindsey. Mrs. Smith also testified during the sentencing phase, however, her testimony was limited to the description of Marion Lindsey's uncles burning his cat alive during his childhood. While this

event is very important, Mrs. Smith had other information which should have been presented to the jury. Mrs. Smith will testify that, like Mrs. Lindsey, she had very little contact with Mr. Lindsey's defense team prior to trial and had very little assistance in preparing her testimony.

Mrs. Smith is expected to testify about Marion Lindsey's family history, the events and influences in his life and his actions and state of mind during the weeks preceding the shooting of Nell Lindsey. Mrs. Smith will be able to testify about the type of parenting and guidance Marion Lindsey received as a child, the violent behavior of Mr. Lindsey's family member and his educational and emotional difficulties as a child and adolescent. Mrs. Smith is expected to testify about the period of time when Marion Lindsey came to live with her and her immediate family.

Mrs. Smith can describe for the Court the evening shortly before the shooting when Mr. Lindsey expressed an intention to commit suicide. She can describe Mr. Lindsey's actions that evening, his families' response and the lack of follow up treatment or help he received. Mrs. Smith is also expected to testify that she observed his continued depression up until the day before the shooting when she had a telephone conversation with Mr. Lindsey about the situation with his wife, Nell Lindsey.

- 15) **Steve Pilgrim:** is the maternal uncle of Marion Lindsey. Mr. Pilgrim was another witness who did testify during the sentencing phase, but who had very limited contact with Mr. Lindsey's trial team.

Mr. Pilgrim is expected to testify about Mr. Lindsey's life from infancy through adulthood. Mr. Pilgrim lived with Marion Lindsey during the first several years of his life and remained in close contact with him after they began living in separate homes. He can testify about the details of the incident when Mr. Lindsey was run over as a child and the evening Mr. Lindsey stated he was going to commit suicide. Mr. Pilgrim is also expected to testify about Mr. Lindsey's efforts to locate a gun to use to commit suicide during the weeks preceding the shooting.

Mr. Pilgrim is also expected to testify that he was told by Mr. Lindsey's trial team not to request that the jury have mercy on Mr. Lindsey and sentence him to life in prison instead of death.

- 16) **Tim Sims:** is the younger brother of Marion Lindsey. Mr. Sims was probably the closest person to Marion Lindsey and know more information about his personal history and state of mind during the weeks preceding the shooting. Despite his close relationship with Marion Lindsey, Mr. Sims was never given the opportunity to meet with Marion Lindsey's trial attorneys and was not allowed to testify at trial despite specifically asking the attorneys during the trial to allow him to testify during the sentencing phase.

Like the other family members, Mr. Sims can give information about the home environment he and Marion Lindsey grew up in and the events during the weeks prior to the shooting. Mr. Sims differs from the other family members in that he had more frequent and close contact with Marion Lindsey during the weeks preceding the shooting. Because of his frequent and close contact, Mr. Sims was the

best person to describe his actions and state of mind during this time. Mr. Sims is expected to testify that he knew of telephone conversation between Marion Lindsey and a friend of Nell Lindsey during which Marion Lindsey was told that Nell Lindsey was dating a new man who was going to replace Marion Lindsey as the father to his children. Shortly before the shooting, Mr. Sims was a party to a telephone call between Marion Lindsey and Nell Lindsey in which Nell Lindsey told Marion Lindsey he would never see his children again.

CONCLUSION

Due to the testimony presented above and additional evidence to be submitted through the examination of the witnesses at the Post Conviction Relief Hearing, the Applicant is entitled to post conviction relief.

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Date: _____

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

} COURT OF COMMON PLEAS NONJURY

3
4 MARION ALEXANDER LINDSEY, #6015, }

TRANSCRIPT

5 APPLICANT, }

OF

6 VS. }

RECORD

7 STATE OF SOUTH CAROLINA, }

07-CP-42-2848

8 RESPONDENT.

9
10 July 19th - 21st, 2010
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE PAUL M. BURCH, Judge.

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

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17 ESQ.
18 Attorneys for the Applicant

19 DONALD ZELENKA and ALPHONSO SIMON
20 ASSISTANT ATTORNEY GENERAL
Attorneys for the Respondent

21
22
23 PAMELA E. GREEN
24 Circuit Court Reporter
25 Seventh Judicial Circuit

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P R O C E E D I N G S

(Whereupon, Applicant's Exhibit Nos. 1 through 22 were marked and agreed by all parties to be received into evidence at this time.)

THE COURT: All right. Good morning, everybody.

MR. VIETH: Morning, Your Honor.

MR. ZELENKA: Morning, Judge.

THE COURT: I hope everybody is doing, doing well and we'll move forward with the case that we have scheduled this week. It's The State of South Carolina in the Marion Alexander Lindsey matter. The actual reference on it is 2007-CP-42-2848.

MR. VIETH: Please the Court?

THE COURT: Counsel.

MR. VIETH: Please the Court.

Before we get started, I have been asked by Mr. Lindsey if there's anyway he could have a free hand to write with. I don't know if there's a security breach to do that, but I'm, I'm asking if that's a possibility, that one cuff be removed. If not, I understand either way.

THE COURT: If -- he's got leg shackles?

MR. VIETH: He's got, he's got his hands here.

Yet, you can't write, can you?

(The Applicant nods negatively.)

1 MR. VIETH: He can't make any notes for me if he needed
2 to.

3 THE COURT: I will grant that request. We can free his
4 hands. But make sure he's got leg shackles that are secure.

5 APPLICANT: Thank you.

6 MR. VIETH: Thank you.

7 Your Honor, while that's being done, I have given the
8 Court a copy of a document that I have just referred to as
9 kind of a pretrial road map. I'm gonna make a copy
10 available for the Clerk of Court to be filed with the, with
11 the record whenever the clerk comes in. So---

12 THE COURT: Okay.

13 MR. VIETH: ---I'll file that as a document.

14 THE COURT: Okay. Madam Court Reporter, if you would,
15 keep track of it until one of them checks in.

16 MR. VIETH: Please the Court, Your Honor, unless the
17 Court wants some preliminary remarks or comments I'll just
18 call witnesses. However the Court pleases.

19 THE COURT: I'll leave that up to you. I'm pretty
20 familiar with everything that's been passed up though as far
21 as the file.

22 MR. VIETH: All right.

23 THE COURT: So, if you're ready to proceed.

24 MR. VIETH: Yes, sir, we call, call Doug Brannon.

25 DOUG BRANNON, being first duly

Doug Brannon - Direct examination
by Mr. Vieth

1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. VIETH:

4 Q Good morning---

5 A Good morning.

6 Q ---Mr. Brannon.

7 Doug, would you please state your name and occupation?

8 A My full name is Norman Douglas Brannon. I'm an
9 attorney here in Spartanburg, South Carolina.

10 Q All right. When did you receive your license to
11 practice in South Carolina?

12 A I was sworn into the bar in May of 2001.

13 Q Okay. And where did you complete your education with
14 legal training?

15 A I graduated from the University of South Carolina
16 School of Law.

17 Q Okay. All right. When did you start working in
18 Spartanburg?

19 A The day I got sworn in.

20 Q 2001?

21 A Yes, sir.

22 Q So, you're a life long resident of this county, are you
23 not?

24 A Not life long, but my entire adult life.

25 Q Okay. Well, where do you live now?

Doug Brannon - Direct examination
by Mr. Vieth

1 A I live in Landrum, South Carolina.

2 Q All right. And what was the first job that you had
3 when you started practicing law in 2001?

4 Did you open your own practice?

5 A Private practice, yes. Private, yes.

6 Q Okay. You didn't go in with anyone in particular at
7 that time?

8 A No, I did not.

9 Q Okay. What was the nature of your practice from 2001
10 till 2004?

11 A Criminal defense and Family Court law.

12 Q Okay. In 2001, two, and three, you were then
13 developing your law practice, fair to say?

14 A Yes, that's, that's fair to say.

15 Q Okay. And primarily interested in doing criminal
16 defense work and Family Court work?

17 A Primarily interested in criminal defense, but I did
18 Family Court to, to stay busy.

19 Q That's right. Yeah, as we all do.

20 A Yeah.

21 Q And in that capacity, did you ever get involved with a
22 murder case prior to the Marion Lindsey case?

23 A Yes.

24 Q Okay. Capital or non-capital?

25 A It was -- Marion Lindsey's was the first and only

Doug Brannon - Direct examination
by Mr. Vieth

1 capital case that I've been involved in.

2 Q Okay. How did it come to be that you were asked to get
3 involved in the Lindsey case?

4 A I had, I guess, made it, made it known that I would
5 like to, I would like to work on a capital case.

6 Q Okay.

7 A But as far as how I got involved in this one, I can
8 tell you Mr. Bartosh called me and said, look, I've got a
9 capital case, I need a second chair, would you be
10 interested, and I said yes.

11 Q Okay. Do your notes or memory recall when you got
12 involved with this case?

13 A It was March of '04.

14 Q Okay. So, time records that, that we have from you
15 would be a valid recitation of when you got involved?

16 A Yes, that is correct.

17 MR. VIETH: All right. And, Your Honor, we have
18 stipulated to pretty much all the exhibits, and referring to
19 Exhibit No. 1, which is in evidence without objection, it is
20 your time records?

21 A Right.

22 Q And you've reviewed them for this hearing?

23 A Yes.

24 Q And---

25 MR. ZELENKA: Your Honor, for the record, we don't have

Doug Brannon - Direct examination
by Mr. Vieth

1 any objection to State's, to Defense Exhibit 1.

2 THE COURT: All right.

3 MR. VIETH: Thank you.

4 Q So, referring to that document, Mr. Brannon, it
5 indicates that Judge Few actually appointed you on March 5,
6 2004?

7 A That would be correct.

8 Q Or that -- I'll be glad to let you see these if you
9 need to.

10 A That's fine.

11 Q All right. And for the record, the, the trial of this
12 case started May 17th, 2004?

13 A Right.

14 Q Is that correct?

15 So, you had about a month of, a month and a half at the
16 most before this trial began to get ready for a death
17 penalty trial?

18 A That's right. Like I said earlier, when Mr. Bartosh
19 called me, I, I remember it because I was actually on the
20 way to the detention center to see another client. Mike
21 asked me if I, if I wanted to be second chair, I said yes,
22 and I think Bartosh and I went to the jail the next day,
23 which would of been the first time that I'd met Mr. Lindsey.

24 Q All right. Let me show you, in fairness to, to you on
25 this matter, you've got on your Office of Indigent Defense

Doug Brannon - Direct examination
by Mr. Vieth

1 attorney time sheet, first meeting with client, 3/12/04.

2 Would that mean that you actually met with him before
3 that Court order was signed?

4 A Probably. No, no, I didn't meet with him before the
5 Court order was signed, but---

6 Q All right. Let me just---

7 A Yeah.

8 Q The Court order was March 5?

9 A Right.

10 Q Okay. You saw him March 12?

11 A Yeah, yeah.

12 Q So, right after that was signed---

13 A Yeah.

14 Q ---you went to see him?

15 A Right.

16 Q So, March 12 is your initial meeting with, with
17 Mr. Lindsey, is that correct

18 A I'm confident that the dates I wrote down were---

19 Q Right.

20 A ---were actual dates.

21 Q Correct.

22 So, the record speaks for itself --

23 A Yes.

24 Q -- that we've introduced?

25 A Yes.

Doug Brannon - Direct examination
by Mr. Vieth

1 Q All right. And the total hours that the voucher
2 indicates you spent on this case out-of-court were 107
3 hours, what's on your voucher, and that would be, in the
4 total preparation of the case, pretrial, 107 hours you put
5 into this case by the fact that you're only asked to be in
6 it in March of '04?

7 A Right.

8 Q Okay. All right. Did you have any particular marching
9 orders, and if I, if, for lack of the better way to put it,
10 from Bartosh as to what your role in this case would be as
11 second chair?

12 A There was never any -- absolutely we did. Before I
13 even met Mr. Lindsey, my marching orders, to quote you, was
14 the guilt phase of the trial.

15 Q Okay. And you and I had met several months ago and had
16 a meeting in our office and talked about that---

17 A Right.

18 Q ---to the extent that, that basically you were told
19 your focus is to deal with the guilt phase of this case and,
20 and that Mr. Bartosh was kind of regimented in the way he
21 wanted to do things, is that fair?

22 A Exactly. Right.

23 Q Okay. So, as far as a second chair death penalty
24 attorney, did you feel that you were in that capacity when,
25 when you and Mike talked, you and Mr. Bartosh talked?

Doug Brannon - Direct examination
by Mr. Vieth

1 A Did I?

2 Q Were you -- yeah, maybe I'll rephrase it, the question
3 a little bit.

4 Given those instructions, did you feel you were doing
5 anything different than you would of done in the first
6 murder case you had before you got assigned to a death
7 penalty case?

8 A No, I---

9 Q Do you---

10 A I was preparing for a trial.

11 Q Okay.

12 A You know, the guilt phase of the trial. That was it.

13 Q Okay. And at that time, you did not have any knowledge
14 of what a prison adaptability expert would be, is that
15 correct?

16 A That's correct.

17 Q A social historian would be, is that correct?

18 A That's correct.

19 Q And your focus was to see if there was any issues to be
20 developed in the guilt phase of the shooting involving
21 Marion's wife, is that right?

22 A That's correct.

23 Q And is that what you did?

24 A That's what I did.

25 Q Okay. And was Mr. Bartosh solely involved in the

Doug Brannon - Direct examination
by Mr. Vieth

1 mitigation phase until Karen Quimby came on board?

2 A Yes.

3 Q Okay. And, and I believe you were on board before
4 Karen came on board?

5 A Right, in fact, I didn't know Ms. Quimby was involved
6 in the case until she appeared at a meeting that, she was
7 sitting in on a meeting that Mike and I had and Karen was
8 there, and I know that she's a meticulous note taker and,
9 and was a great research attorney.

10 Q Okay. Was -- do you know, of your own recollection,
11 Doug, whether she was involved in a death penalty case
12 immediately preceding this trial?

13 A I didn't know it at the time. But I do now know that
14 she had worked on a death penalty case maybe a month before
15 or something. I mean a short time before Mr. Lindsey's
16 trial came up.

17 Q She had just completed one?

18 A Correct.

19 Q Right.

20 When you got into the actual trial prep that, that your
21 ledger card indicates from five, May 8 -- well, actually May
22 7 until jury selection on May 17, the days that you were
23 dealing with trial prep, did you meet with any of Marion
24 Lindsey's family?

25 A Yes, his mother.

Doug Brannon - Direct examination
by Mr. Vieth

1 Q Okay.

2 A And I think we met with one of his brothers. I'm not
3 sure. But I know that I actually had a conversation with
4 his mother at her apartment and it was on a Saturday. But I
5 don't remember what day that was.

6 Q Okay. Do you recall why you met Virginia Lindsey?

7 A It was to prepare for her testimony in the guilt phase
8 of the trial.

9 Q Okay.

10 A But, but we didn't -- I, I can't -- Mrs. Lenora Topp
11 was with me. So, the questions were not limited to only the
12 guilt phase. It was really just we were getting a
13 historical, we were getting a historical background is what
14 we were doing.

15 Q Okay. So, Mrs. Lenora, who, the mitigation
16 investigator for y'all, was, was with you?

17 A Yes.

18 Q Okay. Was part of the guilt phase issues his state of
19 mind, Marion's state of mind?

20 A Yeah, I mean his state of mind being that, that his
21 wife had, had left him and taken the children, the two
22 children, and that he wasn't being permitted to see them or
23 talk to them, and, and I mean he had told us that she had
24 said she was gonna take the boys and she was gonna leave and
25 he would never see them again.

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1 Q All right. Did he also indicate any concerns about
2 infidelity with his wife or by his wife?

3 A There was some talk about a boyfriend, but nothing that
4 we could ever put -- nothing that I, that I could ever
5 prove.

6 Q All right. I'm gonna show you what has been marked as
7 Exhibit 14, Rusty Clevenger note, that we have already
8 agreed to put into evidence, and ask you, you may or may not
9 have never ever seen this, Mr. Brannon, but take a minute
10 and read that note from Rusty Clevenger's office.

11 MR. ZELENKA: Your Honor, we do not have any objection
12 to Applicant's Exhibit 14 as a document which came from the
13 Public Defender's file.

14 THE COURT: Okay.

15 Q Just read it first.

16 A I, I can't tell you that I've ever seen that document
17 before.

18 Q Okay. Rusty Clevenger, for the record, was an
19 investigator with the Solicitor's Office?

20 A Right.

21 Q Is that correct?

22 A Right.

23 Q So, as part of the discovery provided to you or to
24 your, to the Public Defender's Office, there was an
25 indication that a person by the name of Mike Stewart had

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by Mr. Vieth

1 called and indicated that he had had sexual relations with
2 the victim, and then this apparently, and I can get this
3 through Ms. Quimby tomorrow, I suppose this is a little
4 stickum that was on here that says the boyfriend found in
5 the back of something otherwise very harmless or something
6 like that, what you want us to do anything with, that's not
7 your handwriting?

8 A That's, that's not -- that's Ms. Quimby's writing.

9 Q Okay. So, you didn't have any of this to even
10 follow-up on this report, did you?

11 You never seen it till today?

12 A Not that I'm aware of, no.

13 Q Okay. Do you think that would of been something you
14 would of been interested in knowing?

15 A Well, interested, yes. But the problem, the problem
16 that, that I had, from a, from a, from a guilt phase defense
17 prospective, was we were -- I felt like we were always in a
18 box because there were also witnesses that would have or
19 potentially would of testified that Marion had a girlfriend
20 or another girlfriend at the same time.

21 Q Okay.

22 A So, it, it really wasn't if Nell was being faithful or
23 not. It was the children. That was what we were focused on
24 was her keeping the children away from him as opposed to her
25 having a boyfriend or him having a girlfriend because if we

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by Mr. Vieth

1 had put, even if we, even if I had had that document or if I
2 could have verified that she was seeing someone else, then
3 the State would of put someone else up to say well, so was
4 he.

5 Q All right. I understand.

6 A Yeah.

7 Q I understand.

8 So, from the guilt phase of the trial, this may not
9 have had much importance as maybe in a sentencing phase to
10 show state of mind?

11 A That would -- that was, that was my position, yes.
12 That was my trial strategy.

13 Q Okay and that's fine.

14 And so, with regards to the, to the children issue,
15 that he didn't get to see his children---

16 A Right.

17 Q ---which was a big concern of his, is that fair to say?

18 A Yes.

19 Q Did you ever know of Rod Tullis' involvement in this
20 case at that time in your investigation?

21 A I, I knew, I knew that Rod had gotten a phone call.
22 Well, Rod had gotten a, a message on his phone from
23 Mr. Lindsey and---

24 Q Let me stop you there for the Court's benefit.
25 Who is Rod Tullis?

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by Mr. Vieth

1 A Rod Tullis is a gentleman from Spartanburg who, who, at
2 the time of Mr. Lindsey's charge when he was arrested and
3 charged with this crime, he was an attorney practicing law
4 here in Spartanburg.

5 Q Okay.

6 A And apparently Rod had represented Mr. Lindsey in the
7 past. They had some kind of a relationship. I know that
8 Rod sent a letter to, I think to the detention center saying
9 that he was going to be representing Mr. Lindsey and that he
10 was invoking his Fifth Amendment right. But the, the phone
11 call, the taped message, excuse me---

12 Q Uh-huh. (Affirmative).

13 A ---was, I think, Mr. Lindsey telling Rod that he was
14 gonna commit suicide. Now, it's my understanding that there
15 was a letter that, a suicide note that Mr. Tullis got after
16 the phone call, and I'm not sure that I ever saw the letter.
17 I think, I think I did, but I'm not sure that I ever saw a
18 suicide letter. Okay.

19 Q Uh-huh. (Affirmative).

20 A But I know, I knew about the phone call.

21 Q Uh-huh. (Affirmative).

22 Okay. You -- did you ever speak with Mr. Tullis?

23 A I didn't, no.

24 Q Do you know whether Mr. Bartosh ever spoke with
25 Mr. Tullis?

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by Mr. Vieth

1 A I think they did because Bartosh and, and Rod were,
2 were friends.

3 Q Okay. And for whatever reason, Mr. Tullis was not
4 called in the trial of this case, either for the guilt phase
5 or sentencing phase, is that correct?

6 A He was on the witness list and was intended to be
7 called during the sentencing phase, but, no, he was not
8 called.

9 Q Okay. Were you familiar with the fact that Mr. Lindsey
10 had gone to see someone at Piedmont Legal Services about
11 three or four months before the shooting to seek advice and
12 potentially representation on a domestic matter with him and
13 Nell?

14 Were you familiar with that?

15 A I didn't know that, no.

16 Q Okay. When you were in the whole trial of this case,
17 and without going into the transcript, is it fair to say
18 that some of the questions that were asked by the prosecutor
19 in that trial to, to lay witnesses was to the effect that if
20 Mr. Lindsey had needed help in getting to see his children,
21 they would of helped him financially to see a lawyer or
22 something of that effect?

23 A There were questions of that nature asked, yes.

24 Q All right. Which clearly was to indicate that he
25 didn't care about the children or they, he would of gone to

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by Mr. Vieth

1 seek help?

2 A That was, that was what they were trying to get at,
3 yes.

4 Q That's correct.

5 And nothing was ever introduced into the record to show
6 that, in fact, he had tried to see his children by either
7 going to Piedmont Legal or to Rod Tullis?

8 A Well, no, nothing to that effect, but, but his mother
9 was called as a witness and, and she testified that even she
10 had been prevented from seeing the children.

11 Q Uh-huh. (Affirmative).

12 A So, I mean, I mean that, that evidence, that testimony
13 was, was, was put forth.

14 Q Right.

15 But obviously she didn't go seek help to get
16 grandparent---

17 A No, no.

18 Q ---visitation?

19 A No.

20 Q Okay. To, to be safe, the, the issues of future
21 adaptability, clinical social worker involvement, and also
22 like a mitigation expert to testify, those issues were not
23 within your purview and no reason for me to ask you any
24 questions about those, is that correct?

25 A That would be correct, yes.

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by Mr. Vieth

1 Q Okay. What was done or not done in the sentencing
2 phase essentially was outside your purview for this trial?

3 A Right. I'm sure that Mr. Bartosh and Ms. Quimby met
4 more frequently than Bartosh and I did because they were in
5 the same office at the Public Defender's Office, and I'm not
6 suggesting that Mike, that I didn't have enough access to
7 Bartosh. That's not what I'm saying. But I'm sure that
8 Quimby met much more frequently than I did with him.

9 Q Okay.

10 A What we really worked on together was the, the jury and
11 stuff like that. He did his sentencing phase, I did my
12 guilt phase, and then the matters that we needed to work on
13 together, like the jury, we did those things together.

14 Q All right. And, and the -- lastly, I think I want to
15 ask co-counsel of any questions I need to ask you, but, but
16 given Mr., Doug, that, that, that he was indicted on
17 October 7th, 2002, and a trial starts in May of '04, and
18 he goes to William S. Hall Psychiatric for an evaluation in
19 '03, is it your impression that nothing was done on this
20 case to prepare for this trial until the Spring of '04?

21 A No, I wouldn't say that. I wouldn't say that at all.

22 Q All right. What was then?

23 A Well, by the time that I got involved, Mrs. Lenora Topp
24 was already working on the case. Mr. Bartosh and Mr.
25 Lindsey had a, a relationship developed. So, Mike had

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1 spent, I would believe, a significant amount of time with
2 Marion at the detention center. I know that Mike had
3 already talked with potential witnesses in the case or, or
4 at least Lenora had talked to them and Mike had notes on
5 meetings. I wasn't present. So, I don't know if they were
6 face-to-face or anything like that. But, no, I wouldn't say
7 that nothing was done.

8 Q Okay. Well, okay. Maybe that's a bad way to look at
9 it.

10 That, that -- all of the work would be fact finding and
11 gathering of information for either side of the trial would
12 be coming when Lenora Topp got involved. She's your
13 mitigation investigator.

14 You didn't do any investigation?

15 A Not before I was -- no, not before I was appointed, no.

16 Q That's right.

17 Okay. And, and, of course, for the record, Mr. Bartosh
18 is now deceased?

19 A Correct.

20 Q Is that correct?

21 And, and, so, with -- the reason I'm having to ask
22 questions of you and Karen is I don't have anyone else to
23 ask?

24 A Right.

25 Q And, so, if Karen gets on board 30 days before the

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by Mr. Vieth

1 trial, and you get on board about 45 days before the trial,
2 anything that was done before you two hopped on board was
3 either under Lenora's watch or Mike by himself?

4 A Yes. Now, I will tell you that the Public Defender's
5 office has investigators that work, that works for that
6 office. So, there may of been other investigators before
7 Lenora got a, became involved. But I don't know anything,
8 you know.

9 Q Yeah.

10 Okay. You weren't handed a packet of anything when you
11 got on says here's where we are now or---

12 A No.

13 Q ---or anything like that?

14 A No.

15 MR. VIETH: Give me one second, judge, to see if
16 there's anything else.

17 (Pause.)

18 Q Let me ask you just if you recall, in the end of the
19 case, apparently Mr. Lindsey had a letter he wanted to read
20 to the Court and do you recall whether that was allowed to
21 be read and, if not, why?

22 A Well, he, he had written the letter before, I think it
23 was the night before, it may of been a couple of nights
24 before he had the opportunity to speak to the jury, and the
25 letter had some, some inappropriate language and/or

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1 inappropriate statements included in it, and I remember
2 sitting at the table and Mike took a pen and crossed some of
3 the statements out and said you can't say this or you can't
4 say it this way, and Marion read over the letter again after
5 Mike had done the redacting that he, that he had done at
6 the, at the table, and then when Marion got up to speak,
7 let's just say he went off script. He, he didn't, he didn't
8 read the words that were left. Okay.

9 Q Okay. All right. And one last -- well, never mind, I
10 can get that in through Ms. Quimby tomorrow morning. I
11 think that's all the questions I have of you. Thank you
12 very much.

13 A Sure.

14 THE COURT: Your witness.

15 MR. ZELENKA: Thank you.

16 CROSS-EXAMINATION

17 BY MR. ZELENKA:

18 Q Mr. Brannon, when you were appointed to represent the
19 defendant in March of 2004, briefly describe the felony
20 trial experience you had at that time.

21 A I had tried a lot of cases. But if you're asking me
22 numbers of cases, I, I, I mean I tried an armed robbery
23 trial the week after I got sworn into the bar. So, I mean I
24 was in court a lot. What I did was I, because I, I wasn't
25 the typical law student, I was in my 30's when I went to law

Doug Brannon - Cross-examination
by Mr. Zelenka

1 school, as soon, the day that I got sworn into the bar I
2 sent out letters to all of the attorneys in Spartanburg that
3 did criminal defense work, and I said, look, I'll take any
4 of your appointed cases, you know, just for the opportunity
5 to, to have the work.

6 And so, I, I know, prior to Mr. Lindsey's trial, I
7 believe I had tried three murders. A lot. But I don't know
8 a number. I'm sorry. I don't know a number.

9 Q Okay. Did you attend criminal law CLE programs?

10 A Certainly, yes.

11 Q As part of those programs, did some of those concern
12 capital trials, death penalty trials?

13 A Yes, they did, and, in fact, I had been to the bar
14 convention just before it was the end of January '04, and
15 the keynote speaker at the criminal defense, that day long
16 seminar on Friday, was one of the -- he's an attorney from,
17 from Duke University and he specialized in jury selection
18 for capital cases. But I had done a lot of CLE's on
19 criminal defense work and I had done another one on capital,
20 defense in a capital case. But that one was important
21 because we had actually used that man and some of his, his
22 subordinates in selecting Mr. Lindsey's trial.

23 Q Okay. Did the, the defense team contact him?

24 A I did, yes.

25 Q You did?

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by Mr. Zelenka

1 A Yes.

2 Q And did you give him an understanding of the theme of
3 the case that you're going to present to the jury?

4 A We did and we -- I mean we -- I sent, I sent all of the
5 documentation that they asked for. Now, I can tell you that
6 I only talked to that professor one time and then he kind of
7 farmed it out to his underlings, but they made it clear that
8 they would not be able to come to Spartanburg for jury
9 selection, but that they could look at the documents and the
10 jury list and they could tell us, you know, they could, they
11 could, could give us what they would be looking for. Okay.

12 Q And that was based upon the type of case you were gonna
13 present?

14 A That's right. That's right.

15 Q And essentially describe what was the theme of the case
16 that, that you understood the defense team was gonna present
17 to defend Mr. Lindsey.

18 A Well, from the guilt phase, the defense was the only
19 thing that he had in his life was these two children.
20 Marion didn't know his father when he was growing up.
21 Marion Lindsey had a terrible life, I mean a miserable life,
22 and, and the, the theme that he portrayed throughout my
23 meetings with him and with Mr. Bartosh was he didn't want
24 his boys to grow up the way he grew up.

25 So, really the theme throughout the whole case, guilt

Doug Brannon - Cross-examination
by Mr. Zelenka

1 and sentencing, was to attempt to show the tragic life that
2 Marion Lindsey was forced to lead. But through the guilt
3 phase, it was the only thing I have in my life has been
4 taken away from me. I, I can't even talk to my children and
5 I snapped. That was it.

6 Q Okay. With an understanding of that theme as you
7 presented it to the law professor that, that you had
8 contacted, did they give you questions, theories to utilize
9 on particular jurors?

10 A I can't say they gave us questions. But they, they,
11 they gave us -- they gave us a list of jurors that they did
12 not believe would be suitable for this case.

13 Q Okay. And did you utilize that theme in your
14 examination of the jurors that you examined?

15 A Yeah, we, we, we met for two or three days, I don't
16 remember, it's on that, on that hour sheet that I submitted,
17 but I know we, we spent, when I say we, me, and Mike
18 Bartosh, and Karen Quimby, and I think Mrs. Topp, was
19 involved in some of those discussions where we, we spent
20 days just going over the jury list and, and saying well,
21 this is what the experts are saying about this juror. Okay.

22 Q Okay. And this was before the actual voir dire began?

23 A Oh, yeah, it, it -- absolutely.

24 Q Okay. And with that whittling down of those jurors,
25 what was your role in presenting to the jurors?

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by Mr. Zelenka

1 A The, the, the general rule was, after they did the, the
2 opening, the initial qualification in the roll call, then
3 Judge Few broke the, the jury panel down into ten member
4 groups, I guess, and, and he let all of the groups go
5 except -- the first, the first night after the initial
6 qualification, it was, it was late. I think we questioned
7 that first group of ten until eight or nine o'clock at
8 night. But I know that we only questioned one group that
9 first night I think, and the way we had talked about it was
10 Bartosh would take a group, then I would take a group, and
11 then Bartosh would take a group.

12 But we did have a list of jurors that we did not want
13 to sit on our jury, and if one of those jurors appeared in a
14 in, in a group of ten that was going to be questioned by
15 Bartosh, I would take that juror. So, I was -- it was, it
16 was my job to get rid of a juror if we had determined ahead
17 of time that we didn't want that juror. Now, there were a
18 lot of jurors that, based on these questions in the voir
19 dire, that came up -- it was clear we didn't want them and,
20 and, you know, Mike would handle those. But the ones that
21 we had targeted ahead of time we knew we didn't want, I
22 would question those jurors.

23 Q Okay. And you took roughly 24 of the jurors in your
24 inquiries according to the record, is that about right?

25 A Probably.

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by Mr. Zelenka

1 Q okay.

2 A But I was stopped from questioning any further jurors.

3 Q okay. Now, when you became involved in the case in
4 March, 2004, according to your voucher, you first met with
5 your client, Marion Lindsey, it appears to be March 12th,
6 2004?

7 A Yeah.

8 Q Does that appear to be correct?

9 A Yeah.

10 Q And describe your first interview with Marion Lindsey,
11 your factors that stood out with that interview with
12 Mr. Lindsey that may of impacted upon how you handled or how
13 you saw the defense handling Mr. Lindsey's case.

14 A I went over to the Public Defender's Office, and then
15 I, I rode over to the detention center in, in Mr. Bartosh's
16 car, and Mike said something along the lines of Marion is a
17 unique character, and we got over to the detention center
18 and Pod 5 is the, is the, is the lock down pod. And when we
19 got in there, they brought Marion in and there were four
20 chairs around the table. Actually, actually there weren't
21 four chairs around the table. There were four chairs in the
22 room and three chairs around the table, and Marion sat down
23 and I went to sit in the chair next to him and he said no,
24 no, no, no, don't sit there. And, and I said okay, why not
25 and he said cause Jimmy sits in that chair, and I looked at

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1 Bartosh and he just kind of pointed at the other chair that
2 was away from the table and I went and drug the chair up to
3 the table and I sat there.

4 So, every time I met with Marion Lindsey there was an
5 empty chair sitting at the table. Now, sometimes when I met
6 with Marion it was with me and Mr. Bartosh and sometimes it
7 was with me and Ms. Quimby. But there were two or three
8 occasions where it was just he and I, but there was always
9 an empty chair sitting at the table.

10 Q Okay.

11 A After we met and left for that day, when we got
12 outside, Mike said something to the effect of I guess I
13 should of told you about Jimmy, and, and I came to learn
14 about Jimmy afterwards reading some of the reports. You
15 know, it, it dated back to when he was a much younger person
16 and, and was in a hospital and the roommate that he had he
17 said he looked like Charles Manson. But, but other than
18 that, Marion was a very friendly -- the conversations were,
19 were cordial. If you asked a question Marion would answer
20 the question.

21 The, the only, and I'm not gonna say problem, but the
22 only thing that, that, that I, that I had trouble with or
23 couldn't get Marion to understand was there were things that
24 he wanted to talk about that didn't really have anything to
25 do with the, the case. There was an allegation of Nell's

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1 mother stealing his motorcycle and we looked into that, and,
2 and there, there wasn't anything -- that didn't have
3 anything to do with what happened at the Inman Police
4 Department. But he was a, he was a very cordial individual.
5 I never ever felt threatened in a room with him. I mean he
6 was -- we had friendly conversations.

7 Q Okay. Go back to the motorcycle thing.

8 A Yeah.

9 Q Your investigation of that, what did it resolve for you
10 as part of your defense?

11 A Marion had a motorcycle, and I don't remember exactly,
12 but I think he owed Nell's mother some money. That
13 motorcycle, she took that motorcycle in payment for the
14 money that, that he owed her. She took the motorcycle to a,
15 a motorcycle shop to have it sold. Marion gave us some
16 names. We had the investigator for the Public Defender's,
17 Defender's Office go and talk to the, the shop owner, and,
18 so, it -- I think he felt like she had stolen his
19 motorcycle, but it really had no relevance in the case.

20 Q Now, with respect to, to your role in the defense, you
21 testified it concerned the guilt phase, correct?

22 A Correct.

23 Q Were you aware that there were mental health issues
24 presented or suggested by the facts that, that you
25 described?

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by Mr. Zelenka

1 A Yeah, but we also had Narayan's report. I mean there
2 was no question that Marion's I.Q. was, was lower, but he,
3 he, he was not retarded in any way, and like I said, other
4 than Jimmy, if you asked Marion a question he gave you a
5 very lucid, clear answer, and, and he certainly is not the
6 only client I ever had that wanted to focus on issues that
7 they felt were important, but, but may not have been in the,
8 in the trial of the case.

9 Q Okay. With respect to the defense you were presenting,
10 was there -- what indication of reasons did Mr. Lindsey give
11 to you for the particular shooting?

12 A He snapped. That was it. His, his, his statements to
13 me and to Bartosh and basically to everyone were I -- he,
14 he, he was not contemplating the murder of his wife. He was
15 contemplating his own demise, his own suicide. But that day
16 he knew that was Nell, and he knew there were other people
17 in the car, but the other people weren't his children. So,
18 at that point he didn't even know who had his kids and
19 snapped.

20 Q Okay. And you were aware, from the prosecution's
21 discovery, that the EMS, at the time that they came upon the
22 scene, received some statements from the defendant, weren't
23 you?

24 A Yeah.

25 Q And, and those statements were essentially that, that

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by Mr. Zelenka

1 she had another boyfriend, is that correct?

2 A We -- yeah, I saw that in the, the -- I knew, I knew
3 that he had made those statements, yes.

4 Q Okay. And with that information, was that consistent
5 or inconsistent with the, the child as a basis or the
6 children's visitation as a basis?

7 A It was consistent because it wasn't just I'm not gonna
8 let you see the boys. It was I'm going to move away and you
9 will never see the boys again, and, and the boyfriend may
10 have been the means to move away.

11 Q Okay. Now, with respect to, to the visitation, how
12 long did Mr. Lindsey tell you that he had been denied access
13 to the children?

14 A About a month.

15 Q Okay.

16 A Now, it was about a month without seeing them, but
17 there was a period of time when she was letting him talk to
18 the boys. But then that had stopped too and I think that
19 stopped about a week before the shooting.

20 Q Okay. And when you were looking at it, did you make
21 inquiry of Mr. Lindsey as to whether he had sought lawyers
22 to represent him or assist him in the visitation itself or
23 the lack of visitation?

24 A I don't remember if I asked that question. I don't
25 remember that conversation. I don't. I don't.

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by Mr. Zelenka

1 Q But you did ask that question of Virginia Lindsey, is
2 that correct?

3 A That's -- yes. Well, no, no, I didn't ask her if she
4 went to see a lawyer. I asked her if she was being allowed
5 to see the boys.

6 Q Okay. And what information did you have, if any, that
7 Mr. Lindsey had sought out legal assistance?

8 A Other than him telling me that his lawyer had always
9 been Rod Tullis, I mean that was, that was the information
10 that we had. He, he thought of Rod Tullis as his attorney.

11 Q Okay. And with respect to that, did you ever listen to
12 the telephone message?

13 A No, I, I, I never heard that tape.

14 Q Okay. And how did you come to, to learn that such a
15 tape existed?

16 A Tullis had told Bartosh and Bartosh told me what he,
17 what his recollection of the, the, the audiotape was.

18 Q Okay. As part of your defense, be it guilt phase or
19 penalty phase, did you consider having that information
20 presented to the jury?

21 A Yeah, we did. But I'm not sure we could find Rod
22 Tullis at the time of, of this trial. Rod had come into
23 some problems and, and I'm not sure that he was even around
24 in May of '04.

25 Q Okay. Now, Rod Tullis was definitely on your witness

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by Mr. Zelenka

1 list---

2 A He was.

3 Q ---correct?

4 A He was.

5 Q In addition, Benjie Stewart was also on your list?

6 A Benjie Stevens.

7 Q Benjie Stevens.

8 A Stevens, right.

9 Q And do you recall why Benjie Stevens was on the list?

10 A It was my understanding that Mr. Lindsey had made an
11 appointment to see Ben Stevens, but never -- didn't attend
12 the appointment. Now, I don't know if the appointment was,
13 was sometime -- I don't know what the date of the, the
14 appointment was, but he never went to that appointment.

15 Q Okay. And he was not called as a witness either, was
16 he?

17 A No.

18 Q Now, as you prepared the case, you did take a witness
19 in the penalty phase of this trial?

20 A I did.

21 Q But primarily your role in the guilt phase was the
22 examination of, of the experts, forensic experts, who
23 testified at that point in the trial, correct?

24 A Correct.

25 Q The presentation of some of the, Virginia Lindsey as a

Doug Brannon - Cross-examination
by Mr. Zelenka

1 witness in that case, correct?

2 A Yeah.

3 Q You did the cross-examination of Celeste Nesbitt, the
4 driver of the vehicle---

5 A Uh-huh. (Affirmative).

6 Q ---that, that Nell was in with her family, correct?

7 A Yeah.

8 Q Officer Godfrey, you did the cross-examination of him,
9 the Inman police officer who is on the site at the time of
10 the shooting and, and shot at Mr. Lindsey, correct?

11 A Correct.

12 Q And you had reviewed those records, the discovery that
13 you had received from the State prior to that, isn't that
14 correct?

15 A Right.

16 Q You also had the opportunity, in addition to
17 cross-examining Randy Bogan and Dan Defreese from SLED, the
18 opportunity to cross-examine the pathologist in the case,
19 and you, you chose not to do that?

20 A Right.

21 Q Correct?

22 Now, you called as witnesses, in the guilt phase, Jason
23 Stewart, the EMS person --

24 A Uh-huh. (Affirmative).

25 Q -- who came on the scene was your first witness?

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by Mr. Zelenka

1 A Right.

2 Q Virginia Lindsey, the mother, correct?

3 A Right.

4 Q And Chris Wilkens, the cousin, correct?

5 A Uh-huh. (Affirmative).

6 Yeah.

7 Q And is it correct that your theory in presenting
8 Virginia Lindsey and Chris Wilkens was trying to inject in
9 this case the concern that your client had for the loss of,
10 of visitation?

11 A Yes, that was it.

12 Q And the mental impact that, that that was having upon
13 him at the time leading up to the tragic event?

14 A Yes.

15 Q Had you interviewed those folks---

16 A Yes.

17 Q ---before you called them as witnesses?

18 A Yes.

19 Q You had spoken to Mr. Stewart, correct?

20 A Yes.

21 Q So, you had spoken to Virginia Lindsey?

22 A Yes.

23 Q And Lenora Topp was, was in on that?

24 A Right.

25 Q Had Mrs. Topp previously spoken with Virginia Lindsey?

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by Mr. Zelenka

1 A I don't know. She may have cause she knew where
2 Mrs. Lindsey lived. So, I, I don't remember who drove that
3 Saturday that we went to see Mrs. Lindsey. But Lenora knew
4 where her apartment was. So, I'm -- I can't say that she
5 did or she didn't talk to her before, but I know that she
6 knew where she lived.

7 Q Okay. And as -- the information that you got from
8 Virginia Lindsey at the time in your pretrial preparation,
9 was it consistent with the information that she testified at
10 trial?

11 A Well, it was, it was consistent to a certain extent in
12 substance. But in her apartment, she was colorful and, and
13 I mean she cried at times. She was, she's, she was, she was
14 a very believable, very moving witness in her kitchen. She
15 was significantly less moving, less emotional on the witness
16 stand.

17 Q Okay. Kris Wilkins, the cousin that he was living with
18 at the time I think, how soon before the, the testimony in
19 the guilt phase of the trial did you meet with him?

20 A It would of been the same day that we talked with
21 Mrs. Lindsey.

22 Q Okay.

23 A So, I think it was the Saturday. It was, it was
24 approximately eight days before the trial started. It was,
25 it was not the Saturday before we, we started the jury

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by Mr. Zelenka

1 selection, but it was, it was the week before that.

2 Q Okay. Let me back up a little bit.

3 How much order of protection did you have prior to the
4 trial---

5 A Ten days.

6 Q ---of this case?

7 A Ten days.

8 Q Ten days.

9 A Yes.

10 Q So, you had the statutory ten days in which you were
11 relieved from any additional Court responsibilities---

12 A Right.

13 Q ---correct?

14 A Correct.

15 Q Up to that period of time, did you pretty much have a
16 full trial docket as far as a criminal defense lawyer
17 generally?

18 A Well, I, I, I would of had a, a full calendar for an
19 attorney who had been practicing for two and a half years.

20 Q Uh-huh. (Affirmative).

21 A But I was in private practice by myself and pretty much
22 if Bartosh called and said let's go do this or let's talk
23 about that, I, I made myself available to do that.

24 Q Okay.

25 A But I also know that -- I typically saw Marion Lindsey

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by Mr. Zelenka

1 in evenings. I would meet with him after five o'clock and
2 sometimes stay till 8:00 or 8:30 talking with Marion. The
3 investigators for the Public Defender's Office as well as
4 Mrs. Topp had my cell phone number, and I, I remember the,
5 the motorcycle incident, when the investigator from the
6 Public Defender's Office talked with that fellow that owned
7 the motorcycle shop, I was at one of my son's ball games and
8 we talked about the motorcycle at a ball game at, you know,
9 9:30, ten o'clock at night.

10 So, I was relatively busy, but I was never too busy
11 during, from March to May. If something came up with Marion
12 Lindsey's trial, I was available to deal with it.

13 Q Okay. Okay. Now, in addition to being aware of Doctor
14 Narayan's report, did you have any interaction or discussion
15 with Mr. Bartosh about Doctor Margaret Melikian, the
16 forensic psychiatrist who testified in the penalty phase, or
17 Doctor Tora Brawley, who had done a evaluation of the
18 defendant?

19 A Bartosh talked to me about both of those individuals
20 and, and what he believed the substance of their testimony
21 to be, and I can tell you that I was in his office one time
22 during a conference call or during a conversation that he
23 was having I believe it was with Doctor Melikian. So, I
24 was -- I sat in on that conversation. I don't know that I
25 interjected anything, but I was in on that.

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by Mr. Zelenka

1 Q Okay.

2 A But I think that day I was there to talk to him about
3 something else and that phone call came in.

4 Q Okay. With the information you, you learned about
5 Doctor Melikian's opinion, that didn't create, for you, a
6 potential defense of, of guilty but mentally ill or a lack
7 of criminal responsibility in your preparation for this
8 case, did it?

9 A No, because Bartosh and I both, we did talk about that.
10 We talked about that at length.

11 Q Okay.

12 A And no, it, it, it didn't.

13 Q Okay. If, if, if you recall, explain why it didn't.

14 A Well, the, the basis for everything on that subject was
15 Narayan's report, that he was malingering, and, and, and
16 that he was fully competent to stand trial and take part in
17 his defense or to assist in his defense. We talked about,
18 again, about the, the, just the terrible circumstances that
19 Marion grew up in. But we -- I mean we also -- the
20 knowledge that we had and that we knew the State had of the
21 life that Marion Lindsey led from the time he was 15 or 16
22 years of age until his arrest, I mean if, if something
23 broke, Marion could fix it. If -- Marion was the life of
24 any crowd that he was in. He was the center of attention in
25 the crowd. People liked to be around Marion Lindsey, and

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by Mr. Zelenka

1 then we knew that he had, for years, been involved in, in
2 the sale of drugs. I mean he was, he was a businessman and
3 we knew that the State knew all of that.

4 We -- the, the decision was to, to play the miserable
5 life and to play that he was just intelligent enough to pass
6 the tests. And, and if you add the miserable life with the,
7 the, the minimal intelligence level, then it was believable
8 that he did, in fact, snap on that day. I mean that's,
9 that's what the conversation, that's where the conversations
10 went.

11 Q Okay. Now, Mr. Brannon, you were aware of the
12 defendant's other history of alleged criminal violence
13 against Nell Lindsey which predated this incident?

14 A Yes.

15 Q Correct?

16 A Yes.

17 Q You were aware that in 19, August of 1996 there was a
18 report of criminal, criminal domestic violence,
19 October 1996, a report of criminal domestic violence, August
20 of 2000, another report, in December 2001, the Applebee's
21 incident, which was, in fact, presented at trial?

22 A Right.

23 Q You were aware of those matters in your discussion
24 prior to the beginning of this case?

25 A Yes.

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by Mr. Zelenka

1 Q You were also aware, weren't you, that, that
2 Mr. Lindsey also had incidents involving other females---

3 A Other people, yeah.

4 Q ---weren't you?

5 A Yeah.

6 Q Dating back to 1995?

7 A Yes.

8 Q And he also had other violent incidents involving
9 males, correct?

10 A Yes.

11 Q In addition to his conviction for the assault charge
12 against Mr. Wilkins, correct?

13 A Correct.

14 Q With that information, did you consider having
15 Mr. Lindsey testify in the guilt phase of the trial about
16 the impact that the loss, the apparent loss of visitation
17 with his children had on him at the time of the incident?

18 A Well, we, we had a conversation -- both myself and
19 Mr. Bartosh had a conversation with him about his decision
20 to testify or not testify, and, and we, we talked about
21 those arrests and charges and convictions that you just
22 enumerated as, as well as other potentially damaging
23 testimony that he would open up if he testified. Marion
24 clearly understood what we were saying to him. I mean we
25 certainly took the opinion that this was -- if there was, if

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by Mr. Zelenka

1 there was anything to work with at all in the guilt phase it
2 had to come from other witnesses.

3 Q Okay. So, as you realized, the State was trying to
4 basically impeach the theory of the lack of visitation by
5 suggesting that he could of sought out legal assistance?

6 A Uh-huh. (Affirmative).

7 Q Did that impact on, on your decision whether or not to
8 call Mr. Lindsey knowing that he would be a witness who
9 could testify about the reasoning, whether he made a, an
10 attempt to get legal assistance and with whom?

11 A Well, yeah, it, it certainly entered into the, into the
12 thought process. I'm not sure who I had this conversation
13 with. But the -- I think it was Quimby, but it, it, it
14 might of been Bartosh, I don't remember, but there was talk
15 about him going to Family Court. If, if you show the
16 convictions, the convictions and the arrests, and if you,
17 you know, if there'd been a temporary hearing in Family
18 Court where he was seeking visitation, and if Nell Lindsey
19 had put together a, a package of information for the Family
20 Court judge, I think it's pretty safe to say that his best
21 bet would of been supervised visitation, but he probably
22 would of been denied visitation given the historical
23 background.

24 Q Okay. So, that pretty much was a Catch 22 for you---

25 A Absolutely.

Doug Brannon - Cross-examination
by Mr. Zelenka

1 Q ---if he had done that?

2 A That's when -- every way we turned we were still inside
3 that box.

4 Q Okay. And, and you testified that the additional
5 problem about the boyfriend issue that I recall was it would
6 clearly open up impeachment to his other girlfriend?

7 A That's right.

8 Q And one of those girlfriends was in the car he was
9 actually in at the time of the incident---

10 A That's right.

11 Q ---isn't that correct?

12 A Yeah.

13 Q So, that was sort of already there, correct?

14 A Correct.

15 Q Which impeached that theory that that was something
16 that, that drove him to this, correct?

17 A Right.

18 Q And, in fact, showed, unfortunately for you, isn't it
19 correct, that he was a very controlling individual?

20 A Marion liked to be in control of everything, yes.

21 Q Even those who he couldn't control, correct?

22 A Correct.

23 Q And when that happened, historically that could lead to
24 violence, correct?

25 A Well, I mean that's what it looks like, yes.

Doug Brannon - Cross-examination
by Mr. Zelenka

- 1 Q Okay. Now, going to his prison adaptability, you
2 testified on direct that you weren't aware of prison
3 adaptability experts, correct, nor is that---
- 4 A Yeah. No, I mean I, I mean I had heard the term
5 before, but, but I was -- that wasn't, that wasn't my thing.
6 I mean I wasn't, I wasn't concerned about the sentencing
7 phase. So, that was Bartosh's thing. I was, I was focused
8 on putting the best possible defense that I could put up
9 without, without opening him up to something that would be
10 more damaging than, than the evidence I was putting forth.
- 11 Q Okay. But you were aware that his adaptability to
12 prison, good conduct in prison, based upon the seminars you
13 had gone to, was something that would be potentially
14 admissible evidence, correct?
- 15 A Correct, yes.
- 16 Q And based upon the meetings that you had at the
17 Spartanburg Detention Center, you had a general
18 understanding of his demeanor within that jail setting,
19 isn't that correct?
- 20 A Well, within the, within the confines of the conference
21 room, and, and, yeah, I mean, like I say, those
22 conversations were all cordial and, and fruitful I felt.
- 23 Q Okay. But weren't you also aware there had been at
24 least one jail incident of fighting while he was in the
25 detention center?

Doug Brannon - Cross-examination
by Mr. Zelenka

1 A Yeah, he got, he got into a fight while in the
2 detention center, yes.

3 Q And as a result of that fight, he, he did have a
4 disciplinary and a charge---

5 A Right.

6 Q ---within those records, correct?

7 A Yes, and he was on, he was on lock down. At least for
8 the first three or four weeks that I was involved in this
9 case he was on complete lock down and, and they would bring
10 him completely shackled into the, into the conference room.

11 Q Okay. When the, the case was being presented in the
12 penalty phase, with your understanding of the law, did you
13 think that it was, that Mr. Bartosh forgot something,
14 failing to put in evidence of his conduct in, in the jail?

15 MR. VIETH: Your Honor, I object to that. I don't see
16 how he could go in the state of mind of Mr. Bartosh. He, he
17 said he wasn't involved in the guilt, in the sentencing
18 phase and I asked him about prison adaptability. He said he
19 didn't know what it was. Now we're rehabilitating him to
20 say now well, I know why we didn't get a prison adaptability
21 expert. I don't think he knows the answer to that question
22 and he certainly can't say what Bartosh was thinking. Maybe
23 Quimby can do that.

24 MR. ZELENKA: That's why I'm asking it.

25 MR. VIETH: I just, just object to it.

Doug Brannon - Cross-examination
by Mr. Zelenka

1 THE COURT: All right. I'll give you some leeway.

2 I'll overrule the objection. But keep in mind now he's
3 already testified that he didn't have anything to do with
4 that aspect of the trial. But I'll -- go ahead.

5 Q Okay. You put in witnesses, a witness in the penalty
6 phase of the case, didn't you?

7 A One, yes.

8 Q Okay. And you understood the defense theory at the
9 time you were putting that witness in in the penalty phase
10 of the case, didn't you?

11 A Yeah. Yes, I did.

12 Q And you knew what witnesses, at that stage, Mr. Bartosh
13 was going to put in, didn't you?

14 A Yes.

15 Q And you knew that conduct in prison, in jail could be
16 presented as evidence, didn't you?

17 A I knew it, yes.

18 Q And there wasn't any jail guard on the witness list,
19 was there?

20 A I don't think so.

21 Q Okay. And, additionally, you were aware, as you said
22 before, of the jail incident at the time---

23 A Right.

24 Q ---that case was presented?

25 Did you have any information about the defendant's 1995

Doug Brannon - Cross-examination
by Mr. Zelenka

1 through 1996 incarceration in the Department of Corrections?

2 A I'm sorry. Did I know about it?

3 Q Yes.

4 A I knew that he was in prison.

5 Q Okay. Did you have any under, understanding of his
6 jail records, his---

7 A No.

8 Q ---disciplinary records---

9 A No. No.

10 Q ---of that type?

11 A No.

12 Q Okay. Did -- were you present when Doctor Melikian was
13 testifying in Court?

14 A Yeah, I was in the courtroom the whole time, yeah.

15 Q Okay. And when she was testifying in Court, one of the
16 things that she said she hadn't reviewed was the records of
17 the Department of Corrections of, from the earlier
18 incarceration.

19 Did you recall hearing that?

20 A I heard her testimony, yes, sir.

21 Q When you heard that, did, did that concern you that you
22 needed to try to figure out a way to get those records to
23 Doctor Melikian at sometime---

24 A No, it didn't concern---

25 Q ---for her consideration?

Doug Brannon - Cross-examination
by Mr. Zelenka

1 A It did not concern me, no.

2 Q Okay. Again, do you know if you reviewed those
3 records?

4 A The records of his --?

5 Q First incarceration.

6 A I, I can tell you I did not.

7 Q Okay. Now, in the penalty phase -- excuse me. Let me
8 back-up.

9 On the witness list, Lenora Topp was on that witness
10 list?

11 A Right.

12 Q Isn't that correct?

13 A Yes.

14 Q And describe what Lenora Topp's role was with the
15 defense as you understood it.

16 A She was, she was an investigator. I mean she was a
17 mitigation investigator. She, she knew Marion Lindsey's
18 history about as well as Marion Lindsey knew it, and she was
19 very helpful to me in locating witnesses and, and filling in
20 blanks, you know, relationships and stuff like that.

21 Q Okay. And about the family history?

22 A Yes.

23 Q Correct?

24 A Yes.

25 Q And did you understand that Mr. Bartosh intended to

Doug Brannon - Cross-examination
by Mr. Zelenka

1 call her as a potential witness concerning that family
2 history?

3 A I, I can't tell you that I did. I mean I saw the
4 witness list. But I, I didn't -- please understand that,
5 that Mike Bartosh was and still is one of the best lawyers
6 that I had ever met in my life. And, so, if Mike said he
7 was gonna do something or not do something, I didn't -- you
8 know, he'd tried more cases in a month than, than I had
9 tried, you know, in my career at that point. So -- and
10 that's an exaggeration, but I mean I wanted to second chair
11 with Bartosh for the experience because of who he was, and,
12 so, if Bartosh decided not to call a witness, I certainly
13 didn't believe that it was, it was up to me or that I, I
14 should say well, Mike, why didn't you call Lenora or he had
15 been doing it for so long. I mean Mike had the ability to
16 see if I call this witness then this is going to happen.
17 So, I wasn't gonna second guess Bartosh as to who he called
18 or not.

19 Q Okay. After the guilt phase of the trial ended there
20 was a 24 hour period?

21 A Yes.

22 Q And, and if you can go back, what did you do during
23 that 24 hour period, if anything, to assist the defense in
24 this case?

25 A It -- I, I can not give you specifics, but I know that

Doug Brannon - Cross-examination
by Mr. Zelenka

1 we were at the Public Defender's Office the next morning
2 early, I mean before 9:00, and we worked that whole day or
3 the, the better part of that whole day anyways. But I
4 don't -- I'm sorry. I can't tell you exactly what we did
5 that day. I---

6 Q Okay.

7 A I can't tell you.

8 Q Do you recall if you were interviewing witnesses again?

9 A That might of been the day that we met with the
10 gentleman that had taken Marion fishing.

11 Q Oh, the -- Bill Burton?

12 A Yeah. That, that might of been the day that we met
13 with him. I remember going over notes forever that day.
14 But I don't, I don't have any specific recollection to that
15 day.

16 Q Okay. Was Lenora Topp present with y'all---

17 A Yes.

18 Q ---that day?

19 A Yes. Yes.

20 Q Was she sharing with you information about potential
21 witnesses?

22 A She did everytime we were together. So, yes, I'm, I'm
23 sure she did.

24 MR. ZELENKA: Okay. Court's indulgence one moment.

25 (Pause.)

Doug Brannon - Cross-examination
by Mr. Zelenka

1 Q Now, with respect to, to Karen Quimby's role, when she
2 got involved in the case the month before, isn't it correct
3 that, that she then undertook to basically review the entire
4 case file, seek to organize that case file, and summarize
5 information both within the defense consult and the State's
6 discovery, is that correct?

7 A Yes. Yes.

8 Q And she put that in, in a, a series of documents that
9 you utilized in your, your preparation and presentation?

10 A Right.

11 Q Correct?

12 A She would come up with, with short outlines for each
13 witness, would, would interject different, you know, cases
14 that might be pertinent or something like that. I mean --
15 but she was -- that's, that's what Quimby does is organize
16 and research. I mean she's, she's good at it.

17 Q Okay. It wasn't her role to actually present any
18 witnesses in this case?

19 A No.

20 Q Is that your understanding?

21 A That's, that's -- yes.

22 Q Okay. And did she participate in the discussions that
23 you had with Mr. Bartosh after she got involved or was she
24 kind of off to the side?

25 A No, she was, she was, she was in as deep as we were

Doug Brannon - Cross-examination
by Mr. Zelenka

1 once she got involved.

2 Q All right.

3 A She was in the discussions. She was at the jail. Now,
4 I, I can tell you that she was not present when we
5 questioned, when Lenora and I went to see Mrs., Lindsey's
6 mom and the cousin. She wasn't there then. But if, if we
7 were having a meeting with the attorneys Karen was in there.

8 Q Okay. Do you recall, during the trial, one evening
9 during the trial, there was a meeting at the jail with a
10 state retained expert, Doctor Pamela Crawford?

11 A Yeah, I remember that meeting.

12 Q A short meeting, well, maybe it lasted about an hour
13 and a half, where Doctor Crawford was interviewing your
14 client?

15 A Yeah, it was in the library.

16 Q Okay. And do you recall why you were there?

17 A I was there because somebody wanted to talk to my
18 client. I mean I, I can't tell you that I played any
19 specific function in the meeting, but, but because somebody
20 wanted to talk to my client I was there.

21 Q Okay. And was Karen Quimby there?

22 A Yes.

23 Q Okay. Did you ever interview Latresse Smith, the
24 defendant's girlfriend?

25 A No.

Doug Brannon - Cross-examination
by Mr. Zelenka

1 Q Okay. Do you know if anybody on the defense team did?

2 A I don't have any personal knowledge of that, no.

3 Q Did you ever talk with either Doctor Narayan or Doctor
4 Musick from the State Hospital?

5 A With Narayan.

6 Q You spoke directly with Narayan?

7 A Here at the courthouse, yes.

8 Q Okay. Did you speak with him about his potential
9 testimony in the case?

10 A I was in the room when Bartosh asked him questions
11 about his potential testimony or his, his forthcoming
12 testimony. But the only -- I had some questions for him
13 about a report that I had reviewed. So, no, I didn't ask
14 him questions about his testimony. That was Bartosh. But I
15 was in the room. But I did have a question about something
16 that I read in one of the reports. I don't even remember
17 what the question was, but he, he, he gave me an answer.

18 Q Okay. Did you see any reason, based upon that
19 discussion, to have called Doctor Narayan in the guilt phase
20 portion of your case?

21 A No.

22 Q Did you hear anything during that discussion that
23 suggested that the defense team should of called Doctor
24 Narayan in the penalty phase of the case?

25 A No, Doctor Narayan was gonna call Marion Lindsey a, a

Doug Brannon - Cross-examination
by Mr. Zelenka

1 faker, and, so, no, I didn't want him anywhere near the
2 witness stand.

3 Q Okay. And Doctor Narayan had made that determination
4 in April and June of 2003?

5 A Yes.

6 Q Before you were even involved in the case, right?

7 A That's correct.

8 Q Did you have any meetings with either Lenora Topp or
9 Mr. Bartosh or Ms. Quimby, with any of the other lay
10 witnesses that testified in the penalty phase of the case?

11 A Not other than his mother and I believe Mr. Burton.
12 Those, those were the two -- I mean I met with Mrs. Lindsey
13 that week to ten days before the trial and then I, I think
14 we met with Mr. Burton that off day, that 24 hour period
15 and---

16 Q Okay. You also testified about Kris Wilkins?

17 A Right. Yeah, we met with Mr. Wilkins the same day that
18 we met with his mother. Those are the only witnesses that I
19 remembered -- well, I think I met with the paramedic by
20 myself. I think, in fact, I think that took place over the
21 telephone. So, as far as meeting with any of the people
22 that you named, it would of been Wilkins, Burton, and, and
23 his mother.

24 Q Okay. Did you ever meet with his brother, Tim Sims, or
25 Tim Lindsey?

Doug Brannon - Cross-examination
by Mr. Zelenka

1 A I didn't, no.

2 Q Okay. No further questions. Thank you.

3 MR. VIETH: Judge, I'll be brief I promise.

4 REDIRECT EXAMINATION

5 BY MR. VIETH:

6 Q Let me ask you just a couple things, Doug, and I think
7 you've been honest with us that, that you got into this for
8 experience. You asked if you could serve so you could get
9 some experience in death penalty cases, that's what you did,
10 that's what you're -- and, and cause you knew you were gonna
11 be primarily on a guilt phase and you've tried a murder
12 case. You knew how to try a murder case, but you didn't
13 know how to try a death penalty case.

14 Is that fair to say?

15 A Fair to say.

16 Q Okay. And I -- when I was questioning you, I had some
17 stack of things I was gonna go over. I said I'm not gonna
18 ask you about all this stuff because you didn't have much to
19 do in that penalty phase---

20 A Right.

21 Q ---and we're still there, correct?

22 A Right. That's correct.

23 Q I don't have to go reinvent that.

24 Okay. Now, in -- if I've got American Bar Association
25 guidelines for appointment and performance of defense

Doug Brannon - Redirect examination
by Mr. Vieth

1 counsel in death penalty cases, which I intend to introduce,
2 if it says in here that counsel should spend probably at
3 least 12 times the amount of hours in a death penalty case
4 as a regular murder case, would you agree with that now that
5 you've got some experience under your belt?

6 A Well, I think that you would have -- I mean I'm not
7 gonna argue with the American Bar Association. But I think,
8 I think different cases would require different amounts of
9 time. But I would agree that you, you need to spend
10 significantly more time on a death penalty case than you,
11 you do a non-capital case.

12 Q All right. Matter of fact, in, in your case, you would
13 agree with me that some murder cases can be a lot easier
14 than say criminal sexual conduct cases?

15 A Absolutely.

16 Q I mean in your case, when you get right down to the
17 bottom line in your case, it is do we have a legal defense,
18 is there self-defense, is there sudden heat of passion or
19 provocation that we might get a manslaughter charge, was he
20 insane, I mean these are the kinds of things, when you look
21 at, the simplistic things you look at in a shooting case
22 where someone dies, isn't it?

23 A Correct.

24 Q And, you know, absence of self-defense, absent being
25 guilty but mentally ill, absent being insane, absent

Doug Brannon - Redirect examination
by Mr. Vieth

1 accidental shooting where the gun goes off, or any of those
2 things, you basically, and particularly no legal provocation
3 that a judge allows a charge of manslaughter, you're
4 basically stuck with the facts you got, isn't it?

5 A That's right.

6 Q And that's what your role was?

7 A That's correct.

8 Q Okay. And so, if you met with some people, you're
9 looking at it from that vein, and, as you say, you were in a
10 box, you had no way to go to get a not guilty or a potential
11 charge of manslaughter based on the factual basis that you
12 were given?

13 A That's correct.

14 Q Okay. No matter how depressed he was, no matter how
15 suicidal he was, no matter how many notes were left with Rod
16 Tullis, no matter whether he sought legal assistance from
17 Family Court, none of this would of given a jury charge from
18 a judge to mitigate murder, would it?

19 You couldn't have got it?

20 A I, I don't think so.

21 Q No.

22 Okay. So, all of those things pour over it, if at all,
23 into the penalty phase to see if they have meaning in there?

24 A Absolutely.

25 Q Okay. And that's where you've been honest and had

Doug Brannon - Redirect examination
by Mr. Vieth

1 minimal involvement?

2 A Right.

3 Q Okay. And on the Jimmy issue, when you met with him
4 and had Jimmy, which is permeated through his times from the
5 date of, date of arrest up through Narayan and, and meeting
6 with---

7 MR. ZELENKA: I would object to that. There's nothing
8 in the record that are permeated from the times since the
9 date of arrest.

10 Q Okay. Well, from the date that was in the record then,
11 the day that the death notice was served, I think that was
12 in the records that that's the first time that---

13 MR. ZELENKA: No objection.

14 Q ---that date forward, when you met with him, he wasn't
15 gonna gain anything by telling you Jimmy was there, was he?

16 A No.

17 Q There wasn't any gain for him to tell you that, was
18 there?

19 A No.

20 Q Okay. And with regard to Rod Tullis, obviously if
21 Marion had left a suicide note and or voice message it would
22 of been done in 2002 when he shot her, right?

23 A Yes.

24 Q Okay. And, so, your thoughts are that they didn't, you
25 didn't put up Tullis cause you couldn't find him in two

Doug Brannon - Redirect examination
by Mr. Vieth

1 years, and if that's true though, Bartosh apparently never
2 preserved the tape of 2002.

3 Is that fair to say?

4 A Right. Now, I didn't mean to testify that they, they
5 couldn't find Rod for two years. What I'm -- my testimony
6 is that from when I got involved he, he wasn't accessible.
7 So, from mid March until mid May is, is -- that, that's what
8 I'm saying.

9 Q okay.

10 A Cause I'm pretty sure that he was still practicing in
11 2002.

12 Q okay. But the tape that would of been left on his
13 machine was not preserved by the Public Defender's Office?
14 You didn't have it?

15 A We didn't have it. I'm not gonna say it wasn't
16 preserved, but we didn't have it.

17 Q okay. And do you know of your own personal knowledge
18 whether anyone with subpoena powers or a subpoena went out
19 looking for him?

20 A I don't know that.

21 Q okay. And on the lock down issue when, when you went
22 to see him and he was in lock down, also he was in lock down
23 if, for any reason, he was suicidal, had notes in there
24 about being suicidal, is that not right?

25 A He -- yeah, again, he was always in one of those Velcro

Doug Brannon - Redirect examination
by Mr. Vieth

1 suicide gowns too, yeah.

2 Q Okay. And with regards to the paramedics that you
3 talked to, you felt -- you would of liked to of been able to
4 get in, I assume on your examination, why did he, why did he
5 shoot her or shoot himself and, and you couldn't?

6 A My only goal with that was isn't it true that he
7 attempted to kill himself. That was where I was trying to
8 go, yes.

9 Q Okay. And did he, in fact, attempt to kill himself?

10 A Well, he shot himself.

11 Q That's right. Okay.

12 A I mean he did that.

13 Q Okay. Do you know whether or not the Public Defender's
14 office happened to get any incident reports surrounding
15 other criminal activities or just rest on SLED reports and
16 records or do you know of your knowledge?

17 A I do not know.

18 Q Okay. All right. So, on the wilkins shooting and
19 things of that nature, if there was a reason or any motive
20 or anything like that, you, you basically just looked at the
21 record to see what he had?

22 A Well, now, on, on that issue, Marion and I had a
23 conversation about that. I mean he told me about that case.
24 So, I had, you know, I had the rap sheet, but I asked Marion
25 about that.

Doug Brannon - Redirect examination
by Mr. Vieth

1 Q Okay. And on the dealings with what you brought up on
2 cross-examination about drug dealing and stuff, do you know,
3 in your examination, whether or not he was not putting that
4 to be a correct way to make money, but that he was helping
5 to support his family and other people with those?

6 A Oh, that was, that was the consistent story is that
7 Marion would -- when Marion was selling drugs, he made good
8 money, and, and then Nell would say to him look, I don't
9 want you to do this anymore, I don't want you to get caught,
10 I don't want you to go to prison. So, he, he would stop and
11 he would go get a job. But then when he had a, a regular
12 hourly job, he wasn't making the money.

13 So, in Marion's mind, if he kept selling dope she was
14 gonna leave him because of the, the potential danger. So,
15 he would quit doing that and then he would go get a job and
16 then she would threaten to leave him because he didn't have
17 any money.

18 Q All right. Okay. All right. And, and then the
19 ultimate issue was that he was afraid he wasn't ever gonna
20 see his children, afraid that there was, he, there was a new
21 guy, not see them, and snapped, and that's kind of the---

22 A That was it.

23 Q ---what you dealt with?

24 A That was it, yeah.

25 MR. VIETH: Okay. That's all the questions I have.

1 Thank you, Your Honor.

2 MR. ZELENKA: Nothing on recross, Your Honor. Thank
3 you.

4 WITNESS: May I be excused?

5 THE COURT: May he be excused?

6 MR. ZELENKA: No objection.

7 MR. VIETH: Yes, sir, no objection.

8 MR. ZELENKA: No objection from the State.

9 MR. VIETH: Continue on?

10 THE COURT: Well, it's ten after. Your next witness is
11 gonna take how long?

12 Just guesstimate.

13 MR. VIETH: We think probably the next one will be
14 Doctor Brawley. Will be about 20 or 30 minutes.

15 THE COURT: All right. Let's take---

16 MR. VIETH: It depends on cross. We don't know how
17 long that will go.

18 MR. ZELENKA: Depends on direct honestly, Your Honor.

19 THE COURT: Is he, is he here and ready?

20 MR. VIETH: Doctor Brawley is here, yes.

21 THE COURT: Let's take about ten minutes for a restroom
22 break, and we'll come back and take care of him and then
23 we'll, we'll have a little later lunch today.

24 MR. VIETH: All right. Thank you.

25 THE COURT: All right.

1 (Whereupon, a short recess was taken at this time.)

2 MR. ZELENKA: Judge, those are the transcripts.

3 THE COURT: Okay.

4 MR. ZELENKA: I wasn't sure---

5 MR. VIETH: One, two, and three is probably -- you gave
6 him all that with the jury in the first three?

7 MR. ZELENKA: Except for the last maybe ten pages of
8 volume three. That's the beginning of it. So, it's
9 basically four and five are the relevant transcripts,
10 transcripts are up on---

11 THE COURT: Okay.

12 MR. VIETH: She's in the restroom I think.

13 THE COURT: All right. We got everybody?

14 MR. VIETH: Yes, sir.

15 THE COURT: Ready to proceed?

16 MS. NORRIS: Applicant calls Tora Brawley.

17 THE COURT: Come around and be sworn please.

18 TORA BRAWLEY, being first duly
19 sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. NORRIS:

22 Q If you would, please state your full name for the
23 record.

24 A Tora Brawley.

25 Q And Doctor Brawley, we have marked as Applicant's

Tora Brawley - Direct examination
by MS. Norris

1 Exhibit 9 your curriculum vitae. So, I'm not gonna go
2 completely through that, but when were you licensed as a
3 clinical psychologist?

4 A I was first licensed back in 1993 in the State of
5 Texas.

6 Q And do you have training beyond just the, the Ph.D. in
7 psychology?

8 A My speciality is in the area of neuropsychology and I
9 have specialized training in that area.

10 Q Okay. And have you previously worked as a Court
11 appointed examiner in forensic cases?

12 A I have.

13 Q And was that at William S. Hall?

14 A Yes, it was.

15 Q And have you worked educating prosecutors at the
16 National College of District Attorneys?

17 A I have.

18 Q Okay. What is the, what is the difference between
19 clinical psychology and neuropsychology?

20 A Neuropsychology is the study of brain behavior
21 relationships. So, we focus on cognitive functioning,
22 different areas of the brain.

23 MS. NORRIS: Okay. Your Honor, I offer Doctor Brawley
24 as an expert in the clinical psychology with a speciality in
25 neuropsychology.

Tora Brawley - Direct examination
by Ms. Norris

1 MR. ZELENKA: No objection.

2 THE COURT: So qualified.

3 Q Doctor Brawley, were you asked to assess Marion
4 Lindsey?

5 A I was.

6 Q Do you recall when you were retained?

7 A I received a call from Mr. Bartosh on April 12th.

8 Q Okay. And when did you actually see Marion Lindsey?

9 A Well, I believe I initially told him I could not do
10 something that quickly. He told me the trial date was May
11 17th. But then I had a cancellation. So, I was able to
12 see him on April 27th.

13 Q Okay. And prior to seeing him, were you provided any
14 background records or information concerning Mr. Lindsey?

15 A Only what Mr. Bartosh told me in our initial
16 conversation. I had no records.

17 Q Do you recall what that was?

18 A I have my notes. He told me that there was a death
19 penalty coming up. There was a history of head trauma,
20 gunshot wound, car accident. The trial date was May 17th
21 and he also mentioned to me that there was a question of
22 malingering with Mr. Lindsey.

23 Q And what did your evaluation itself consist of?

24 A I performed an extended clinical interview and a
25 battery of neuropsychological tests.

Tora Brawley - Direct examination
by Ms. Norris.

1 Q Were you able to consult with any other expert?

2 A Prior to the testing, after the testing?

3 Q After the testing.

4 A I provided verbal results to Doctor Melikian and also
5 to Doctor Absher.

6 Q And who is Doctor Absher?

7 A I believe he's a neurologist.

8 Q And in your testing, what were your bottom line
9 findings?

10 A My bottom line finding was that there was some
11 scattered neuropsychological deficits, and I recommended
12 that they obtain medical and school records and speak with
13 collateral sources of information to further investigate
14 this.

15 MS. NORRIS: Okay. And for the Court, Your Honor,
16 Doctor Brawley's invoice of her time is marked as
17 Applicant's Exhibit 10 and her report is marked as
18 Applicant's Exhibit 11.

19 THE COURT: Okay.

20 MR. ZELENKA: No objection.

21 Q In your interview, was Mr. Lindsey cooperative with
22 you?

23 A He was very cooperative.

24 Q Did, did he report information about head injuries or
25 things of that nature that would cause concern about

Tora Brawley - Direct examination
by Ms. Norris

1 neurological functions?

2 A He did.

3 Q Do you recall what those were or---

4 A I'll refer to my notes.

5 Q Okay.

6 A He told me that he had fallen on the steps, hit his
7 head four to five times, had stitches. He's been run over
8 by a car at age two. Run over -- let's see. He, he blacked
9 out. He was in the hospital for two weeks. He had surgery
10 on his face. He said he had a couple of, two or three
11 motorcycle wrecks. One in '93 with no helmet. One in '98
12 where he was thrown off and he was dazed. He also told me
13 about the self-inflicted gunshot wound to the head in 2002,
14 and about a history of migraine headaches.

15 Q And did he report any educational history that would
16 cause concern about his neurological function?

17 A He did. He told me that he completed the ninth grade
18 and he quit in the tenth, that he had to repeat the first
19 grade because he said he wasn't up to speed. He said he had
20 to repeat the seventh grade. He said that on the second to
21 the sixth grade he was in speech therapy and learning
22 classes. He said his speech wasn't good, and that he had
23 problems spelling.

24 Q And did Mr. Lindsey report to you any psychiatric
25 history that was significant to you in terms of doing your

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by Ms. Norris

1 neuropsychological testing?

2 A He did. Going back to age 12 he told me he had a
3 suicide attempt at age 12 where he took an overdose. He
4 also told me about his suicide attempt in 2001 and another
5 one in September of 2002 and then the gunshot wound to the
6 head in, also in September of 2002.

7 Q Okay. would it -- would a history of depression be
8 significant in terms of your actual testing?

9 A Yes.

10 Q why?

11 A If a patient has significant levels of depression it
12 can affect test performance.

13 Q And how would it affect it?

14 A In a variety of ways. It can cause slowing and, and
15 general decrease in performance. If you're not feeling good
16 emotionally it can affect how you do cognitively.

17 Q Did you conduct an I.Q. test on Mr. Lindsey?

18 A I did.

19 Q And what were your findings?

20 A He had a full scale I.Q. of 85, a verbal I.Q. of 80,
21 and a performance I.Q. of 92.

22 Q What, what, if any, is the significance of the
23 discrepancy and the verbal and the performance scores?

24 A Well, it's not -- it doesn't quite reach the level of
25 being considered statistically significant. You generally

Tora Brawley - Direct examination
by Ms. Norris

1 look for a 15 point discrepancy. But I like to go back and
2 look at the individual subtest scores to see if there's,
3 there is any significance there.

4 Q And in your report, you had listed a number of
5 impairments and I'm gonna go through those. And if you
6 would, on each one, tell me the area of, of the brain that
7 is associated with and just briefly how you test that.

8 A Okay.

9 Q The, the first one is severely impaired speed of mental
10 tracking.

11 A For mental tracking, we look at his ability to
12 sequence. Things like say the ABC's, the months of the year
13 forward, the months of the year backward, that type of
14 thing, and it is a score for both, speed and accuracy.

15 Q And below average accuracy of mental tracking. So---

16 A That's the same thing. That's that, the accuracy
17 score. So -- and, and those are both mediated by the
18 frontal lobe, the attention and concentration aspect.

19 Q Severely impaired verbal fluency.

20 A You give them a letter from the alphabet or sometimes a
21 category, and you ask them to come up with as, as many words
22 as they can that he start with that letter or fall into that
23 category. Again, that is a frontal lobe function.

24 Q Severely impaired confrontation naming.

25 A That's their ability to name objects. If you look at a

Tora Brawley - Direct examination
by Ms. Norris

1 fixture and pull out the word, the name of that object.

2 Q And what area of the brain is that associated with?

3 A That's a left hemisphere, frontal temporal.

4 Q Okay. How about the speed, manual speed on the right
5 and the manual, manual dexterity on the left?

6 A Well, speed is looked -- we have a machine that shows
7 how fast they can tap their finger and calculate that. The
8 dexterity is a fine motor skill where they're putting
9 grooved pegs into holes. Both of those are mediated by the
10 motor part in the brain, which is in the, right where the,
11 the frontal and the parietal, parietal lobe come together.

12 Q Below average immediate verbal memory.

13 A Right. Verbal memory, we tell a story, ask them to
14 tell it back to us. We do that for immediate recall and for
15 delayed recall. That's a left temporal lobe function.

16 Q Delayed visual memory.

17 A Visual memory, they're given designs. Again, scored
18 for immediate and delayed recall, and that's a right
19 temporal lobe function.

20 Q Severely impaired verbal learning ability.

21 A Usually for a list of words that's repeated several
22 times. You look at their ability. Do they have a learning
23 curve, can they pick things up, can they learn, and that's
24 also a left temporal lobe function.

25 Q Impaired ability to copy and recall a complex figure.

Tora Brawley - Direct examination
by Ms. Norris

1 A It's basically what it sounds like is they -- we give
2 them a really detailed figure and ask them to copy it, take
3 it away, and then a certain period of time later come back
4 and ask them to draw it from memory. So, that falls into
5 two. One is -- the copy is, is visual spatial and motor,
6 and then the recall is the right temporal lobe.

7 Q So, essentially, in all of those areas, Mr. Lindsey's
8 brain does not function as "normal"?

9 A He falls below the average range of scoring.

10 Q Is there any way to tell what, what caused the brain
11 dysfunction?

12 A At, at my point, no. I mean he had so, you know, what
13 I call multiple idealogies, multiple possibilities from the
14 damage to the brain. But I also didn't have enough
15 information to say specifically whether this was consistent
16 with where it should be or was it due to head injuries. I
17 didn't have medical records. I didn't have school records,
18 et cetera.

19 Q Okay. Was there anything -- well, you mentioned that
20 you were able to consult with Doctor Melikian after your
21 testing.

22 Was there anything inconsistent in your interview and
23 testing with Doctor Melikian's diagnosis of a major
24 depressive disorder?

25 A No.

Tora Brawley - Direct examination
by Ms. Norris

1 Q Did you -- were you aware, at the time of your testing,
2 that there was a question, question of malingering in this
3 case?

4 A No, I was not.

5 Q Okay. What, what is malingering?

6 A Malingering can be production of symptoms or
7 exaggeration of symptoms usually for secondary gain.

8 Q Okay. And did you test to determine whether
9 Mr., whether Mr. Lindsey was malingering during your
10 examination?

11 A I did and, and let me go back to a previous question.
12 The only indication I had of malingering was when
13 Mr. Bartosh had told me about the imaginary friend, but I
14 was aware that any other doctors had seen him and diagnosed
15 him with malingering. So, because of that, and, and really
16 in any criminal cases I assess for effort because my tests
17 are completely dependent upon how hard a person is trying,
18 and, so, I did malingering tests for cognitive, for memory,
19 and also for psychiatric symptoms.

20 Q And what test did you do for, to determine whether he
21 was malingering cognitive symptoms?

22 A I did the test of memory malingering.

23 Q Could you describe that test for us?

24 A It's basically a test that looks hard, but it's not.
25 It's a forced choice test. You're telling them that you

Tora Brawley - Direct examination
by Ms. Norris

1 want them to remember a group of 50 things, but then they're
2 actually given two choices when you come back for the
3 recall. So, it's not pure memory. It's more of a
4 recognition test. So, it's easier than it appears and a lot
5 of people, times people who are malingering will do poorly
6 on those tests. Any score on, below 45 is considered
7 consistent with poor effort.

8 Q And is, is the scoring actually objective meaning that
9 you, as the examiner, can't just look at somebody and say I
10 think he's faking?

11 You go by the test scores?

12 A You have to go by the number of items that they got
13 incorrect.

14 Q And how did Mr. Lindsey do on, on the TOM?

15 A He -- there was no issue. He scored completely within
16 normal limits on the TOM, the Test For Malingering.

17 Q And what test did you give for malingering of
18 psychiatric symptoms?

19 A I gave the Structured Interview of Reported Symptoms.

20 Q Describe that one for me.

21 A It's basically interview format. The patient is asked
22 to respond to questions yes, no, true, false types of
23 things. It basically looks at a variety of, of different
24 psychiatric symptoms. Some you expect if someone has
25 psychosis and some that take it a notch up that may sound

Tora Brawley - Direct examination
by Ms. Norris

1 "crazy" to someone who's trying to appear crazy. So, it
2 helps you, it helps you distinguish, A, are they, are they
3 malingering psychotic symptoms, or, B, are they psychotic,
4 but their psychotic symptoms are within the range that they
5 should be for psychosis.

6 Q And how did Mr. Lindsey score on that one?

7 A He was completely within normal limits on that test
8 also.

9 Q Was there any indication, in your clinical interview,
10 of malingering?

11 A Absolutely not.

12 Q Do you recall, after your evaluation, whether you
13 consulted with Mr. Bartosh concerning whether you would
14 testify?

15 A I called him and gave him a verbal report of my
16 results.

17 Q Do you have any recollection of why you were not called
18 to testify?

19 A I do not.

20 Q When you provided a written report, why did you provide
21 your report to Doctor Melikian rather than to Mr. Bartosh?

22 A That's where I was asked to send, to send the report.

23 Q So, in essence, it was Doctor Melikian that asked you
24 for it?

25 A Yes.

Tora Brawley - Direct examination
by Ms. Norris

1 Q Why did you recommend to Doctor Melikian that medical
2 and school records be obtained?

3 A I had not been provided those. So, as I said, it would
4 be important to know whether the cognitive deficits that I
5 was seeing with the ideology might be if there was any
6 indication of those earlier in life, et cetera.

7 Q Okay. And why did you recommend that interviews be
8 conducted for collateral sources of information?

9 A Because, again, I did not have any information and I
10 think it's helpful to talk to others and see how did he do
11 in school because his recollection may or may not have been
12 correct. As a matter of fact, he was a little bit off with
13 his recollection and report to me on, on his educational
14 history because the school records that I later got as part
15 of phase two showed that he was three years in the eighth
16 grade, and he told me that he had repeated the seventh.

17 Q Good.

18 And when you're referring to that, that you later got
19 the school records, did you receive those prior to trial?

20 A I did receive them prior to trial, but it was after I
21 had produced my report and been told that I was not going to
22 testify.

23 Q So, so, you didn't actual look at them then?

24 A I did not look at them.

25 Q But as part of your current work, you, you have looked

Tora Brawley - Direct examination
by MS. Norris

1 at the school records?

2 A That's correct.

3 Q Have you also been provided with the report from
4 William S. Hall?

5 A Yes.

6 MS. NORRIS: And, Your Honor, that is marked as
7 Applicant's Exhibit 12.

8 And were you also provided, provided with the raw data
9 from the psychological testing done at William S. Hall?

10 A I was.

11 Q In the William S. Hall examination, psychological
12 examination where they reported a lower I.Q. score than you
13 found, specifically where you found 85 in 2004, they found a
14 full scale of 76 a year earlier, is there anything
15 significance, significant about that to you?

16 A Well, again, you look at the, the 15 point discrepancy.
17 I think the -- I believe the big discrepancy between the two
18 was with performance I.Q. were different. So, I go back and
19 I look at the individual subtest to see which one were
20 different from my evaluation to Doctor Musick's evaluation,
21 and there can be a variety of, of reasons for those. As we
22 talked about before, depression is certainly, can be a
23 factor that can lower, in particular, performance scores.

24 Q Okay. And would depression likewise lower verbal
25 scores?

Tora Brawley - Direct examination
by Ms. Norris

1 A It can, yes.

2 Q Okay. So, did it -- did you actually look where
3 William S. Hall found a verbal of 80 and you found a verbal
4 80, but Hall found a performance score of 75 where yours was
5 92, did you specifically look, as you said, to the subtests
6 to see what the difference was?

7 A I did.

8 Q And what was the difference?
9 Can you tell?

10 A There were two subtests that were considered
11 significantly different. One was picture completion which
12 is an attention to detail. He got better with me than he
13 was with them. And another was abstract reasoning ability.
14 It got significantly better with me than it was at Hall and
15 all of the other 12 subtests, again, were, were pretty much
16 consistent. So, it was those two sub-scores that gave him a
17 higher performance I.Q. with me.

18 Q And are those two subtests particularly subject to
19 impact of, of depression?

20 A They can be. Any of these subtests can be subject to,
21 to depression. Those two are attention and concentration,
22 abstract reasoning, which is a frontal lobe function.

23 Q All right. And in the William S. Hall report, they
24 referred to a borderline range score of 74 on the repeatable
25 battery for the assessment of neuropsychological status.

Tora Brawley - Direct examination
by Ms. Norris

1 Does that score tell you anything?

2 A When I looked at that, again, I broke that down into
3 general subtests and, and looked at that, and he had
4 scattered deficits that were also consistent with, with my
5 findings.

6 Q Okay. And did the examiners, specifically Doctor
7 Musick at William S. Hall, also give the malingering test
8 that you gave?

9 Specifically the TOM and the SIRS?

10 A He did.

11 Q Was there any indication at all in those objective
12 tests conducted at William S. Hall in 2003 that Mr. Lindsey
13 was malingering?

14 A No.

15 MS. NORRIS: No further questions. Thank you, Your
16 Honor..

17 CROSS-EXAMINATION

18 BY MR. ZELENKA:

19 Q Doctor Brawley, when you met with the defendant on I
20 believe it was April 26th was anyone else present at that
21 meeting?

22 A No.

23 Q Where was that meeting?

24 A It was April 27th and it was at my offices at the
25 University of South Carolina School of Medicine.

Tora Brawley - Cross-examination
by Mr. Zelenka

1 Q Okay. And, once again, what had Mr. Bartosh told you,
2 prior to your meeting with Mr. Lindsey, as to the basis for
3 this request?

4 A That there was a death penalty coming up and that there
5 was a history of multiple neurological events, problems, and
6 he wanted me to evaluate him.

7 Q Okay. Did he give you an indication as to what Hall
8 Institute had already found?

9 A He did not.

10 Q Okay. And in your meeting with Mr. Lindsey, I believe
11 it was six hours, is that correct?

12 A Probably three hours with Mr. Lindsey, and then it's
13 another -- it's takes me as long to score and interpret
14 these tests and read the reports as it does. So, about half
15 of that time was face-to-face time with Mr. Lindsey.

16 Q Okay. During that face-to-face time, did he talk to
17 you about this imaginary friend Jimmy?

18 A He did not bring it up to me. So, I specifically asked
19 him about it, and he did tell me about Jimmy. I can read to
20 you my notes of what he said.

21 Q Okay.

22 A I also have a question mark. That always means that I
23 initiated the question. I asked him about his friend Jimmy.
24 And he said he's like an older role model, I have that in
25 quotes. He says he came to me in age 12 when I was in

Tora Brawley - Cross-examination
by Mr. Zelenka

1 mental health for the first time and tried to kill myself.

2 So, in a room with a man and I was scared.

3 He said he doesn't tell me to do things. God sent him
4 to me to help, to help me out. I talk, I talk to him when I
5 have a problem. He only comes around when I'm in trouble,
6 when he's suicidal. That's what he told me about Jimmy.

7 Q Okay. Well, was Jimmy present in his statement at the
8 time of the meeting?

9 A He did not say that Jimmy was there when I met with
10 him.

11 Q Okay. And did you share that information with Doctor
12 Melikian?

13 A I did.

14 Q You gave the verbal results to Doctor Melikian on two
15 days later on April 29th, correct?

16 A That's correct.

17 Q And was that by telephone?

18 A Yes.

19 Q And in that discussion with Doctor Melikian, what was
20 the impression that you gave her about your results?

21 A That he did not malingering with me and that he had
22 scattered neuropsychological deficits.

23 Q Okay. Did you also give her the social history that
24 you had gotten from Mr. Lindsey?

25 A I don't recall if we specifically went over that. I

Tora Brawley - Cross-examination
by Mr. Zelenka

1 called more specifically to give her the test results.

2 Q Okay. When he described his suicide, previous suicide
3 attempt, what did he essentially tell you about that?

4 A Let's see. He said the one was at age 12, the suicide
5 attempt, and I just have pills. He said that he had been in
6 a fight with his brother, that his mom said she didn't love
7 him anymore, and that he was in Spartanburg Regional for a
8 month and a half.

9 The second one, the suicide attempt, he said was with a
10 gun in 2001. He was having problems with his wife, and the
11 cousin took the gun away from him.

12 The third one he said was in August or August of 2002.
13 Wife said that she was leaving and taking the kids. He
14 planned to drive off the cliff with a truck, but he decided
15 not to, and then suicide attempt in September of 2002, but
16 he said his family talked him out of it. And then, lastly,
17 that he had done a gunshot wound to the head in September of
18 2002 and that he sees mental health in the jail.

19 Q Okay. That -- the, the other one in 2002, did he
20 describe---

21 A If he did, I don't---

22 Q ---what---

23 A I'm sorry.

24 Q ---action he particularly took?

25 A All's I have here are my notes. I don't recall any

Tora Brawley - Cross-examination
by Mr. Zelenka

1 other details from---

2 Q Okay.

3 A ---that.

4 Q Specifically what neuropsychological test did you give
5 the defendant?

6 A I gave him a subtest, several subtests from the Wexler
7 Memory Scale. The Information, Orientation, Logical Memory,
8 One and Two, Visual Reproduction One and Two. I gave him
9 the Time Sustained Attention Test. I gave him the Wexler
10 Test of Adult Reading. I gave him the Wexler Adult
11 Intelligent Scale Third Edition. I gave him the Controlled
12 Verbal Fluency Test. I gave him the Boston Naming Test,
13 finger tapping, growth peg board, Trail Making Part A, Trail
14 Making Part B, Verbal Paired Associates also from the Wexler
15 Memory. I gave him the Rey-Osterrieth Complex Figure, the
16 copy, and the 30 second recall. I gave him the Structured
17 Interview of Reported Symptoms, and the Test of Memory
18 Malinger.

19 Q Okay. What score did he have on the TOM test?

20 A He got a score of 45 on trial one and 50 on trial two.

21 Q Okay. And in your direct testimony you testified that
22 the 45 was the cutoff?

23 A For trial two.

24 Q For trial two?

25 A Yes.

Tora Brawley - Cross-examination
by Mr. Zelenka

1 Q what's the cutoff for---

2 A There is no cutoff for trial one. It's considered a
3 learning trial. And unless there's scoring below chance,
4 then, then you would probably interpret that. But the, the
5 cutoff is for trial two or the retention trial.

6 Q Okay. Did, in each of the tests you gave, did he show
7 deficits below normal?

8 A Not in all of the tests that I gave.

9 Q Okay. Which ones did he show deficits below normal?

10 A I'm gonna flip through my raw data here. His immediate
11 visual memory was average. His delayed was below average.
12 His delayed verbal learning for stories was average. It was
13 at the 36 percentile. His manual speed on his left-hand was
14 average. It was at the 43rd percentile. His right-handed
15 manual dexterity was average at the 28th percentile. His
16 Trail Making on Part B was average at the 35th percentile.
17 However, he did have an error on that which is considered
18 indicative of organicity.

19 As we talked about before, his nonverbal abstract
20 reasoning was above average on that -- that's a subtest from
21 the I.Q. test, and his sequencing ability was average at the
22 37th percentile. And that's it. Everything else was below
23 average to severely impaired.

24 Q Okay. And in addition to Doctor Melikian, did you
25 share that information completely with her?

Tora Brawley - Cross-examination
by Mr. Zelenka

1 A I went over all my results with her, yes.

2 Q Okay. And that was in your verbal consult?

3 A Yes.

4 Q Okay. Cause in your written report it doesn't include
5 all those specific information about this test that you
6 talked about?

7 A I put in -- yes, that's correct. I put in the areas of
8 deficits and then noted he had scattered deficits meaning
9 some things were fine and some things were not.

10 Q Okay. And in your consultation with, with the lawyer,
11 which shows a half an hour consultation, what did you share
12 with Mr. Bartosh?

13 A Same thing. I went over the test results with him and
14 the other information that I had gathered that we've talked
15 about through interview.

16 Q Okay. And that, according to the invoice, was May 2nd,
17 2004?

18 A Correct.

19 Q Either in your consultation with Doctor Melikian or
20 your consultation with Mr. Bartosh, did you make a specific
21 request for the school records that you listed in your May
22 20th report?

23 A I know that I spoke with Doctor Melikian about it
24 because she and I believe were in similar boats where we had
25 been called in late in the game and didn't have everything

Tora Brawley - Cross-examination
by Mr. Zelenka

1 that we needed.

2 Q Okay. So, you're pretty sure you asked Mr. Bartosh, at
3 least on, on May 2nd, for the medical records?

4 A I told him those things would be needed in order for me
5 to say firmly one way or the other.

6 Q Okay. And do you recall when you received those
7 records?

8 A It was after I had written my report.

9 Q Which would be on May 20th?

10 A Right.

11 Q Okay. With respect to your consult with Doctor Absher,
12 the neurologist, what was the purpose of that, that call?

13 A I don't have a strong recollection of that. I didn't
14 even remember speaking to him until I was reviewing and
15 looked at my invoice and I don't have any notes from it. I
16 believe what happened was that he was consulting on the case
17 and they wanted me to share my results, my cognitive testing
18 results with him.

19 Q Okay. And, again, that was a half an hour, which was
20 essentially the same amount of time that you consulted with
21 Doctor Melikian and counsel, correct?

22 A That's correct.

23 Q All right. And your best recollection would be it was
24 the same information, the same details as what the
25 neurologist would of normally been asking you?

Tora Brawley - Cross-examination
by Mr. Zelenka

1 A That's correct.

2 Q Did he, if you can recall, indicate anything back to
3 you about abnormality or anything?

4 A I have no recall on that.

5 Q Okay. Do you recall how you received the medical
6 reports and the school records?

7 Was it hand delivered to you?

8 Did it come in the mail?

9 A They faxed those to my office.

10 Q Okay. And that was while the trial was ongoing?

11 A I'm, I'm not sure the dates of the trial. I---

12 Q Okay.

13 A I don't know.

14 Q But it was after your reports?

15 A It was after my report. I'm, I'm not in my office
16 every day. I only work part-time. So, if it had been faxed
17 and I remember them coming in to send out, they sent out the
18 reports and went to my mail box and there were some records
19 that had been faxed. But, as I said, at that point I
20 already had been told that I would not be coming to Court.

21 Q Okay. I have no further questions. Thank you, Doctor
22 Brawley.

23 REDIRECT EXAMINATION

24 BY MS. NORRIS:

25 Q Doctor Brawley, just so it's clear about this fax that

Tora Brawley - Redirect examination
by Ms. Norris

1 you received, do you have that with you in your file there?

2 A I believe I do. Yes.

3 Q How, how long is that fax?

4 A Well, here's the first one that's the school records.
5 Fifteen pages.

6 Q And it was---

7 A It was faxed on May 20th and there's another one
8 regarding the Marion Lindsey case and it was faxed on the
9 19th, again, to my office and it also is fifteen pages.

10 Q And is that also school records?

11 A No, this says information from Lenora Topp.

12 Q Okay. So, with the exception of those two documents,
13 you were never provided any background information other
14 than from Mr. Bartosh and Mr. Lindsey?

15 A Correct.

16 MS. NORRIS: Nothing further, Your Honor.

17 MR. ZELENKA: Just, just a couple.

18 RECROSS EXAMINATION

19 BY MR. ZELENKA:

20 Q So, the information in your report that you had that he
21 denied suicide ideation, that would of come directly from
22 Mr. Lindsey?

23 A Correct. I asked currently because I wanted to do the
24 risk assessment. I want to make sure they don't commit
25 suicide in my office.

Tora Brawley - Recross examination
by Mr. Zelenka

1 Q Okay. And the information that, from other family
2 members from Mr. Lindsey had suffered from depression, of
3 Mr. Lindsey had suffered from depression, that would be from
4 Mr. Lindsey?

5 A That's correct.

6 Q Okay. Even though it says by history in your report?

7 A His history. That's what I meant.

8 Q His history---

9 A His history that he gave me.

10 Q ---that he reported to you?

11 A Correct.

12 Q Okay. And the fact that your report revealed a
13 chaotic, chaotic childhood, that was from Mr. Lindsey?

14 A Correct.

15 Q That his stepfather was a heavy drinker, that came from
16 Mr. Lindsey?

17 A Yes, sir.

18 Q That his mother had worked most of the time, that came
19 from Mr. Lindsey?

20 A Yes, sir.

21 Q That Lindsey reported he was responsible for his
22 younger sibling and was responsible for taking care of the
23 home and meals, that was from Mr. Lindsey?

24 A Yes, sir.

25 Q And that he was living with a cousin at the time of the

Tora Brawley - Recross examination
by Mr. Zelenka

1 incident, had been separated from his wife, that all came
2 from Lindsey?

3 A Yes, sir, during my clinical interview.

4 Q Okay. So, the information, again, that several other,
5 other family members suffered from depression was not coming
6 from your discussion with Mr. Bartosh, is that correct?

7 A Correct.

8 MR. ZELENKA: Okay. No further questions. Thank you,
9 Your Honor, for your indulgence.

10 MS. NORRIS: Nothing, Your Honor. We ask that Doctor
11 Brawley be excused.

12 MR. ZELENKA: No objection.

13 THE COURT: You're excused. Thank you.

14 WITNESS: Thank you.

15 THE COURT: All right. Suit everybody to break for
16 lunch?

17 Hour and 15?

18 Let's try to be back around 2:15.

19 MR. VIETH: Thank you, Your Honor.

20 (Whereupon, Court was in recess for the lunch hour.)

21 THE COURT: All right. I believe we got everybody.

22 MR. VIETH: We're ready, Your Honor.

23 MR. COLLINS: Your Honor, we call Mr. Vincent Bell.

24 THE COURT: Come around and be sworn please.

25 VINCENT BELL, being first duly

Vincent Bell - Direct examination
by Mr. Collins

1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. COLLINS:

4 Q Sir, can you give us your full name?

5 A Vincent Lee Bell.

6 Q All right. And, Mr. Bell, where do you currently work?

7 A I'm a paramedic at Spartanburg EMS.

8 Q All right. And how long have you been with Spartanburg
9 EMS?

10 A Ten years.

11 Q All right. Jumping straight back to September the
12 18th of 2002, were you working that particular day?

13 A Yes, sir, I was.

14 Q All right. And were you one of the paramedics that
15 responded to the Inman Police Department that evening?

16 A Yes, sir, I was.

17 Q All right. When you arrived there that evening, what
18 did you find there at the parking lot of --?

19 A We pulled up. We got dispatched to a shooting, pulled
20 up to that location. There was two vehicles sitting out
21 there. There's also a police officer sitting out there. We
22 got told that the scene was clear, which they clear a scene
23 before we move in. And when we came in, I, my partner went
24 immediately to the gentleman. I went over to the car to the
25 female, ascertained that, that she was dead, and then I went

Vincent Bell - Direct examination
by Mr. Collins

1 up and started taking care of the gentleman, which was
2 Mr. Lindsey.

3 Q Okay. Who were the other paramedics that were with you
4 that evening?

5 A Susan Horton was there and also Joseph Stewart was
6 off-duty, and he happened to live in the area, and he came
7 by to give us a hand.

8 Q All right. So, three of you were there to, to work
9 that scene?

10 A Yes, sir, that's correct.

11 Q All right. And Mr. Lindsey was the gentleman you found
12 that the three of you were there working on right then?

13 A Yes, sir.

14 Q When you came up to work on Mr. Lindsey, was he
15 conscious?

16 A Yes.

17 Q All right. And as part of your normal procedure, do
18 you ask conscious victims certain questions?

19 A Yes, we, we try to ascertain what's going on with the
20 situation, and also, if they -- if it's a medical or a
21 trauma, it depends on what questions we ask.

22 Q All right. And are there purposes behind those
23 questions that you ask?

24 A Yes, what we do is we try to ascertain what happened
25 and then it also give us a, an idea of how alert that

Vincent Bell - Direct examination
by Mr. Collins

1 patient is to the situation.

2 Q And in this particular case, would you also be looking
3 to see whether or not that individual is a danger to you or
4 anyone else?

5 A Oh yes. Oh yes.

6 Q All right. Now, as part of those questions, did you
7 get some responses from Mr. Lindsey that evening?

8 A Yes, sir, I did.

9 Q All right. What type of questions did you ask him that
10 evening?

11 A I asked him basically what happened. He initially said
12 that he shot himself and then my partner, Susan, had asked
13 him, you know, the same type of question, and he said he had
14 shot himself, let me die, and then during that time he also
15 turned around and said -- I said, I asked him again what
16 happened. He said I shot myself and then I shot my wife.

17 Q All right. And did you have any follow-up questions to
18 that?

19 A We were taking care of him and initially he was not
20 wanting to be very cooperative. After we made sure
21 everything was secure, all weapons were off of him, we were
22 packaging him and doing our normal care, we loaded him into
23 the truck and started in route to the hospital emergency
24 traffic. I then asked him again what happened, and he
25 basically told me, he said I shot myself and then I shot my

Vincent Bell - Direct examination
by Mr. Collins

1 wife. Well, I immediately said why because normal
2 conversation, and he told me that his wife was fooling
3 around with somebody.

4 Q All right. Now, you said he was not -- he did -- his
5 attitude towards the, the original treatment or attempted
6 treatment was that he was not cooperative?

7 A Correct. He, he basically told us that he wanted to
8 die and let him die.

9 MR. COLLINS: Okay. Your Honor, if I may have just one
10 moment?

11 (Pause.)

12 MR. COLLINS: Your Honor, those are all the questions
13 we have for Mr. Bell.

14 MR. SIMON: May it please the Court.

15 CROSS-EXAMINATION

16 BY MR. SIMON:

17 Q Good afternoon, Mr. Bell.

18 A Afternoon.

19 Q Shortly after you treated, where you picked up with
20 Mr. Lindsey, did you talk with the defense or the state in
21 any point in time?

22 A Did I talk with---

23 Q More towards the, I guess, the solicitor's office or
24 the police.

25 A I gave a statement to the police after we took

Vincent Bell - Cross-examination
by Mr. Simon

1 Mr. Lindsey to the hospital and care was transferred over to
2 the Spartanburg Regional.

3 Q Okay. Did you give them a written statement?

4 A Yes, I gave them a statement. I sat there and talked
5 with the gentleman about the statement.

6 MR. SIMON: Okay. Your Honor, may I approach opposing
7 counsel?

8 THE COURT: Sure.

9 MR. SIMON: May I approach the witness, Your Honor?

10 THE COURT: Uh-huh. (Affirmative).

11 Q Okay. Mr. Bell, I apologize. That appears to be a
12 sticky note over the copy of it.

13 Can you take a look at this and tell me if you can
14 identify that?

15 A Yes, that's correct. That's my signature.

16 Q Is that the written statement you gave to the police?

17 A Yes, sir, that's my signature down at the bottom.

18 Q Okay.

19 A Except for the sticky note area that's scanned over.

20 MR. SIMON: All right. Your Honor, at this time I'd
21 like to move this in as State's 1.

22 MR. COLLINS: Your Honor, let me take a little bit
23 closer look since he mentioned this sticky note.

24 WITNESS: There's a sticky note blank place at the top.

25 MR. COLLINS: I got you.

Vincent Bell - Cross-examination
by Mr. Simon

1 MR. SIMON: All right. Actually -- yes, sir, I'd like
2 to move this in as State's 1.

3 MR. COLLINS: No objection, Your Honor.

4 THE COURT: Without objection then.

5 (Whereupon, the statement was marked as Respondent's
6 Exhibit No. 1 and received into evidence at this time.)

7 Q All right. Mr. Bell, hand this back to you for a
8 second.

9 Now, earlier you were testifying about your
10 conversation with Mr. Lindsey.

11 A Uh-huh. (Affirmative).

12 Q That he had told you that he shot himself and then shot
13 his wife.

14 A Yes.

15 Q Well, first, let me ask, when you gave the statement,
16 this was closer to the time of the incident, correct?

17 A Correct, yes. That is correct.

18 Q And your memory, your memory, your memory in writing
19 the statement is a lot better than it is now?

20 A Uh-huh. (Affirmative).

21 Q Can you just take a look at that and take a look at
22 your statement and see if, again, what your recollection,
23 see if that will refresh your recollection, your
24 recollection of what he told you on that day in terms of the
25 order of the shooting.

Vincent Bell - Cross-examination
by Mr. Simon

1 A If you're talking about the order of the shooting, like
2 if you look at the fourth one down, he states that I shot my
3 wife and I shot myself in the head.

4 Is that what you're talking about, order?

5 Q So, yeah. So, he did say he shot him, he shot his wife
6 first?

7 A Yes, sir. Yes, sir.

8 Q Okay.

9 A That's correct.

10 Q And further down, didn't he also say that he shot his
11 wife because she was fooling around with another man?

12 A Yes, if you look down almost down there at the bottom,
13 which in natural conversation I asked him why, and then I
14 asked him why he did it and he said my wife was fooling
15 around with another man.

16 Q And, to your recollection, he didn't say anything about
17 his kids or anything?

18 A No, sir.

19 Q And---

20 A I don't remember anything about the children.

21 Q Okay. And he didn't make any other statements that you
22 remember at, from that?

23 A No. No, sir.

24 MR. SIMON: Court's indulgence just for a second, Your
25 Honor.

Vincent Bell - Cross-examination
by Mr. Simon

1 (Pause.)

2 Q Okay. Did you have any discussions with Mr. Lindsey's
3 defense counsel before trial?

4 A They just called me and told me I needed to be here.

5 Q Okay.

6 A If that's these guys over here.

7 Q Oh, no. I mean it would be a gentleman named Mike
8 Bartosh or---

9 A I remember getting subpoenaed the last time, and I did
10 not have to testify the last time.

11 Q Okay. By any chance, did you speak with a lady named
12 Lenora Topp?

13 A I don't remember that name.

14 Q Don't remember that name?

15 A No, sir. I'm sorry.

16 Q Okay. Did you discuss this case with anybody other
17 than -- other than receiving this subpoena and providing a
18 written statement, have you spoken with anybody else about
19 this case?

20 A No, the only ones I talked to is when they told me to
21 come up here.

22 MR. SIMON: Okay. Just one moment please.

23 (Pause.)

24 MR. SIMON: No further questions, Your Honor.

25 WITNESS: Okay. Do you want this?

Vincent Bell - Cross-examination
by Mr. Simon

1 Do you want this?

2 THE COURT: Yes.

3 MR. COLLINS: Your Honor, if I may ask one additional
4 question.

5 THE COURT: Sure.

6 REDIRECT EXAMINATION

7 BY MR. COLLINS:

8 Q Mr. Bell, during the ambulance ride from the police
9 department to the hospital, did you continue this
10 conversation with Mr. Lindsey?

11 A Yes, we were talking in the back and, and that
12 basically was ascertained how alert he was and, and every
13 question I asked him he answered.

14 Q All right.

15 A He became a lot more alert as in more cooperative with
16 us, I might as well say that, more cooperative with us on
17 the way to the hospital.

18 Q All right. Was this a two way conversation?

19 In other words, did he ask questions back of you during
20 that?

21 A He didn't say that -- no, I don't remember saying -- he
22 didn't say that much. He didn't ask me any questions. It
23 was just me asking questions and him responding to me.

24 MR. COLLINS: Okay. Your Honor, those are all the
25 questions I have.

Vincent Bell - Redirect examination
by Mr. Collins

1 MR. SIMON: No further questions, Your Honor.

2 THE COURT: You may step down.

3 MR. VIETH: Like to ask he be excused, Your Honor.

4 Thank you very much.

5 THE COURT: Any---

6 MR. ZELENKA: No objection.

7 THE COURT: You're excused.

8 WITNESS: Thank you.

9 MR. VIETH: Appreciate it, sir.

10 WITNESS: Thank you.

11 MR. VIETH: Lenora Topp.

12 LENORA TOPP, being first duly
13 sworn, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. VIETH:

16 Q Lenora, if you'll please state your full name for the
17 Court.

18 A Lenora Topp, T-O-P-P.

19 Q All right. And where do you live now, Mrs. Topp?

20 A In Asheville, North Carolina.

21 Q Okay. Are you employed at this time?

22 A I am, at this time.

23 Q And what do you do now?

24 A I'm actually selling, I'm selling batteries on-line.

25 Q Okay. And prior to that -- let me go back prior to the

Lenora Topp - Direct examination
by Mr. Vieth

1 Lindsey case.

2 A Yes.

3 Q Were you in law enforcement?

4 A I started in law enforcement in 1975.

5 Q Okay.

6 A And got out of it in 1990, and then started doing
7 private investigative work in about 1991, '92 when I was
8 living in California and subsequently started working in
9 North Carolina when I moved back to Asheville in 1993.

10 Q All right. And when you did private investigation
11 work, that was after law enforcement?

12 A Yes, sir.

13 Q And by law enforcement, what are we referring to?
14 What did you do?

15 A I was an investigator with both first the Buncombe
16 County Sheriff's Department and then with the North Carolina
17 State Alcohol Law Enforcement where I---

18 Q Okay.

19 A ---ended up being a supervisor with that division.

20 Q All right. And then when you went into private
21 investigations, it would be a general investigation whether
22 you're doing domestic work or criminal work?

23 A Yes, sir.

24 Q Anything that required investigation---

25 A That---

Lenora Topp - Direct examination
by Mr. Vieth

1 Q ---from lawyers or otherwise?

2 A That's correct.

3 Q And in that capacity, were you contacted by anyone in
4 reference to getting involved in the Marion Lindsey case?

5 A Yes, I was.

6 Q And do you recall how that happened?

7 A Yes, I do.

8 Q All right.

9 A Attorney Jeff Blume recommended I assist the Public
10 Defender's Office here in Spartanburg on their case
11 regarding Marion Lindsey in the capacity of an investigator,
12 of mitigation expert/investigator, whatever you---

13 Q All right.

14 A ---determine.

15 Q What did you anticipate, or maybe phrase it better,
16 what did you feel your instructions were with regards to the
17 Public Defender's Office?

18 What were you to do?

19 A I -- my major job was to gather records.

20 Q Okay. No one ever mentioned you as a witness to
21 testify in a case?

22 A No, they never did.

23 Q Okay.

24 A I even asked the day of trial when it started, I said
25 am I going to testify. Oh, well, we don't know. You're not

Lenora Topp - Direct examination
by Mr. Vieth

1 gonna testify. So, no one had approached me about that to
2 begin with.

3 Q Okay. So, you ended up being essentially a fact
4 finder, getting records as needed, and assembling that, and
5 meeting with witnesses as necessary, and then getting ready
6 for the trial of the case?

7 A Yes, sir.

8 Q Okay. And in looking at the exhibits that we have
9 introduced, and, Pam, I do not know how to find the number,
10 but looking at your invoice, this right here, okay, it's
11 Applicant Exhibit No. 2, your invoice, and I will just ask
12 you, we've already agreed that it can come into evidence,
13 but is that, in fact, your invoice?

14 A Yes, sir.

15 Q Okay. And I'm just gonna go over this a little bit
16 with -- you were first apparently involved in this case
17 April 16th, 2004?

18 A Yes.

19 Q Is that correct?

20 A Uh-huh. (Affirmative.)

21 Q That would be, with a trial starting on the next month
22 on the 21st of the following month, just about a month
23 ahead of time?

24 A Yes, that's correct.

25 Q All right. And on that day, your records reflect that

Lenora Topp - Direct examination
by Mr. Vieth

1 you spent seven hours that day, which would include a 120
2 mile round trip from Asheville to Spartanburg, right?

3 A Uh-huh. (Affirmative).

4 Yes.

5 Q And then that, assuming that takes place about two
6 hours, you had five hours for your initial meeting with the,
7 the defendant you say and, and, again, getting a medical
8 release?

9 A Yes, the -- well, the medical releases, I, I came back
10 to get those another time just to get those signed.

11 Q Okay. I'm just looking at what was written on here.

12 A Yeah.

13 Q It said and obtained medical release.

14 A Yeah.

15 Q So, that's what I'm going from.

16 A Well, the Public Defender's Office assisted me with
17 that also, and I think that I got -- I think they had him
18 sign it.

19 Q Okay. All right. So, I'm gonna just put on this list
20 that that's about five hours of active working time, two
21 being given to driving?

22 Is that fair---

23 A Yes.

24 Q ---to say?

25 A Yes, it is.

Lenora Topp - Direct examination
by Mr. Vieth

1 Q Then on April 19th, three days later, six and a half
2 hours, 155 miles in a car, and that's to obtain medical and
3 mental health records and seek, visit the Public Defender's
4 office?

5 A Yes.

6 Q Okay. Again, knocking a couple hours off of that for
7 driving, about four and a half hours of time.

8 Then the next day you have eight hours involved,
9 150 miles, and that's for interviews, Public Defender's
10 office, and obtain work records release. So, you came back
11 two days in a row.

12 A Yeah, that -- yes, that's when I came back to get the
13 work, records released from Mr. Lindsey.

14 Q Okay. Again, on the 22nd, you come to Spartanburg to
15 retrieve records. That's about four and a half hours that
16 you have on your voucher. So, that's about two and a half
17 hours here. 26th of April, seven hours, 150 miles, travel
18 to Spartanburg to interview defendant again and to collect
19 records.

20 A Yes.

21 Q All right. And 5/14, seven and a half hours, travel to
22 Spartanburg for records retrieved, and a conference at the
23 P.D.'s office.

24 Okay?

25 A Yes.

Lenora Topp - Direct examination
by Mr. Vieth

1 Q All right. And then finally, on 5/15, travel to
2 Spartanburg for an interview with Attorney Brannon and
3 attempted to locate witnesses and that's 180 miles that day
4 I guess you're driving around trying---

5 A Yeah.

6 Q ---to find these witnesses.

7 A Put a few more miles on, yes, sir.

8 Q As well as your round trip to and from Asheville.

9 Okay. And then the trial starts. Make sure I got the
10 date right. I don't want to trick anybody. The trial
11 started on 5/17.

12 So, at that point in time, 5, 10, 15, 21, 31, about 40
13 hours or so it looks like it was spent working on the case,
14 give or take?

15 A Yes.

16 Q Just whatever these records show.

17 A Yes, sir.

18 Q All right. As a mitigation investigator?

19 A Correct.

20 Q Okay. And the rest of the time that you had in the
21 case was after the trial had actually started, 5/18, 5/19,
22 5/20, 5/21, and 5/22, 23.

23 Those, those hours are basically Court time hours, is
24 that fair to say?

25 A Fair to say, uh-huh. (Affirmative).

Lenora Topp - Direct examination
by Mr. Vieth

1 Q Okay. Now, given that, that these hours give you about
2 a week in time that you spent working, 40 hours -- have you
3 done death penalty cases since this one?

4 A Yes, I have.

5 Q Okay. Have you -- given the hours you spent on this
6 and hours you spent on subsequent death penalty cases, do
7 you feel, have an opinion whether you had sufficient time in
8 this case?

9 A I do have opinion.

10 Q And what is it?

11 A I did not have sufficient time to do the work that was
12 needed.

13 Q Okay. In a, in a recent death penalty case you've been
14 involved in or maybe the last one, whether it's recent or
15 not, how many, how much time did you spend in the case?

16 A Three years.

17 Q Okay. And that's a North Carolina case?

18 A Yes, sir.

19 Q Okay. All right. Now, with regards to the preparation
20 of the case, were you involved in doing a genogram or
21 anything to show a jury the historical background of Marion
22 Lindsey?

23 A No, I wasn't asked to do that.

24 Q Okay. Was one done?

25 A I have no knowledge of one. I don't, I don't -- I

Lenora Topp - Direct examination
by Mr. Vieth

1 never saw one.

2 Q Okay. To your recollection, was the only testimony
3 attempted to be elicited in the case involving his
4 background through family members?

5 A As far as I know.

6 Q Okay.

7 A Yes.

8 Q All right. In your trial time, the time that you were
9 actually in court, were you trying to locate a Doctor Barry
10 Henderson?

11 A Yes, I was.

12 Q All right. Tell the Court briefly about what -- well,
13 let's go ahead with my question.

14 Tell me about Barry Henderson.

15 Tell me, tell me what you were trying to do with Barry
16 and how you found out about Barry.

17 A I found out about Barry when I talked with Virginia
18 Lindsey, the day that Doug Brannon was with me, and we went
19 to see her. And Doctor Henderson was a childhood -- well,
20 he, he, he dealt with Mr. Lindsey when he was a child on
21 numerous occasions and he also was friends. His children,
22 when Barry, when Marion was growing up, his children were
23 friends with Marion and they played together. So, the dual
24 purpose, I needed, I needed medical records and also wanted
25 to see if he would be a witness for us.

Lenora Topp - Direct examination
by Mr. Vieth

1 Q All right. Now, let me go address your type of work
2 real quick again.

3 Is it important to you, as a mitigation investigator,
4 to have time to develop relationships?

5 A Oh, yes.

6 Q All right. Can you -- do you get information right off
7 the bat from anybody, a defendant or defendant's family?

8 Does it take any culturing to get information?

9 A Most of the time it takes time for them to trust me and
10 to give information. There's some people who will spill it
11 all. You know, they feel comfortable with you. Most people
12 do feel comfortable with, with me when I do interview them,
13 but it takes more than one trip to get all the information
14 because you, you don't remember to ask questions and you'd
15 rather not spend time on the phone if you can visit them in
16 person and look them in the eye and let them think about it
17 and reflect, and then they are able to have better recall.

18 Q All right.

19 A Especially after the first -- I didn't mean to
20 interrupt.

21 Q No, go ahead. Go ahead. You can speak up.

22 A If you visit somebody the first time, and, and they're
23 asked questions, it -- sometimes it surprises people that
24 they need to remember years ago. And then when you leave
25 them, they have time to remember. I do that too. I say oh,

Lenora Topp - Direct examination
by Mr. Vieth

1 yeah, I forgot that this happened, that you, you know, you
2 jogged my memory.

3 Q All right.

4 A So, it's always important to talk to key witnesses more
5 than one time.

6 Q All right. And, and, so, in considering that and
7 Doctor Henderson, when you first met with Marion only a
8 month before trial, obviously that name apparently did not
9 surface?

10 A No, in fact, Mrs., Mrs. Lindsey, she accidentally gave
11 me the, the wrong name. She called him Hennison and I
12 searched pretty hard for Doctor Hennison and there was no
13 such person. And it was in Court when Marion was able to
14 correct it and say Henderson. So, I knew exactly where to
15 go at that point because I had seen where the name was
16 similar anyway. But I could never get an answer at that
17 office, and then when I realized it was Barry Henderson, we
18 couldn't, I couldn't find him. He, he didn't return calls
19 or the fax requesting information.

20 Q So, at this time you were in trial?

21 A Yes, we were, we were in trial.

22 Q Okay. Did you subsequently talk to Doctor Henderson?

23 A Yes, I did.

24 Q What did, what did Doctor Henderson tell you in that
25 conversation?

Lenora Topp -- Direct examination
by Mr. Vieth

1 A He said he was very sorry that he couldn't help, that
2 he did like Marion and he would of been glad to come to
3 court to testify what a good person he was, and how he
4 trusted him to play with his children --

5 Q All right.

6 A -- years ago.

7 Q All right. And were you concerned enough about what
8 you heard from Doctor Henderson that you sent an email to
9 the Public Defender's Office?

10 A I did.

11 Q Okay. And I share with you Exhibit, Applicant Exhibit
12 3, and just ask you to read that document.

13 A The whole thing?

14 Q Yes.

15 A Everything.

16 Q And who was it to?

17 A This was to Ms. Quimby, Karen Quimby. She's the only
18 one that I, I, that I communicated with was Ms. Quimby --

19 Q You did not---

20 A --- and that started with email and everything. I said
21 how are you today. Yesterday, yesterday was totally
22 depressing and I know you take these defendants to heart.
23 When does Marion get moved to the State facility and do you
24 know the address. Today I called Doctor Barry Henderson's
25 office to ask where the records were we, we requested, and

Lenora Topp - Direct examination
by Mr. Vieth

1 the lady in charge was not there. But I left word that we
2 still needed them for the file. Then I asked to speak to
3 Doctor Henderson and he came to the phone.

4 You see Marion never told me he wanted the doctor as a
5 witness for him until we were in court the other day, which
6 was Saturday. We went through on Saturday. Marion said he
7 used to play with the doctor's children, et cetera, and I
8 was only told about the medical records, and, damn it, the
9 doctor thinks Marion is a fine person and knew he loved his
10 children. He said everytime he saw Marion out the kids were
11 with him, and he was talking about Marion's children.

12 Virginia had been, had been to see the doctor a short
13 time ago, and she didn't even ask him about speaking for
14 Marion. Now I really feel like I didn't do enough for him.
15 Can the doctor do anything now. He said just ask.

16 Q Okay. And what's the day of that?

17 A May 25th, 2004.

18 Q All right. Okay. And that's the day after the jury
19 had given the death penalty in this case?

20 A Yes, sir.

21 Q Okay. And, of course, to try to show that Doctor
22 Henderson may of impacted that jury had he been there, we
23 would try to produce him, have we learned that he died?

24 A Yes, he's deceased.

25 Q And that is Court Exhibit, Court Exhibit, Applicant's

Lenora Topp - Direct examination
by Mr. Vieth

1 Exhibit 7, which is the, to the Court's knowledge, the
2 coroner's certificate that Doctor Henderson died April 9,
3 2006, and is unavailable to testify at this hearing this
4 week.

5 okay.

6 MR. ZELENKA: No objection to that evidence, Your
7 Honor---

8 MR. VIETH: Thank you.

9 MR. ZELENKA: ---Court Exhibit 6. I mean Applicant's
10 Exhibit 6.

11 Q All right. All right. Additionally, Lenora, with
12 regards to allegations of infidelity, I realize this may not
13 be at issue on a guilt phase, but it may be an issue on a
14 sentencing phase, did you have any knowledge of that, of a
15 Rusty Clevenger note given from the Solicitor's Office to
16 the public defender indicating that a person had called the
17 solicitor's Office to say that he had been, had an affair
18 with Nell Lindsey?

19 A I had no knowledge of that note.

20 Q okay. would you have followed up on that note if you
21 had the opportunity to?

22 A Yes.

23 Q okay. With regards to that, and I think we've covered
24 pretty well your lack of time in this case, but were you
25 still seeking records, even during the course of the trial

Lenora Topp - Direct examination
by Mr. Vieth

1 particularly to try to get records on Robin Keith and Bessie
2 Smith and those that have been introduced into evidence?

3 A I was.

4 Q And the date of those exhibits that are, that are in,
5 and I won't bother to go look at the number, but the exhibit
6 number reflects two medical release forms dated 5/21/04?

7 A I think I recall seeing that on the bottom of the page.

8 Q Right. The -- I can show you those.

9 A There was another date for Robin.

10 Q 5/21 I think and 5/20.

11 A Robin Keith, 5/21, and 5/24, Ms. Bessie Smith.

12 Q That's Exhibit, Applicant's Exhibit 8.

13 A Yes.

14 Q Okay. And whether these records would of been vital or
15 not vital, you didn't have them?

16 A I did not.

17 Q Okay. And is that the same with all family records?
18 Did you get any family records other than Marion's?

19 A I was not asked to get any family records.

20 Q Okay. Did you ever hear of Rod Tullis?

21 A I, you know, we heard about it since, but I don't
22 recall -- I may of heard about him during that, during the
23 trial.

24 Q Were you asked to interview Mr. Tullis?

25 A No, I was not.

Lenora Topp - Direct examination
by Mr. Vieth

1 Q Okay. And I think the one last document that may be in
2 evidence, I don't know, is a letter that you sent to Chapman
3 High School May 10th asking for records even as late as
4 that.

5 So, it's fair to say that even right up to the time of
6 trial, and during trial, you're still trying to do work as
7 best you can?

8 A Uh-huh. (Affirmative).

9 Q Okay.

10 A Yes.

11 MR. VIETH: Excuse me one second, judge. I may be
12 done.

13 (Pause.)

14 Q Thank you. Answer any, any questions the prosecutor
15 may have.

16 A Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. ZELENKA:

19 Q Mrs. Topp, prior to becoming involved in Mr. Lindsey's
20 case, had you been a mitigation investigator on any other
21 case?

22 A No, I had not. Not a mitigation investigator.

23 Q Okay. Have you ever been involved in any case in South
24 Carolina?

25 A Not prior to this one.

Lenora Topp - Cross-examination
by Mr. Zelenka

- 1 Q And have you been subsequently?
- 2 A Yes, I have.
- 3 Q How many other cases?
- 4 A Two for the Public Defender's office and---
- 5 Q Spartanburg?
- 6 A Here, uh-huh. (Affirmative).
- 7 Q Okay.
- 8 A And one for a Greenville case.
- 9 Q Okay.
- 10 A Camelle Evans.
- 11 Q And did you spend three years on any of those cases?
- 12 A No.
- 13 Q Roughly how much time did you spend on each of those
- 14 cases?
- 15 A I didn't have enough time on those cases either.
- 16 Q Okay.
- 17 A No more than about two months.
- 18 Q Okay. And on this case, according to your notes, you
- 19 began around April 16th, 2004?
- 20 A Yes, sir.
- 21 Q And the -- you indicated, on direct, that you spent
- 22 five hours working on that case on that first day?
- 23 A Yes, I did.
- 24 Q Is that correct?
- 25 A Uh-huh. (Affirmative).

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q What did you do in that five hours?

2 A I stopped at the Public Defender's Office and to meet
3 everyone, and then Mr. Bartosh took me over to meet Marion
4 where I interviewed him---

5 Q Okay. And how long---

6 A ---the rest of the time.

7 Q How long did that interview take?

8 A Well, it took three or fours hours.

9 Q Okay. And during that interview, did Mr. Lindsey give
10 you information about his family background?

11 A Yes, he did.

12 Q What type of information?

13 A Everything that he could remember. We started from the
14 day he was born that he remembers and the incidents he was
15 in and the accidents he had and he's run over by a car and
16 when he was a child, and that he had very very poor -- it
17 was very bad. It was a very sad upbringing. And he talked
18 about how he lived in the house with -- four of them slept
19 in one bed, and that he was not raised by his father, and he
20 has had children and he would never want his -- he never
21 wanted his children to be without a father because he just
22 never had a male figure in his life.

23 So, he -- we, we talked about that and everything up to
24 the incident in the police department parking lot.

25 Q Okay. Did he also talk to you about his imaginary

Lenora Topp - Cross-examination
by Mr. Zelenka

1 friend Jimmy during that conversation?

2 A I think I -- if I recall, I heard about Jimmy, but I
3 don't think Jimmy was in the room.

4 Q Was he ever in the room?

5 A Not while I was there.

6 Q Okay. During that interview, did he indicate to you
7 the reasons why he shot his wife?

8 A Well, he couldn't, he couldn't remember half of it. He
9 was upset at his wife. He had gone to his brother's house
10 to try and get him to calm him down. He said I'm sure he
11 would of done that, but his brother was not home, and he had
12 been given some Xanax by his uncle prior to that too, but
13 that he was very upset about the, his wife having an affair
14 with a gentleman who was going to take over raising his
15 children, and he got in a car and he saw his cousin or
16 Celeste. He saw Celeste, who was driving the vehicle his
17 wife was in. He said I didn't know she was in the back seat
18 then.

19 He said all I wanted to know is what was going on and
20 to tell Celeste that I wanted to see my children cause he,
21 the children had been taken away from him and his, his
22 family, his mother and no one could see his children. He
23 said and that's when he saw the wife, Nell, in the back
24 seat, and that he wanted them to pull over so he could talk
25 to her, but Celeste took off.

Lenora Topp - Cross-examination
by Mr. Zelenka

1 And that's when he just -- he didn't remember a whole
2 lot. He knew that he followed them, and that when he got to
3 the, to the jail, he, he just shot when he got to the police
4 station. He shot into the car.

5 Q Okay. In describing his family history during that
6 first meeting, did he also give you some information about
7 his mother?

8 A Yes.

9 Q How to get in touch with her?

10 A Yes, I, I did know. I went back for -- he gave me as
11 much information as he could. Right now I can't recall if
12 he had all the names written down, but I know, when I went
13 back to see him, that may of been the time I'd gotten the
14 names of everybody, of most of his family, and the last
15 known addresses and phone numbers that he had.

16 Q Okay. So, you had two major interviews with him. One
17 on April 16th and another on April 25th?

18 A Or 26th I think. 25th or 26th. One of them, yes,
19 sir.

20 MR. ZELENKA: May I approach, Your Honor?

21 THE COURT: Yes, sir.

22 MR. VIETH: No objection to that document.

23 Q Mrs. Topp, let me ask if you can identify that
24 document.

25 A Yes, I sure can. On the 25th, yeah.

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q Okay. And what is that document?

2 A That is another interview with Marion Lindsey.

3 Q Is that a summary of two interviews?

4 A There are two -- there's a separate -- oh, I -- think
5 this -- yes, this is general reflections. I believe that
6 this was a summary of two because I was able to get some
7 more information. Most of this was done on the 18th. I
8 mean on, I'm sorry, that's his date of birth. On the
9 16th.

10 Q Okay.

11 A And then I just did a general, general summary of the
12 interview and reflections from him during that interview on
13 that date, the subsequent, the subsequent date.

14 MR. ZELENKA: Your Honor, we would request to move this
15 in as Respondent's Exhibit No. 2.

16 MR. VIETH: Without objection, Your Honor.

17 THE COURT: All right. In without objection.

18 (Whereupon, the notes were marked as Respondent's
19 Exhibit No. 2 and received into evidence at this time.)

20 Q Okay. Mrs. Topp, let me hand you Respondent's Exhibit
21 No. 2---

22 A Okay.

23 Q ---that you may wish to use to refresh your
24 recollection---

25 A Uh-huh. (Affirmative).

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q ---on that.

2 During that interview or those interviews, it indicates
3 you were able to get some information about his mother,
4 Virginia Lindsey, how to get in touch with her, correct?

5 A Yes.

6 Q The father, Leon McDowell, correct?

7 A Yes.

8 Q And what Mr. Lindsey considered his relationship with
9 Mr. McDowell, correct?

10 A Yes.

11 Q And that relationship was essentially somewhat distant,
12 isn't, as far as his parental involvement with him?

13 A That's correct.

14 Q Is that a fair statement?

15 A Very fair statement.

16 Q Did he indicate to you at that time that he felt bitter
17 towards his father?

18 A Yes, he did and he was bitter.

19 Q Did it indicate to you that he had hatred towards his
20 father?

21 A It's more that he was bitter. I don't know if he's,
22 said every, that his, he hated him. He said -- I said he
23 had -- well, he did have a hatred toward his dad, and a lot
24 of it had to do with the fact that he never could do
25 anything with his father. You know, he saw -- he said he

Lenora Topp - Cross-examination
by Mr. Zelenka

1 saw kids going different places with their dad, football
2 games, going fishing, and Leon, Leon McDowell was never
3 around to be a dad to him. So, yes, he did, he did express
4 hatred toward him.

5 Q Okay. And also that -- how was his family life like as
6 far as clothes that he had?

7 Did he have new clothes, old clothes?

8 What did your notes reflect about that?

9 A He wore the same clothes over and over again. They
10 never had new clothes. They had to wash their clothes out
11 every other night. Not every night. But every other night
12 and hang them out behind the wood heater---

13 Q Okay.

14 A ---in the house.

15 Q Did Mr. Lindsey also advise you concerning his
16 relationship with his brothers?

17 A He did.

18 Q And what did he indicate to you?

19 A That -- well, one of them had drown and it affected him
20 emotionally pretty severely. That was Paul.

21 Q And when did that occur according to your discussions
22 with Mr. Lindsey?

23 A That was when, as I was about to say, was the -- Paul
24 was Marion's second older brother. I mean -- yeah, older
25 brother and he was 27. So, it's about seven years ago

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Marion said and actually I, I did get a copy of the official
2 death certificate. They never found the body.

3 Q Okay. So, you did get some information about some
4 other family members?

5 A Yes, I did. I went to the courthouse to do that.

6 Q Okay. What was his relationship with Fred?

7 A That's Paul. Paul Frederick Lindsey.

8 Q Okay.

9 A It was a very close one. He said it affected him for
10 at least three years, his death.

11 Q Now, at one time did they move to West Virginia?

12 A I don't know. Oh, when they did that, that's when he
13 and Fred, before he drown, they moved, he moved with him up
14 there to work at a construction company and Marion got home
15 sick I think and came back and moved in in his mama's house.

16 Q Okay. What was Marion's relationship with Timothy
17 Sims?

18 A He loved him I think and he, he felt like Tim took over
19 the father in the household for Marion. He said he was like
20 a father to him and he followed him everywhere. Tim was his
21 idol and his mentor and they went places, they went places
22 together. But Tim had -- they all had different fathers.

23 Q Okay.

24 A The boys.

25 Q And Marion was essentially raised with Tim's other,

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Mr. Simmons' other children?

2 A He did, he -- well, he was raised by, I don't know
3 about the other children, but even Tim's dad helped out some
4 too as if he were his child. So, he was basically the only,
5 he says, the only father figure he had.

6 Q Okay. In your interviews with Mr. Lindsey, what did he
7 indicate to you about, about his nutrition, what he ate,
8 what the family ate?

9 A Well, he said that he ate so much bologna back then,
10 it's all they could afford, that he can't stand to look at
11 it now. In fact, I think we were there and they were
12 serving sandwiches and he refused to eat it cause it was
13 bologna in the jail.

14 Q In your discussions with Mr. Lindsey, did he talk to
15 you about his involvement with drugs?

16 A Yes, he did.

17 Q And what did he tell you?

18 A He said that he sold drugs off and on, that he, when he
19 didn't need to sale drugs -- he only sold drugs when he
20 needed the money, and he started getting into it heavy duty
21 because he needed the money and he liked the life-style that
22 he had when he sold drugs. Cars, houses, nice places to
23 live, and he could afford to buy things for his children and
24 that they were, that he was, drugs just afforded him a
25 better life-style. He never used them, but he sold them.

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q Okay. He indicated to you at, at one time, didn't he,
2 that some of Mr. Simmons' children started to hang with him?

3 A Uh-huh. (Affirmative).

4 Q Did he indicate to you that he tried to sell drugs to
5 them?

6 A No, hu huh. (Negative). He never said anything to me
7 about that that I recall.

8 Q Was he selling drugs at that time?

9 A Some of the time he was, and my notes just show that
10 the other children, he was not selling drugs at the time.
11 And -- but the other children, Leon McDowell's children, and
12 the twin, the sisters of Leon's, Leon, Junior, they were
13 trying, wanting to hang out or else they didn't like -- he
14 was an outsider. You know, he wanted Leon's attention I'm
15 sure and then Leon just wasn't there for them cause he did
16 have this second family grown-up by this time.

17 Q Okay. And, again, to clarify, Leon McDowell is Marion
18 Lindsey's natural father, correct?

19 A That's what he told me, uh-huh. (Affirmative).

20 Q Okay. Did they also provide information to you that
21 Leon McDowell, Junior took out a warrant against Marion?

22 A That's what Marion said.

23 Q That Teresa McDowell got along with Marion?

24 A Uh-huh. (Affirmative).

25 Q That Orlando McDowell still considered Marion to be an

Lenora Topp - Cross-examination
by Mr. Zelenka

1 outsider?

2 A At the time of this interview that is what he said.

3 Apparently so.

4 Q And Claude Lindsey got along with him and considered
5 him brother and sisters?

6 A Claude Lindsey's 27 year old triplets got along with
7 Marion, and he considered them to be his brother and
8 sisters.

9 Q Who else did he consider like brother and sister?

10 A Sammy Lindsey, Kathy Lindsey.

11 Q Okay. In your interview, and, and, and correct me if
12 I'm wrong, but this wasn't coming from your interview, but
13 according to that note, it suggested that you also inquired
14 of him at that time about his educational history.

15 Did you do that?

16 A Oh, yes, sir, I did.

17 Q All right. Did you report that educational history in
18 that document?

19 A I did.

20 Q And, again, that document you have, Respondent's
21 Exhibit 2, was that prepared for the defense team?

22 A Yes, it was.

23 Q Did you go over that with Mr. Bartosh?

24 A No, I didn't.

25 Q Did you go over it with Karen Quimby?

Lenora Topp - Cross-examination
by Mr. Zelenka

- 1 A Yes, probably so.
- 2 Q Okay.
- 3 A Since she's the one who got this.
- 4 Q Got it meaning---
- 5 A This---
- 6 Q ---that you handed it to her?
- 7 A I either handed it to her or I, or I emailed it.
- 8 Q Okay. Did he also report to you disciplinarian actions
- 9 that he had while he was in school?
- 10 A Yes, he did.
- 11 Q Including fights?
- 12 A Yes.
- 13 Q Fights against girls, fights against boys, correct?
- 14 A Yes. Well, he slapped, he slapped a girl. It's girls
- 15 and boys.
- 16 Q He was suspended from school for a week according to
- 17 him, correct?
- 18 A Yes, sir.
- 19 Q Did he also indicate to you traumatic, what he
- 20 considered the traumatic times in his life?
- 21 A He -- well, the -- yes, there were several it -- yeah,
- 22 especially one, a very serious one.
- 23 Q And what was that?
- 24 A That was when he saw his, his two uncles, Paul and
- 25 Willie, throw his favorite cat into the wood heater while it

Lenora Topp - Cross-examination
by Mr. Zelenka

1 was alive.

2 Q Okay. Explain that and is that all the detail he gave
3 you or did he give you---

4 A Yes, uh-huh. (Affirmative).

5 Q ---more detail?

6 A No, that was basically it. I mean he didn't do
7 anything about it and he cried, of course. But they, they,
8 they didn't like the cat and so that---

9 Q And how did you react to that?

10 A Well, shock, tears. It made me want to cry.

11 Q You had tears and it made you want to cry?

12 A Yeah.

13 Q You found that to be very disturbing, didn't you?

14 A (Witness nods affirmatively.)

15 Q And recognizing something like that would impact on his
16 life, correct?

17 A I think it would. It should impact on anybody's.

18 Q Okay. Now, in your discussions with him, Mr. Lindsey
19 also indicated to you, after a period of time, he quit
20 school, correct?

21 A Yes, he did.

22 Q And then began to take some jobs?

23 A He -- yes, he did. He, he, he was working. He tried
24 to keep a job. He didn't stay long at most of them.

25 Q Okay. And at one period of time he had a car accident,

Lenora Topp - Cross-examination
by Mr. Zelenka

1 correct?

2 A Yes.

3 Q Car blew out, I mean tire blew out on the car?

4 A He had a doughnut tire on it at the time and it did
5 blow out and he said it flipped three times. So, he even
6 lost some of his memory during that time and had to have
7 facial surgery.

8 Q Okay.

9 A He broke his hip in two. So, for a year he said he was
10 out of work.

11 Q He indicated to you, subsequent to then, that he
12 returned to work at Burger King, is that not correct?

13 A That's right.

14 Q Worked there for a while.

15 A Two of his brothers worked there, uh-huh.

16 (Affirmative).

17 Q And then lost that job and was out of work?

18 A Pardon me?

19 Q He was out a month, correct?

20 A I'm sorry. I didn't hear you.

21 Q He lost that job and then was out of work?

22 A Yes.

23 Q Went to work for United Cloth in Spartanburg.

24 A Uh-huh. (Affirmative).

25 Q Is that what he indicated to you?

Lenora Topp - Cross-examination
by Mr. Zelenka

1 A Yes, he did.

2 Q How did he feel about that job?

3 A He thought it was boring. He was sorting cloth and
4 then he had to work with a lot of women, and the reason he
5 hated doing that is cause all they did was gossip. So, he
6 felt he had a good relationship with the employees as far as
7 working with them, but, and the management. He stayed there
8 six or seven months and he felt he advanced pretty quickly
9 with his job when he got one.

10 Q Did you ask him about his other relationships with
11 women?

12 A He told me that, he told me about them and Marion
13 pretty much volunteered information. But, of course, I did
14 direct him to various, what were your relationships and
15 things. So, yes, he told me about several girlfriends in
16 his life.

17 Q Okay. Did he tell you about Stephanie Petty?

18 A Yes, he did. His first very serious girlfriend.

19 Q Okay. And how did that -- how long is that
20 relationship?

21 A He said they were together from around 1992 to 1996.

22 Q Okay. And how did that relationship end?

23 A They -- she, she -- they just split up and I don't
24 recall what the reasons were, and if it's not in here I
25 don't remember. I'm not sure that there was a -- they were

Lenora Topp - Cross-examination
by Mr. Zelenka

1 still friends because it didn't seem to be it was a -- it
2 didn't, didn't seem to be an ill parting.

3 Q Okay. At sometime during your interviews did you learn
4 about Bill Burton?

5 A I did.

6 Q And, and what did you learn about, from Mr. Lindsey
7 about Bill Burton?

8 A That Bill Burton was a, a plant manager. He was -- he
9 knew him from years ago and he ran across him and Bill
10 Burton offered him a job in his plant cause he was the plant
11 manager. Mr. Burton was a lifeguard at the rec center years
12 ago when Marion could go and Mr. Burton remembered Marion
13 and always thought he was the cutest kid. And, so, when he
14 saw him, that he, he offered him a job. Mr. Burton use to
15 take Marion fishing and even took him over to his parent's
16 house, they had a pond there, and Marion would fish with him
17 and Mr. Burton is old, was older, you know, but is an older
18 friend. Not much older I would think. But he, he, he
19 really liked Marion.

20 Q Okay. And he got Marion a job, correct?

21 A He did.

22 Q And when Marion was fired from that job, he tried to
23 get him reemployed in that job too, didn't he?

24 A Yes, he did. Marion worked there for about two years.

25 Q Did you also learn about Marion's mother---

Lenora Topp - Cross-examination
by Mr. Zelenka

- 1 A I did.
- 2 Q ---Patsy I believe.
- 3 what did you learn about her relationship with Marion,
- 4 if anything?
- 5 A which mother?
- 6 who?
- 7 Q Bill Burton's mother?
- 8 A Oh, Bill Burton's mother.
- 9 Q Yes.
- 10 A That -- oh, I didn't know her first name. I don't
- 11 know. I don't think -- do I -- let's see here. The -- I
- 12 don't know much about -- there wasn't anything said except
- 13 that she, she was friendly with Marion and took care of him
- 14 and that I think that sometimes he went over there by
- 15 himself when the parents were there when Bill was not there.
- 16 Q Okay.
- 17 A I'm sorry. I didn't know her first name.
- 18 Q Do you recall asking Marion about his, the rest of his
- 19 employment history---
- 20 A Yes, I do.
- 21 Q ---to help you get that understanding?
- 22 A Yes, sir.
- 23 Q Did you try to include that information in this report
- 24 that you provided to the defense counsel?
- 25 A I did.

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q Okay. Did you do any discussion with Marion about his
2 previous incarcerations?

3 A There wasn't -- I don't think there was a, he told me a
4 whole lot about his incarcerations. He, he did have to stay
5 in jail. He -- there's a failure to appear on a traffic
6 ticket, and he had to stay in jail a couple of hours, and
7 that's -- I think that's about all I know about his
8 incarcerations.

9 Q Okay. You're aware of his prior conviction for the
10 assault against Stanford Wilkins, correct?

11 A Yes, I am.

12 Q And that involved, in fact, a shooting into another
13 automobile, isn't that correct?

14 A I, I do believe so.

15 Q And there was another individual in that car, wasn't
16 there?

17 A Yes, there was.

18 Q Okay. In your report you made some general reflections
19 on Marion Lindsey that you provided to the defense team at
20 the time of this report, didn't you?

21 A I did.

22 Q And essentially what were those general reflections
23 that you were trying to indicate to the defense team to be
24 aware about with their client?

25 A Well, that he, he, he'd had such a, a hard time in life

Lenora Topp - Cross-examination
by Mr. Zelenka

1 that he was, didn't really want to be in the drug dealing
2 business, that he ended up in it because the money was so
3 good. He had given Nell money to take care of the children,
4 but he said that she spent it on boyfriends. And, so, he
5 even gave his mother-in-law money. He'd fill her gas up,
6 car up with gas on frequent occasions.

7 But he tried to shield that he, he, in his heart, he
8 was, you know, a really pretty good person. He tried to
9 keep the drug dealing away from his mother. He didn't want
10 her to know about it because he said he didn't want anyone
11 to see his weak side and then he told me about Jimmy. He
12 began having a friend named Jimmy who told him God sent him,
13 and Jimmy had arrived during Marion's early, early teens.
14 He said, at that point, that he was just resigned to dying
15 and his biggest regret is not having enough time to spend
16 with his children.

17 Q Okay. You made some other reports, in addition to
18 this, concerning your interviews with Mr. Lindsey, isn't
19 that correct?

20 A Yes, I'm sure I did.

21 Q Let me ask if you can identify that document.

22 A Yes, uh-huh. (Affirmative).

23 This is an interview, an interview with Marion.

24 Q And what's the date of that interview also?

25 A That was 4/16/04.

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by Mr. Zelenka

1 Q Okay. So, that was at, included in that first day of
2 interview?

3 A Uh-huh. (Affirmative).

4 Q Okay.

5 A It was a long interview.

6 Q So, correct me if I'm wrong, but what you did, you
7 parsed out various parts of your interview with Mr. Lindsey
8 with particular subject headings, is that correct?

9 A Yes, I did.

10 Q You, you did one on Marion Lindsey himself with his
11 background, correct?

12 A Yes, I did.

13 Q You did another one which basically summarized Mr.
14 Lindsey's educational and employment history?

15 A Uh-huh. (Affirmative).

16 Q Correct?

17 A Uh-huh. (Affirmative).

18 Q You did the one that I've handed you, which is
19 basically Marion Lindsey telling you about---

20 A Well.

21 Q ---Well?

22 A Yes.

23 Q Correct?

24 A Yes.

25 Q And you had another one where Marion Lindsey talked

Lenora Topp - Cross-examination
by Mr. Zelenka

1 about his mother, Virginia, correct?

2 A Yes.

3 MR. ZELENKA: Okay. Your Honor, I would move to
4 introduce, as Respondent's Exhibit No. 3, a document
5 entitled Ruby Nell Wright Lindsey. Interview with Marion
6 Lindsey, 4/16/2004.

7 MR. VIETH: Your Honor, no objection.

8 THE COURT: In without objection.

9 (Whereupon, the notes were marked as Respondent's
10 Exhibit No. 3 and received into evidence at this time.)

11 Q Mrs. Topp, let me just ask you a couple of questions
12 about this.

13 A Uh-huh. (Affirmative).

14 Q When did you prepare these documents for the defense
15 team?

16 A I -- it was -- these I think were prepared just as we
17 were going into the, before Court, of course.

18 Q Okay. So, you didn't go home, type them up, give them
19 to the defense team the next day?

20 A Immediately, no, not -- if I did it was not all of it
21 at one time, no.

22 Q Okay. But did they request you provide them this
23 information?

24 A They did.

25 Q Okay. And in your interview with Mr. Lindsey, who else

Lenora Topp - Cross-examination
by Mr. Zelenka

1 was present at that time?

2 A Nobody.

3 Q Just---

4 A Just---

5 Q ---you and---

6 A Just -- I was the only one there with, with Marion.

7 Q And after the defense team got these documents, were
8 you asked to follow-up at all on this?

9 A I was not.

10 Q Okay. And this document is based upon information as
11 given to you for Marion Lindsey on that day, is that
12 correct?

13 A That is correct.

14 Q Okay. Let me provide you another document and, and ask
15 you if you can identify that document.

16 A Yes, this was a document I did regarding an interview
17 with Virginia Lindsey.

18 Q Okay. No date is, is listed on that one?

19 A I know and I, I, I'm sorry. I don't know why that's
20 not on here. Maybe it was on the -- it should of been on
21 here. It probably was on the cover sheet or certainly the
22 fax that was received I guess.

23 Q Okay. Let me show you Applicant's Exhibit No. 2 and
24 see if that can refresh your recollection at all as to when
25 that may of occurred.

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by Mr. Zelenka

1 A This was -- it was probably -- I put it May 15th and
2 I think if that's the day we went to talk to -- that might
3 of been the day we went to talk to Virginia.

4 Q Okay. So, this document was not prepared before that
5 interview, but would of been prepared subsequent to the
6 interview---

7 A That's right.

8 Q ---of May 15th?

9 A Uh-huh. (Affirmative).

10 MR. ZELENKA: Okay. We would move to introduce this as
11 Respondent's Exhibit No. 4.

12 MR. VIETH: Without objection, Your Honor.

13 THE COURT: In without objection.

14 (Whereupon, the note was marked as Respondent's Exhibit
15 No. 4 and received into evidence at this time.)

16 Q Mrs. Topp, we're -- you testified that Attorney Jeff
17 Blume contacted you concerning involvement in this case?

18 A I believe he did, contacted Mike Bartosh directly and
19 then Mr. Bartosh called me---

20 Q Oh, okay.

21 A ---on April 6th.

22 Q But you understood the individual that referred you
23 then to Mr. Bartosh was Jeff Blume?

24 A Jeff Blume, yes.

25 Q Okay. Had you had prior involvement with Mr. Blume in

Lenora Topp - Cross-examination
by Mr. Zelenka

1 any case?

2 A Yes.

3 Q Okay. In your discussions with the defense team, what
4 exactly were you being asked to do, as you understood it,
5 with respect to other family members, friends, girlfriends,
6 acquaintances of Mr. Lindsey?

7 A I was asked to locate them, to make sure they were, you
8 know, at the given addresses. A couple of them had no
9 addresses and I had to find them. I served some subpoenas
10 and -- but as far as being asked to interview any of the
11 family members or spend time, gosh, I was more involved in
12 trying to get records and get them to them in time and they
13 had no records at all as far as I know. No medical, no
14 mental health, no social services. They had none. No
15 school records.

16 So, I had to go to almost every location more than one
17 time and pick up records or send, give them subpoenas and
18 wait. And, so, as far as the rest of the, that normally
19 would go with my work as a mitigator, there wasn't time to
20 do it and they didn't ask me to do it.

21 Q Okay.

22 A So, I thought someone else was taking care of it. I
23 could only follow the direction of the attorney at that
24 point. There was no time to argue with them about what they
25 needed to do. They had no time.

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by Mr. Zelenka

1 Q Okay. So, you were asked to get records from the
2 Spartanburg County Detention Center, correct?

3 A No.

4 Q You weren't?

5 A Hu huh. (Negative).

6 Q Were you asked to get records from the mental health---

7 A Yes.

8 Q ---folks?

9 And did you get those records?

10 A I did and also got some, got, had them look for mental
11 health records on Bessie Smith and Robin.

12 Q Okay. And did you also get medical records related to
13 the prior injuries that, that Mr. Lindsey had told you
14 about?

15 A I did and I had to go back to the hospital and get some
16 more because they failed to include the head trauma from
17 being run over when he was a baby, a child.

18 Q Okay. Did you get the school records?

19 A I did.

20 Q Did you have to do that twice too?

21 A I -- some of them I did. It's amazing. The school
22 system in this area is different than North Carolina. You
23 have different districts here and each district has
24 different records, and you go to one place to request the
25 records and they sent them on somewhere else, that the place

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by Mr. Zelenka

1 is burned down, and there's nothing there. And, so, I did a
2 lot of traveling around trying to find the school records,
3 and I think I went to all of them at least once and called
4 them and faxed and did, did a lot with the records.

5 I'm not sure still that we even have them all. I, I
6 don't know if they're anymore out there or not. There's one
7 school I believe that had no record of him or the place it
8 possibly had burned, the records had burned or something.
9 But I got a lot of them.

10 Q Okay.

11 A And excuse -- I was just gonna add this if I may. You
12 have to be real careful with the spelling of the last name
13 too. Some of them couldn't, spelled it Lindsey. Others
14 Lindsay type things. So, going in person is certainly the
15 way to do it and, and standing over them to get their help.

16 Q In your role as mitigation investigator, what did you
17 consider your ultimate goal to be?

18 A To gather information and facts that would assist the
19 defense team with the, his defense in regard to receiving a
20 death penalty, to keep him from receiving a death, a death
21 penalty.

22 Q Okay. So, you're a fact finder, but you're a fact
23 finder with a goal to get him a life sentence, isn't that
24 correct?

25 A Well, I just gathered whatever information I could

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by Mr. Zelenka

1 find. whether it was negative or positive for the team,
2 it's up to them to sort through. I didn't pay, look through
3 it. I didn't say well, this is gonna hurt you. But I did
4 bring out points, made such bad grades except in chorus, and
5 P.E. You know, you need to look at this, you need to look
6 at this I.Q. So, for the defense. But I, I did turn
7 everything in that they, that I found.

8 Q Okay. Let me ask you to identify that please.

9 A Yes, I can.

10 Q Can you identify that?

11 A Oh, this is a note I left for Stephanie and that was --
12 was that -- I can't remember.

13 Q Stephanie Petty?

14 A Petty, Petty, his girlfriend. She wouldn't answer the
15 phone. She wouldn't return calls to me. I went by her
16 house several times and---

17 Q Did you ever talk with her?

18 A Oh, yes, finally. She showed up here. I talked to her
19 and I did give her a subpoena. I talked to her in person.

20 Q Okay.

21 A She didn't know what I wanted really.

22 Q And please identify that again please.

23 A Yes, this is a note I left for Stephanie Petty. I left
24 it in her door.

25 You want me to read it?

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q Not yet.

2 A Okay.

3 MR. ZELENKA: Any objection?

4 MR. VIETH: Nope. She's identified it. I have no
5 objection. I don't know what it is.

6 MR. ZELENKA: Respondent's 5.

7 (Whereupon, the note was marked as Respondent's Exhibit
8 No. 5 and received into evidence at this time.)

9 Q Okay. This indicates that, in fact, you were desperate
10 to talk to her, correct?

11 A Yes, Court was coming up like in two days or whatever.

12 Q And your job was to get mitigation information that
13 would hopefully save his life?

14 That's what you said?

15 A I did.

16 Q Isn't that correct?

17 A Yes, I did.

18 Q Okay. Did you ever know that you were on the witness
19 list to testify in this case?

20 A No, I didn't.

21 Q Have you ever testified in a death penalty trial?

22 A A death penalty trial?

23 Q As a mitigation---

24 A No, I had not.

25 Q ---person?

Lenora Topp - Cross-examination
by Mr. Zelenka

1 okay. Did you share this background information, as
2 you were developing it, with Ms. Quimby to provide to the
3 defense team?

4 A which information was that, that I had not testified?

5 Q No, excuse me.

6 A I'm sorry. That -- what I, what you've shown me?

7 Q Yes.

8 A Oh, yes, we talked on a regular basis, emailed.

9 Q And spent a number of hours --

10 A Yes.

11 Q -- according to your time sheet, isn't that correct?

12 A Yes, I was in her office a lot.

13 Q And that was both before the trial and during the
14 trial, is that correct?

15 A It wasn't much time during the trial. They were here,
16 in here.

17 Q Were you in Court with them?

18 A Not everyday.

19 Q Were you providing notes to them?

20 A No, I don't think so. But I was still looking for
21 records and I may of given them some more information. But
22 as far as being involved with anything, I was not involved
23 with the jury selection before or after.

24 Q Okay. After you received the guilty verdict, it was
25 that one day waiting period?

Lenora Topp - Cross-examination
by Mr. Zelenka

1 A Uh-huh. (Affirmative).

2 Q All right. You're at the Public Defender's Office that
3 day working with them, weren't you?

4 A No, I wasn't.

5 Q You were not?

6 A Hu-huh. (Affirmative).

7 Q You had no discussions with them---

8 A I don't recall any.

9 Q ---at that time?

10 A I did not.

11 Q What would trial and witness issues be on May 21st,
12 May 22nd, and, and May 23rd if you can recall?

13 A The only thing I can recall is I was available here
14 with, and here if they needed them. But -- and to bring
15 witnesses in, make sure they were here, and to get them
16 ready to be in here, and I think most of them had to stay
17 outside anyway.

18 Q What do you mean get them ready to be in here?

19 A Well, to, to keep them calm and to let them know
20 generally what would happen when they come in here to
21 testify.

22 Q Did you talk to them about what they would be
23 testifying about?

24 A No.

25 Oh, what they would be testifying about?

Lenora Topp - Cross-examination
by Mr. Zelenka

1 Q Yes.

2 A Oh, only that, what they recall about Marion Lindsey
3 and what someone may have talked to them about prior to
4 that. But as far as telling them what is gonna be asked of
5 them, I had no idea. And what they should say, I certainly
6 wouldn't have told them that.

7 Q Right. But you talked---

8 A They just needed to be honest and---

9 Q Go ahead.

10 A They just had to be honest and reply what they
11 remembered and, and to be responsive.

12 Q Okay. But you tried to get with them, didn't you, as
13 to what they could testify about in your discussions?

14 A No, I don't think so.

15 What they could testify about?

16 Q Uh-huh. (Affirmative).

17 A Well, they just -- I told them they needed to answer
18 every question that they could remember---

19 Q And that was it?

20 A ---that they were asked. Oh, yeah.

21 Q You didn't have a discussion with them about what they
22 remembered about Marion Lindsey?

23 A No, I didn't -- we didn't -- I didn't do any, any
24 witness interviews at all. It was trial. They were here
25 coming and going. They -- I, my opinion, is that they had

Lenora Topp - Cross-examination
by Mr. Zelenka

1 talked to Karen and Doug.

2 Q Okay. On May 14th, excuse me, May 15th, it says
3 traveled to Spartanburg office for interview with Attorney
4 Brannon. Attempted to located witnesses.

5 Is that the day you said you, you interviewed Virginia
6 Lindsey?

7 A I can't remember the date.

8 Q Okay.

9 A I really can't. If that's, if that's the only
10 reference I have to Attorney Brannon. That's why I said
11 this. I'm not real sure when that was. I'm sorry.

12 Q Now, on the day that you interviewed Virginia Lindsey,
13 did you also interview other people with Mr. Brannon?

14 A I -- he -- I don't recall that. I don't think so.

15 Q Okay. Did you ever remember meeting Kris Wilkins?

16 A I don't recall that.

17 Q Did you ever meet any of the witnesses?

18 A I met Bill Burton.

19 Q Bill Burton?

20 A Uh-huh. (Affirmative).

21 well, I met him here. I talked to him on the phone.

22 Q Okay.

23 A Met him here. And as far as Stephanie Petty, Virginia
24 Lindsey. There was, there were not many people I talked to.
25 I don't think there were many witnesses here. There could,

Lenora Topp - Cross-examination
by Mr. Zelenka

1 could of been. There could of been more.

2 Q okay.

3 A So, I don't recall the family members who testified. I
4 was not here everyday that they were here either. I wasn't
5 here for the full days. So, I wouldn't know, sir, exactly
6 who was coming in.

7 MR. ZELENKA: Okay. Court's indulgence one moment.

8 (Pause.)

9 Q Mrs. Topp, do you recall, around April 19th, 2004,
10 sending an email that, to Mike Bartosh at that time telling
11 him about the impact the death of his brother had on him?

12 Do you recall that?

13 A I may have done that.

14 Q Do you recall that you felt, based upon that, the
15 psychiatrist would have a lot to work with?

16 A I probably said that.

17 Q Do you recall saying that he definitely had anger
18 management problems throughout his life?

19 A I very -- I probably said that, yes, sir.

20 Q Do you recall sending Mr. Bartosh an email around May
21 12th, 2004, excuse me, a fax around May 12th, 2004,
22 where you stated in that who tried to help this kid, no one,
23 where's the testing, where's any vocational help, no where,
24 this boy, from day one, cried for help and no one did?

25 A If you have that there that's, I'm -- I probably did,

Lenora Topp - Cross-examination
by Mr. Zelenka

1 yes.

2 Q And that was May 12th, 2004?

3 A Yeah, that was probably after I had gotten some of the
4 school records.

5 Q Okay. And in that you suggested he subpoena family
6 members that's currently using mental health facility,
7 Bessie Smith, Steve Pilgrim, and Paul Pilgrim, the,
8 Virginia, have to contact them?

9 Do you recall that?

10 A Uh-huh. (Affirmative).

11 Q Then possible mental health problems run in the family?

12 A I -- if that's there, yes, sir. I can't see what
13 you're looking at. So, I mean if it's my handwriting.

14 Q Let me, let me ask you if that refreshes your
15 recollection.

16 A Oh, sure, uh-huh. (Affirmative). Yeah, who -- I'd
17 say -- I said who are currently using mental health and I
18 didn't know if they were or not.

19 Q But you said they were.

20 A No, I said I, I think that mentioned currently unless
21 that was told to me by somebody. I believe that probably
22 plea should say -- let me see what it says. Okay. Yeah,
23 Virginia, yeah, Bessie Smith, and we did try to get records
24 and then Steve and Paul, yes, sir, I said that.

25 Q Okay. I don't believe I have any further questions.

Lenora Topp - Cross-examination
by Mr. Zelenka

1 A Thank you.

2 Q Thank you.

3 MR. VIETH: Your Honor, there will be some follow-up
4 obviously.

5 REDIRECT EXAMINATION

6 BY MR. VIETH:

7 Q Lenora, would it appear to you, in your involvement in
8 the cases, that if the Court order was issued to get Doug
9 Brannon in the case on March the, March the 5th, 2004, and
10 you get involved April the 16th, 2004, that the assembling
11 of a defense team is being done at this time frame?

12 A That's what it appears to be to me.

13 Q Okay. And if the testimony from Mr. Brannon earlier
14 today indicated that Karen Quimby came in after you or maybe
15 it's in the time frame that you were there, about 30 days
16 out I think he testified to, then the entire defense team of
17 a investigator, a second chair attorney, and another
18 attorney were all appointed or otherwise involved and
19 retained no more than on March 5, 2004, for a May trial?

20 Is that, that's what all the evidence indicates?

21 A Yes.

22 Q No contradiction on that, is there?

23 A There is no contradiction.

24 Q Okay. So, in essence, this is the defense team put
25 together March to May of two, March to April of 2004---

Lenora Topp - Redirect examination
by Mr. Vieth

1 A Yeah.

2 Q ---for a death penalty trial?

3 A Yes, sir.

4 Q Okay. And there was no other clinical, there was no
5 clinical social worker in the case at all, someone that
6 could form an opinion on what you had put together in the,
7 in the interviews you had made?

8 A No, I was -- no, I did not have the opportunity to meet
9 with anyone. I didn't know who it would be.

10 Q Okay. You certainly are not a licensed social worker?

11 A No, I'm not.

12 Q You can not form an opinion based on what you have seen
13 or read?

14 You just gather the facts and turn them over to a
15 licensed---

16 A I can't form an opinion based on education.

17 Q Based on expertise.

18 A Expertise. But---

19 Q That's right.

20 A I can form opinions.

21 Q I mean you can form opinions just like I can form
22 opinions?

23 A Yes, sir.

24 Q But as far as testifying---

25 A But as far as testifying as an expert in that field,

Lenora Topp - Redirect examination
by Mr. Vieth

1 no, sir.

2 Q Okay. And there was none in the case?

3 A No.

4 Q Okay. Do you have any personal knowledge, on the notes
5 that you took, on the interviews that you had and the
6 detailed notation that you did in three or four or five
7 hours, who saw those notes?

8 Do you know what experts, if any, or anyone else saw
9 your notes other than the Public Defender's Office and Mr.
10 Brannon?

11 A I had no idea who saw those notes other than -- and I
12 don't know if Mr. Brannon saw them.

13 Q Okay. You, you made the notes and gave them to Karen?

14 A Ms. Quimby.

15 Q Okay. And do you know -- I believe you said you
16 weren't in the courtroom all the time, but do you know,
17 based on the notes you took, how much of that fact gathering
18 ever made it into the courtroom for a jury to hear?

19 A I, I don't know. I have no idea. I'm sorry.

20 Q Okay. That's fine. But the, but to have anyone listen
21 to what or read what you had and follow-up on that and form
22 an opinion on what all that tells about Marion Lindsey and
23 his family and his background, no one was able to do that?

24 A That's right.

25 MR. VIETH: Okay. Your Honor, at this time I would

Lenora Topp - Redirect examination
by Mr. Vieth

1 like to at least introduce for the record the American Bar
2 Association guidelines for the appointment and performance
3 of defense counsel in death penalty cases. I'd like to just
4 make it a part of the record, and ask her one or two
5 questions from it. This is the A.B.A. guidelines. And if
6 that's not something you want me to do now, I'll do it later
7 or if you want to read it and see if it's something that can
8 come in.

9 MR. ZELENKA: Well, I don't disagree that they aren't
10 the A.B.A. guidelines.

11 MR. VIETH: Okay. Do you have any objection to me
12 putting them in the record?

13 MR. ZELENKA: As evidence?

14 MR. VIETH: Well, I'll do them as an exhibit.
15 How's that?

16 I won't put them in as evidence, as evidence. I'll do
17 it as an exhibit.

18 MR. ZELENKA: I don't know what the difference is.

19 MR. VIETH: Well, make it part of the record. I'll
20 just want to refer to the guidelines.

21 THE COURT: You can put them in as a Court Exhibit.

22 MR. VIETH: Yes, sir, put them in as a Court Exhibit.

23 THE COURT: You can refer to them.

24 MR. VIETH: Okay. That's what---

25 MR. ZELENKA: All right.

Lenora Topp - Redirect examination
by Mr. Vieth

1 MR. VIETH: That's what I move to do.

2 MR. ZELENKA: Yeah, I---

3 MR. VIETH: As a Court Exhibit.

4 (Whereupon, the guidelines were marked as Court's
5 Exhibit No. 1 for identification purposes only at this
6 time.)

7 MR. VIETH: Your Honor, I do this and simply for a
8 number of reasons. Too many of us don't sit down and read
9 thousand and some odd pages of guidelines that the American
10 Bar Association puts out. Although, I think it is an
11 important document to, to look at, and I want to just read
12 one or two sections to Mrs. Topp and see if she meets this
13 criteria. And I'm looking, the Court, Judge, on Page 959.

14 Mitigation specialist, and I'm just gonna read to you
15 and ask if you did this or able to do this. The mitigation
16 specialist compiles a comprehensive and well documented
17 psychosocial history of a client based on an exhaustive
18 investigation.

19 Were you able to do that?

20 A No.

21 Q Analyze the significance of the importance in terms of
22 the impact on development including affect on personality
23 and behavior.

24 Were you able to do that?

25 A No.

Lenora Topp -- Redirect examination
by Mr. Vieth

1 Q Identifying the needs for expert assistance.

2 Were you able to recommend somebody?

3 A Yes.

4 Q Who did you recommend?

5 A I think a psychiatrist.

6 Q Okay.

7 A Clinical psychiatrist.

8 Q All right. In going to briefly Page 1123 of the
9 document. I'm gonna read this to you. The mitigation
10 investigation should begin as quickly as possible because it
11 may affect the investigation of first phase defenses such as
12 by suggesting additional areas for questioning police
13 officers or other witnesses, decisions about the need for
14 expert evaluations including competency, mental retardation,
15 insanity, motion practice, and plea negotiations.

16 So, immediate, to get you involved immediately would of
17 been 2002?

18 A I believe so.

19 MR. VIETH: Okay. All right. Your Honor, I think
20 that's all. Give me one second. Let me see if that's all.
21 Give me one second, judge. I think that's all I wanted to
22 ask.

23 (Pause.)

24 Q On the interview sheets that you prepared, do you know
25 whether you were ever preparing them pretrial or during the

Lenora Topp - Redirect examination
by Mr. Vieth

1 trial?

2 A It's pretrial.

3 Q Okay. Okay. And you got them to the attorneys at that
4 time?

5 A I think, yes, sir.

6 MR. VIETH: Okay. That's all the questions I have,
7 Your Honor. Thank you.

8 MR. ZELENKA: No recross, Your Honor.

9 THE COURT: You can step down.

10 WITNESS: Thank you, Your Honor.

11 MR. VIETH: Go right on?

12 THE COURT: You got another witness?

13 Anybody need a brief recess?

14 (No response.)

15 MR. VIETH: Fine. Okay.

16 MR. COLLINS: Your Honor, we call Mr. Rod Tullis.

17 ROD TULLIS, being first duly sworn,
18 testified as follows:

19 MR. COLLINS: Your Honor, may I approach the witness
20 very briefly?

21 THE COURT: Yes, sir.

22 DIRECT EXAMINATION

23 BY MR. COLLINS:

24 Q Sir, can you tell us your full name?

25 A Rodman Tullis.

Rod Tullis - Direct examination
by Mr. Collins

1 Q All right. Mr. Tullis, where do you live right now?

2 A Here in Spartanburg.

3 Q All right. And in the past were you a practicing
4 attorney here in Spartanburg?

5 A Yes, I was.

6 Q All right. And are you familiar with that gentleman
7 seated there in the green jumpsuit at the defense table?

8 A Yes, I am.

9 Q Is that Mr. Marion Lindsey?

10 A That's correct.

11 Q How did you know Mr. Lindsey?

12 A I began representing Mr. Lindsey probably in the latter
13 part of the 90's I believe up until the time that this
14 particular incident occurred.

15 Q All right. What types of things did you represent
16 Mr. Lindsey on?

17 A There were some various criminal matters, may of been
18 something in Family Court, traffic things, a lot of things
19 over the years. I represented Mr. Lindsey and a good
20 portion of his family.

21 Q And did you also have a personal relationship with
22 Mr. Lindsey?

23 A Personal arising out of a professional relationship in
24 that, that Mr. Lindsey, once we would finish whatever
25 business we had to do, he'd stay in the office and we'd just

Rod Tullis - Direct examination
by Mr. Collins

1 talk about things going on in the world, how his children
2 were doing, how my children were doing, that kind of thing.

3 Q All right. So, you got to know, you got to know the
4 details, the ends and outs of his life over time?

5 A Yes.

6 Q All right. Did he also do some repair work for you
7 around the office, in your house, those kind of things?

8 A He had done a few things and then he knew how to deal
9 with automobiles and that kind of things. So, yeah.

10 Q Essentially if it was broke he could fix it?

11 A That's what he said.

12 Q All right. Now, did you have some involvement with
13 Mr. Lindsey immediately before or in the weeks preceding the
14 shooting of his wife, Nell Lindsey?

15 A At the time I believe that there were some drug cases
16 pending here in General Sessions. There were also some
17 traffic cases at the City of Spartanburg. There may have
18 been some downstairs in Magistrate's Court, speeding
19 tickets, and, and that kind of thing. Nothing really
20 serious. The drug cases I think were just some trafficking
21 cases. There may have been something in the Family Court
22 near the end that he had spoken to me about.

23 Q All right. As a matter of fact, as a part of that,
24 those domestic issues where you, where you were speaking
25 with him, would those of involved his wife Nell and his

Rod Tullis - Direct examination
by Mr. Collins

1 children?

2 A Yes.

3 Q All right. And as part of your normal practice, do you
4 have new clients or even existing clients fill out a
5 domestic interview sheet?

6 A I think we did at the time, yes, in our office.

7 Q Okay. And was that to get information about their
8 current situation and what they wanted done?

9 A Correct.

10 Q All right. Now -- and if I can point you to that
11 packet of information I've put in front of you. That's been
12 marked as Applicant's Exhibit 13.

13 A All right.

14 Q Towards the back of that packet, is, is that document
15 entitled domestic information from Marion Lindsay, was that
16 from your office?

17 A Yes, and that's my handwriting that's on the document.

18 Q All right. So, that would of been something you filled
19 out as you interviewed him about his domestic issues?

20 A That's correct.

21 Q All right. And if you need to refer to that document,
22 to refresh, to refresh your memory, did you and Marion talk
23 about potential ways to resolve issues involving his
24 children?

25 A I believe we did, yes.

Rod Tullis - Direct examination
by Mr. Collins

1 Q All right.

2 A I, I knew both Mr. and Mrs. Lindsey, and, of course, as
3 I've said, we had spoken about his children and his family.
4 And, so, it was somewhat surprising that he and his wife
5 would start running in some difficulties. So, yeah, we had
6 spent time talking about various ways to handle it.

7 Q And is it fair to say that his biggest concern was, at
8 that point, was the domestic issues, was to see his
9 children?

10 A Yes.

11 Q Did he or did two of you discuss sort of offering a
12 payment of child support in exchange for being able to
13 secure some visitation?

14 A Yes.

15 Q Do you know if that offer was ever made to
16 Mrs. Lindsey?

17 A I don't know whether, whether I conveyed it to her or
18 not.

19 Q Okay.

20 A But I, I know that his main concern was his, was his
21 children. I believe he had two boys and he -- that's all he
22 talked about were his two sons.

23 Q All right. Now, you didn't file any -- as far as you
24 know, you didn't file any pleadings in Family Court here in
25 Spartanburg County, correct?

Rod Tullis - Direct examination
by Mr. Collins

1 A That's correct.

2 Q Would that be indicative in your practice at that time
3 that you had not been retained?

4 A Hadn't been retained and then also, as I recall, and,
5 and refresh my memory with the notes, there's -- I don't
6 think that Mr. Lindsey really wanted to be separated from
7 his family. So, I don't think he was really in a big hurry
8 to try to end his marital situation.

9 Q He still loved his wife and children and wanted to be
10 there?

11 A Yes, sir.

12 Q Okay. Now, did he discuss with you the fact that she
13 may be having an extramarital affair?

14 A Yes, sir.

15 Q All right. And did he have some, at least some
16 circumstantial evidence that that was going on?

17 A Yes, sir.

18 Q All right. Was he concerned at that point about how
19 that new man was affecting his relationship with his
20 children?

21 A Yes.

22 Q Did he give you any details about how, about the
23 dynamics there?

24 A Well, he did not want someone to come in and become
25 daddy to his sons, that he felt that, that he could be daddy

Rod Tullis - Direct examination
by Mr. Collins

1 to his sons, and that he didn't need anyone else being
2 called daddy when he was there and available.

3 Q And did he feel that was a legitimate concern at that
4 point?

5 A Yes.

6 Q Okay. His reluctance to I guess initiate these
7 proceedings, was, was he afraid, at any point, that there
8 might be ramifications on the criminal side if he started a
9 Family Court case?

10 A I think he was and I think that might of arose out, as
11 I said, I knew Mrs. Lindsey. I knew Mrs. Lindsey from her
12 participating and helping with his drug charges and drug
13 cases. And, so, I'm sure that he understood that she was
14 intimately aware of what his situation was in that.

15 Q And her knowledge, could it be damaging to him if he
16 became a witness or she became a witness for the State?

17 A Oh, absolutely.

18 Q Essentially would end his relationship with his
19 children because of the prison sentence?

20 A Yes. Yes, sir.

21 Q Given those difficulties, not wanting to be involved,
22 not wanting to lose his children and his wife and the other
23 concern of going to prison if he mistook, took a misstep,
24 did that kind of put him in a box?

25 A I believe it did, yes, sir.

Rod Tullis - Direct examination
by Mr. Collins

1 Q Limited his options?

2 A Yes, sir.

3 Q All right. Now, in those -- shortly before this
4 shooting took place in September of 2002, did, was there a
5 time when Mr. Lindsey attempted to contact your office but
6 wasn't able to get you?

7 A Yes, Mr., the day that this incident occurred we were
8 out of the office. And when I heard of the incident on the
9 news that evening, I went back to my office because I, I
10 wanted to prepare a, a notice of representation to get to
11 the Sheriff's Office, Solicitor's Office because I knew
12 Mr. Lindsey was in the hospital and had surgery and was in,
13 in, in intensive care. But in order to protect his rights I
14 want back to the office.

15 And when I got there, I was listening to my answering
16 machine, which was one of the old ones at that point with
17 the small mini, micro cassettes, and I heard Mr. Lindsey's
18 voice there where he was trying, he was calling my name and
19 was asking for me to pick up the phone, and that he needed
20 to talk to me, that -- he sounded very distressed, very
21 distraught. He -- it was a disturbing tape to listen to
22 because of, of how he came off emotionally on this, on this
23 tape.

24 And then I was curious about when the tape was made
25 cause I knew -- I realized we left the office about eleven

Rod Tullis - Direct examination
by Mr. Collins

1 or twelve o'clock in the afternoon, and I determined that
2 the tape was made shortly before the shooting. Probably
3 within the, the hour before the shooting.

4 Q Now, when you -- you talked about his state of mind,
5 given, you know, two descriptions.

6 would he have been distraught and upset or would he
7 have sounded angry and, and agitated?

8 which?

9 A He wasn't angry or agitated at all. That was what was
10 so frightening about it. That he was very distraught, very
11 emotionally down and upset. Not manic at all.

12 Q Now, did you hold onto this audio recording for some
13 period of time?

14 A Yes, I did.

15 Q All right. And, you know, kind of switch gears a
16 little bit so we can put this into prospective, you filed
17 that notice of appearance with the, with General Sessions
18 Court, correct?

19 A I filed -- what I did is I drafted a letter notifying
20 the Sheriff's Office, the Solicitor's Office that
21 Mr. Lindsey had representation and that he would not be
22 making any statements or giving any statements to the
23 authorities. I went to the Spartanburg Regional Hospital to
24 intensive care, and I left a copy of it with the nurses
25 there, and the officers who were there at the, at the

Rod Tullis - Direct examination
by Mr. Collins

1 hospital. I then left there and left a copy at, upstairs in
2 the Solicitor's Office, the Clerk of Court's Office, and the
3 Spartanburg Detention Facility.

4 Q And, so, you were the attorney of record for at least
5 some period of time for Mr. Lindsey on these particular
6 charges?

7 A For a short period of time, yes. But I was the only
8 attorney that he had, and I knew, from listening to the news
9 reports, that this was a very very bad situation and that
10 Mr. Lindsey was in no condition to be able to, to protect
11 himself. So, I spoke with his mother and family and let
12 them know what I was, what we talked about it and what we
13 were gonna do to try to, to help him as much as we could at
14 that time.

15 Q And at some point, shortly after that, I believe the
16 Public Defender's Office actually became the attorney of
17 record, is that correct?

18 A That's correct. What happened is that I spoke to
19 Mr. Bartosh, and explained to Mr. Bartosh that, that
20 Mr. Lindsey had called my office, that this tape existed,
21 and that what I had done, and that I was the first person to
22 speak with him once he was released from the hospital and
23 taken to the detention facility, that I could possibly be a
24 witness in, in, in this matter. So, Mr. Bartosh and I spoke
25 with the, the solicitor, Mr. Gowdy, and the decision was

Rod Tullis - Direct examination
by Mr. Collins

1 made that Mr. Gowdy and Mr. Bartosh would contact I believe
2 it was Judge Few who was the administrative judge at the
3 time and that I would be removed from, from acting as
4 counsel in this particular matter.

5 Q Once you were removed and the Public Defender's Office
6 was appointed, did you offer that audiotape to Mr. Bartosh?

7 A Yes, I offered the audiotape and everything that I had
8 to, to the Public Defender's Office.

9 Q And did Mr. Bartosh take you up on that offer?

10 A Yes.

11 Q All right. Did---

12 A They took everything I had.

13 Q Did they take that audiotape as well?

14 A Yes.

15 Q Okay. So, to the best of your knowledge, that
16 audiotape left your possession and went into the possession
17 of the Public Defender's Office?

18 A The Public Defender's Office, that's correct.

19 Q Now, in addition to that audiotape, did you also come
20 into possession of some suicide notes?

21 A Yes, what -- after Mr. Lindsey was released from the
22 hospital, we had surgery from the, from the shooting where
23 he was shot by the, the officers and then he also had
24 attempted to commit suicide and had shot himself in the head
25 and had stitches there, I went to the detention facility, as

Rod Tullis - Direct examination
by Mr. Collins

1 soon as he got there, to speak with him. And Marion was,
2 when I first saw him, back in, in I believe it was Pod 5.
3 He was bleeding from the head, and, and he had -- he was --
4 his head was bandaged, but he was bleeding. So, I asked him
5 about it. He was somewhat drugged still from the surgeries
6 cause they moved him immediately from surgery into the, into
7 the jail, and finally he told me that he had been bashing
8 his head against the concrete wall, concrete block walls in,
9 in the cell where they had him, and he had ripped -- the
10 stitches had come loose and that he was attempting to kill
11 himself by doing that.

12 So, I left him and went back out to the jailor who was
13 on site at the time, and spoke with, spoke with them and
14 informed the jail that he was bleeding, that he had, was
15 attempting to commit suicide and the method he was using,
16 and the jail, of course, got him medical treatment for his
17 head and then they put him on suicide watch. He also had --
18 he would write to me and, and, and, and write things where
19 he indicated that he just didn't want to live, that he
20 wanted to kill himself, that he was very -- he was still
21 distraught and remorseful. His demeanor, from the time I
22 heard the audiotape to the time I saw him, had not changed.
23 It probably had gotten worse and it got worse over the weeks
24 thereafter.

25 Q Did he actually lose some weight and---

Rod Tullis - Direct examination
by Mr. Collins

1 A Well, he, he lost weight and then he gained a lot of
2 weight over time. But, yes, at first he, he really
3 really -- he was trying to die and he was not shy in telling
4 me that he wanted to die and he was trying to die.

5 MR. COLLINS: Your Honor, if I may approach Mr. Tullis?

6 (The Court nods affirmatively.)

7 Q Mr. Tullis, I'm gonna hand you another stack of
8 documents. These have not been marked at this point.

9 Do you recognize what -- they're, they're several
10 documents in order. Could you kind of explain to us what's
11 in that packet?

12 A Appears the first one is the incident report where I
13 reported to the jail that, that, that Mr. Lindsey had been
14 attempting to, to hurt himself in the jail, and I guess
15 these others are pictures of where, in the jail where he had
16 been hurting himself and the, what he was using to do it.
17 The last is an incident report that also says I told him
18 that, that, that he told me he was trying to injure himself,
19 and that he was, what he was doing, what I testified to
20 previously.

21 Q All right.

22 A It, it was just very disturbing. So, that's why I, I
23 felt I had to do something about it.

24 Q Is the information contained in those, those incident
25 reports and the photographs consistent with what you

Rod Tullis - Direct examination
by Mr. Collins

1 remember reporting and seeing when, in the weeks immediately
2 following the shooting?

3 A Yes.

4 Q Now, the -- and along the same lines with this, with
5 the suicide, did you receive from family members, during the
6 time you were representing him, suicide notes that he would
7 have, that he handed them during an incident a couple weeks
8 before---

9 A Yes.

10 Q ---the shooting?

11 A I believe I, I -- in speaking with his mother, I
12 believe I'd gotten some notes from his mother, and I put
13 them in his file and held them there and kept them there,
14 yes.

15 Q All right. That first packet I handed you, Applicant's
16 No. 13, are the first several pages of that, beginning with
17 the first page and going back to your letter of
18 representation, are those accurate photocopies of what you
19 received from the family?

20 A Yes.

21 Q And have you had an opportunity, in the past when you
22 were representing him, to go through those letters and to
23 read them and see what the contents were like?

24 A Yes.

25 Q All right. Were those -- were the contents of those

Rod Tullis - Direct examination
by Mr. Collins

1 letters consistent with the state of mind you observed in
2 those weeks leading up to the shooting and the weeks
3 immediately thereafter?

4 A Yes.

5 Q All right. Did they indicate a, a clear intention to
6 do harm to himself?

7 A That's what they indicate, yes.

8 Q Were those suicide notes part of the package that were
9 handed over to Mr. Bartosh in the Public Defender's Office?

10 A Yes, they were.

11 Q All right. So, those suicide notes and that photo or
12 the, the audio recording, all of that went from your
13 possession immediately and directly to Mr. Bartosh once the
14 P.D.'s Office took control of this case?

15 A That's correct. But I will also add that, that the
16 solicitor's Office was aware of the existence of these
17 documents also, and I, I, that I had given them to the
18 Public Defender's Office.

19 Q Now, were you subpoenaed for trial in May of 2004?

20 A No.

21 Q In May of 2004, where were you living?

22 A

23 Q All right. So, you were here in Spartanburg County?

24 A Same house.

25 Q How long had you lived on Webber Road?

Rod Tullis - Direct examination
by Mr. Collins

1 A Since 1991.

2 Q All right. So, for the preceding 13 years, you'd been
3 at that same location?

4 A Yes.

5 Q Now, in 2004, you, were you still practicing law?

6 A Yes.

7 Q All right. And were you doing any other type of work
8 as well?

9 A Not really, no.

10 Q Okay. So, you had an active law practice in
11 Spartanburg County?

12 A Yes.

13 Q Still representing clients in this courthouse?

14 A Yes.

15 Q Did you still participate in General Sessions Court?

16 A Yes.

17 Q See Mr. Bartosh on a regular basis?

18 A In court and socially, yes.

19 Q All right. And did you know Mr. Doug Brannon?

20 A Yes.

21 Q See Mr. Brannon at the courthouse?

22 A Yes, sir.

23 Q How about Karen Quimby?

24 A Yes.

25 Q Saw her at the courthouse as well?

Rod Tullis - Direct examination
by Mr. Collins

1 A Yes, sir.

2 Q Same phone number you had had for 13 years?

3 A Correct.

4 Q Did any of those individuals contact you about
5 testifying either during the guilt phase or the sentencing
6 phase of Mr. Lindsey's trial?

7 A No, but I inquired about how the, the case was going,
8 and I, I was a bit surprised by that because I thought that,
9 that I was probably the best witness as to state of mind
10 that there was since I was the one who had spent the most
11 time with Marion Lindsey and was more involved with this and
12 his family and his wife than anyone else in the courthouse
13 would of been.

14 Q But in -- despite those inquiries and your willingness
15 to testify, you were never subpoenaed or contacted about
16 coming to Court?

17 A That's correct.

18 MR. COLLINS: Your Honor, if I may have just a moment.

19 THE COURT: (Nods affirmatively.)

20 (Pause.)

21 MR. COLLINS: Your Honor, if I may have a few more
22 moments.

23 Q Mr. Tullis, are you familiar with the South Carolina
24 Centers for Equal Justice?

25 A Yes.

Rod Tullis - Direct examination
by Mr. Collins

1 Q All right. Do you know or can you explain to the Court
2 what that organization is here in Spartanburg County?

3 A South Carolina Center for Equal Justice?

4 Q Yes, sir.

5 A That's the, the fancified name that they changed for --
6 isn't it -- Lord, my mind just went blank.

7 Q Piedmont Legal Services?

8 A Yeah, Piedmont Legal Services, Ellen Hines Smith,
9 Piedmont Legal Services, yes.

10 Q And does that organization provide, provide free or
11 reduced rate legal service for folks in Family Court and
12 other courts?

13 A That's correct.

14 Q And they don't do any criminal defense work, correct?

15 A That's right.

16 Q All right. I'll hand you a document which I believe is
17 already been marked.

18 MR. ZELENKA: Your Honor, I don't have any objection to
19 this document coming in and speaking for itself. Unless
20 Mr. Tullis was previously aware of this document or it was
21 part of his file, I would object to him interpreting what
22 that document says, which I think is where it's probably
23 heading.

24 MS. NORRIS: Your Honor, my understanding is it's
25 already been marked as an exhibit. So, we'll, we'll let

Rod Tullis - Direct examination
by Mr. Collins

1 it---

2 MR. ZELENKA: I don't have any objection to it coming
3 in.

4 MR. VIETH: Okay.

5 MR. COLLINS: That's fine. We'll let it speak for
6 itself, Your Honor. Your Honor, at this point, the only
7 other thing I have would be to move Applicant's No. 13 into
8 evidence, and then if we could mark and number the other
9 document and move it into evidence as well.

10 MR. ZELENKA: No objection to either.

11 THE COURT: In without objection.

12 (Whereupon, the incident report and photographs were
13 marked as Applicant's Exhibit No. 23 and received into
14 evidence at this time.)

15 Q Mr. Tullis, thank you for your time, and if you'll
16 answer anything the Attorney General's Office has for you at
17 this time.

18 CROSS-EXAMINATION

19 BY MR. ZELENKA:

20 Q Mr. Tullis, let me hand you Applicant's Exhibit No. 13,
21 and ask you some questions about it.

22 Do you know where that information came from on that
23 first page?

24 A It came to me from Mr. Lindsey's mother.

25 Q Okay. And do you know when you received it?

Rod Tullis - Cross-examination
by Mr. Zelenka

1 A I received it -- well, I can't tell you the exact date.

2 Q Uh-huh. (Affirmative).

3 A But I would of received this document sometime during,
4 sometime probably immediately after the shooting occurred I
5 think. That's my, my recollection.

6 Q Okay. The shooting occurred September of 2002?

7 A Yes, sir, somewhere in, somewhere in that range. I
8 couldn't tell you the exact date.

9 Q Okay. The jail incidents you reported on were around
10 October 1st, 2002?

11 A Right, after Mr. Lindsey got out of the hospital.

12 Q Right.

13 Do you know how long you were representing Mr. Lindsey
14 during that time period?

15 A I think the notification was dated the, September the
16 19th. From there until probably spring time because I
17 don't think it was till then that the Public Defender's
18 office stepped in.

19 Q Okay. Now, the date of the, the crime was September
20 18th, you were representing him on the 19th, what's the
21 date on the, on the top letter?

22 A It's -- I think it says. That's either an eight or a
23 nine. I can't tell. It's either September the 5th, '02,
24 or, or it could be April the 5th.

25 Q It's either an eight or it could be a four?

Rod Tullis - Cross-examination
by Mr. Zelenka

1 A It could be a four. It could be an eight. Could be a
2 nine.

3 Q You have no idea when that was written, do you?

4 A No. No, I don't.

5 Q And you have no idea -- does that look like a nine?

6 A It appears as a nine there, yes.

7 Q It does?

8 A September the 5th, '02, or it could be April the 5th,
9 '02, I guess.

10 Q Okay. Okay. And on this page, it says suicide notes,
11 you will have to get -- is that your writing or someone
12 else's writing?

13 A This is not my handwriting. I can't tell you whose
14 handwriting that is. Now, the first page, however, that's
15 Mr. Lindsey's handwriting.

16 Q Okay. And you had these in your file?

17 A Yes.

18 Q Okay. And on, on this one, which would be the fourth
19 page, that---

20 A It looks like it's August the 5th, 2005, or September
21 the 5th, 2005. Oh, I'm sorry. 2002.

22 Q Okay. No idea on this one?

23 A No, sir, I couldn't say with any certainty.

24 Q Now, you were subpoenaed by the State May 21st, 2004.
25 That's the time of the trial, correct?

Rod Tullis - Cross-examination
by Mr. Zelenka

1 A Yes.

2 Q Did you show up to court?

3 Did you just provide them those documents?

4 A I provided the records. What -- well, well, I
5 explained to them the records I had had been provided to the
6 Public Defender's Office.

7 Q Okay. But then you, you provided them with a set of
8 material also, didn't you?

9 A I think I did.

10 Q Okay.

11 A I, I, I believe I did.

12 Q Okay. You mentioned something about receiving, and
13 correct me if I'm wrong, some notes from Mr. Lindsey while
14 he was incarcerated after his arrest on these charges about
15 suicide, is that correct?

16 A I think I did, that, that, received some notes from
17 Marion while he was in jail, yes.

18 Q Okay. Those weren't included in the information that
19 you provided to the State, were they?

20 A I don't know everything. I turned everything over to
21 the Public Defender's Office. So, those would of come later
22 in time. In fact, I, I was still receiving communication
23 from Marion after the Public Defender's Office took over
24 representation.

25 Q Okay. But when you, when you were subpoenaed on May

Rod Tullis - Cross-examination
by Mr. Zelenka

1 21st, 2004, and asked to provide all the documents related
2 to Marion Lindsey by the State, there weren't any suicide
3 notes to you provided?

4 A I would of provided everything that was in my, in my
5 possession at that time.

6 Q Okay. But they weren't provided at that time, were
7 they?

8 A If these are the documents that were provided, then a
9 note from the, any notes I got from Marion Lindsey himself,
10 no, they wouldn't have been. They're not included in here.

11 Q Okay. And this document, which is a, the back where
12 they referred to domestic information from Marion Lindsey --

13 A Yes, sir.

14 Q -- when was that filled out?

15 A I don't know what date this was filled out.

16 Q Okay. Do you know if it was the year before the
17 incident?

18 A I don't know. All I can do is look here and interpret
19 what I would of done is that it said the separation date was
20 July the 1st of 1999. So, I can tell you it was sometime
21 after that date.

22 Q Okay.

23 A I can't be any more specific than that.

24 Q All right. Don't know if it was six months before the
25 incident?

Rod Tullis - Cross-examination
by Mr. Zelenka

1 A I don't recall.

2 Q Just had no recollection?

3 A No, I, I know that Mr. and Mrs. Lindsey, when I first
4 began representing Mr. Lindsey, were not having that, at
5 least that either party told me, any marital problems and
6 that, that I'm aware of. And I know I started representing
7 him in the latter part of the 90's. So, I, I'm not quite
8 sure. I don't know.

9 Q Okay. So, you weren't aware---

10 A It would just be speculation on my part.

11 Q You weren't aware of the other CDV, criminal domestic
12 violence events involving those two?

13 A If I didn't represent him on it, no, sir, I don't know
14 a thing about it.

15 Q Okay.

16 A I know that there was a CDV pending at the time of this
17 incident because the, that's what was pending in the City of
18 Spartanburg. They were attempting to try that case, and I
19 was involved in a meeting with Solicitor Gowdy and
20 Mr. Bartosh where we, I was still representing him on that
21 and the City of Spartanburg wanted him tried, and, of
22 course, the Solicitor's Office didn't feel that it would be
23 best to try a good portion of their, their, their murder
24 case at the City of Spartanburg and, and have their
25 witnesses there. So, there was a CDV pending. As, as to

Rod Tullis - Cross-examination
by Mr. Zelenka

1 any CDV convictions, I'm not---

2 Q Okay.

3 A I don't recall that.

4 Q Were you representing him on that CDV?

5 A I represented him on that CDV at the city. That is
6 what it was, at the city.

7 Q Okay.

8 A It was eventually dismissed. It was dismissed by the
9 city at the request of the solicitor.

10 Q You mentioned, on direct examination, that Mr. Lindsey
11 wanted to get back together with his wife, is that correct?

12 A I don't think Mr. Lindsey wanted to leave his wife and
13 leave his family. I think Mr. Lindsey was, as people can
14 get in marriages, somewhat confused. I, I -- as to what he
15 wanted and what he didn't want. I, I, I think that he faced
16 what, what many of us have faced that when you divorce your
17 wife, sometimes you don't have access to the children the
18 way that you had when the two of you were together in the
19 home together.

20 Q Okay. When was he denied access to his children based
21 upon his conversations to you?

22 A Based upon my conversations, it was during the, the --
23 complete and denied access was some time before the
24 shooting, some weeks before the shooting. I think when --
25 how long before I can't recall. But it was some weeks

Rod Tullis - Cross-examination
by Mr. Zelenka

1 before the shooting.

2 Q And did you learn that after the shooting?

3 A No, I, I actually was aware of it before the shooting
4 because Mr. Lindsey had come to my office the week before
5 the shooting and, and to talk to me about wanting to see his
6 children.

7 Q Okay. Do you have any notes about that?

8 A No.

9 Q All right. Don't you usually take notes?

10 A Not necessarily. I mean it wasn't an action that we
11 were bringing or so, no, and then -- but we, but we had that
12 conversation.

13 Q And based upon an incident which occurred just days
14 prior to this, there's an order of protection out where
15 Lindsey wasn't suppose to have any contact with his wife,
16 correct?

17 A I believe that's correct, yes.

18 Q Okay. Did you have any communications with Mr. Lindsey
19 about the impact of that order of protection and his
20 responsibilities, under that order of protection, to avoid
21 his wife?

22 A I don't recall the specific conversation, no.

23 Q Okay. Did he contact you or, or leave a phone message
24 about the impact of that order of protection?

25 A I don't recall, no. I don't believe so.

Rod Tullis - Cross-examination
by Mr. Zelenka

1 Q In the -- your direct testimony, you talked about
2 somehow being able to determine when this message was left
3 at your office.

4 How did you do that?

5 A Well, as I stated before, this shooting incident was
6 the number one thing on the news that evening, and I looked
7 at the news, and, and I saw that my client had, had shot his
8 wife, who I knew and I knew both of them. So, I immediately
9 went back to my office knowing that I needed to do something
10 to, to try to protect his rights up to that point, which is
11 all I could do at that point. It wasn't that next day when
12 we listened to the answering machine. That's when that
13 message was there.

14 Q Okay. Do you know if the message could, could of been
15 left after the shooting?

16 A It could have been left after the shooting, but I know
17 what time we left the office, you know, when we left the
18 office earlier the day, that day before. And the message,
19 I'm positive that the message was left sometime between noon
20 the day of the shooting and the next morning when, at 7:00
21 or so in the morning because I prepared this notice and took
22 it out that morning to the, to, to the hospital.

23 Q Okay.

24 A So, it, it was contemporaneous with it, either before.
25 I mean if it was after, I don't know. It would be difficult

Rod Tullis - Cross-examination
by Mr. Zelenka

1 to see how it could be after the shooting since he was shot
2 and, and arrested in surgery. So -- and I know that when I
3 attempted to see him that next morning, he was in intensive
4 care and all I could do was leave -- I couldn't see him. I
5 wasn't a family member. All I could do was leave the notice
6 with the authorities who were present at the time.

7 Q Okay. The, the tape, you, you say you gave the Public
8 Defender's Office those notes. You gave the Public
9 Defender's Office the tape.

10 A Micro cassette tape.

11 Q Little micro cassette tape?

12 A Yes, sir.

13 Q Did you ever transcribe that tape at all---

14 A No.

15 Q ---for purposes of your own?

16 A No, I didn't. I held the tape---

17 Q Were you representing him until that spring?

18 A I did not, did not transcribe the tape.

19 Q Okay. Did you ever provide that information to the
20 prosecution?

21 A Of the existence of the tape?

22 Q Yes.

23 A Yes, sir.

24 Q Did you describe that tape to the prosecution?

25 A Yes, sir.

Rod Tullis - Cross-examination
by Mr. Zelenka

1 Q Okay. So, if you would of still possessed that tape
2 pursuant to that subpoena, you would of been obligated to
3 provide that tape to the prosecution?

4 A Absolutely.

5 Q And you didn't do that, did you?

6 A No, I didn't.

7 Q Because you---

8 A I turned it over to---

9 Q ---had already given it to the defense?

10 A Yes, earlier, yes.

11 Q Now, is there anything on this domestic relations
12 questionnaire about the defendant wanting custody of his
13 children, Mr. Lindsey wanting custody?

14 A No, it says custody to the, to the defendant.

15 Q Okay. What does that mean?

16 A And -- well, I think this, interpreting this, this was
17 anticipating that we were gonna bring an action for divorce
18 on one years separation. There was no marital property to
19 be divided. The custody would be to his wife, the
20 defendant, of that planned action, that he would be paying
21 child support, and that the parties had agreed the amount of
22 child support that he would pay, that they had spoken about
23 it and reached an agreement on child support.

24 Q Okay. So, when that was written, there was no
25 indication that at that time, that discussion, that he was

Rod Tullis - Cross-examination
by Mr. Zelenka

1 being deprived of any visitation rights, was there?

2 A No, when this was written I even have notes here about
3 what Mrs. Lindsey's income was because this is probably a
4 situation where they both came into my office and they were
5 probably pretty cordial and were trying to get it worked
6 out.

7 Q Okay. Now, closer to the time of the event, were you
8 aware that Mr. Lindsey had relationships with other women?

9 A Yes.

10 Q And at that time?

11 A Yes.

12 Q So, you -- he wasn't wanting to live back together with
13 his wife at that time, was he?

14 A Yes, he was.

15 Q He was?

16 A (Witness nods affirmatively.)

17 Q Okay. Were you aware that they're anticipating divorce
18 proceedings being brought by Virginia?

19 A Yes.

20 Q Not Virginia.

21 A Well, yes, his wife, yes.

22 Q Nell?

23 A Uh-huh. (Affirmative).

24 Yes, sir.

25 Q And you knew that those were going to be not as

Rod Tullis - Cross-examination
by Mr. Zelenka

1 cordial, correct?

2 A Yes, sir.

3 Q And why would they not have been as cordial under those
4 circumstances?

5 A Well, as I told you earlier, Mr. Lindsey's impressions
6 of what were going on, the, were not exactly what a totally
7 accepting and rational person would, would, would make of
8 them. Mr. Lindsey wanted to be married to his wife. Yes,
9 he was involved with, with another person. So -- but he
10 still wanted his wife. He still wanted his children.

11 Mrs. Lindsey was involved with another person. She did not
12 want to be married to him any longer, and that's what their
13 situation was at that time as I understood it.

14 Q There was also the domestic abuse charges, wasn't
15 there?

16 A Yes, but I think all that arose out of this way that
17 the, out of that situation, yes, and which was probably
18 based in the children as often time is the case being used
19 as a pawn in an adult relationship. So --.

20 Q Well, there's, there were a series of incidents
21 involving Nell though, correct?

22 A As I recall, yes.

23 Q August 1996, October 1996, February '99, August 2000,
24 December 2001, correct?

25 A As I recall, that is correct. During those earlier

Rod Tullis - Cross-examination
by Mr. Zelenka

1 periods of time, as I've said, I had a lot of contact with
2 Mrs. Lindsey also, and, in fact, Mrs. Lindsey was the main
3 one who would come and pay my fees for her husband during
4 those periods of time.

5 Q Well, you're no longer practicing law now, are you?

6 A No, I'm not.

7 Q You've been disbarred?

8 A That's correct.

9 Q Those are a matter of public record?

10 A That's correct.

11 Q And at the time that you were, at the time of this
12 particular trial, you were a practicing member of the bar,
13 correct?

14 A That's correct.

15 Q Officer of the Court, responsible for showing up to
16 Court---

17 A Yes.

18 Q ---at the call of the Court?

19 A Absolutely.

20 Q Okay. And at the time of the trial in May of 2004, you
21 still lived in Spartanburg, correct?

22 A Yes, sir.

23 Q Okay. Still held an office in Spartanburg?

24 A Yes, sir.

25 Q Okay. Did you come to Court while the trial was going

Rod Tullis - Cross-examination
by Mr. Zelenka

1 on?

2 A No, I did not attend any of the trial because I
3 expected to be a witness in this case, and, and expected the
4 witnesses would be sequestered. So, I wasn't coming in the
5 courtroom and it was just for that reason.

6 Q The trial wasn't an unknown fact within the Spartanburg
7 legal community, was it?

8 A Oh, no, as, as the solicitor termed this case that this
9 was, that my client, Mr. Lindsey, was the poster child for
10 domestic, criminal domestic violence in the State of South
11 Carolina. So, yeah, the, the crime was, was the main case
12 that was going on at the time.

13 Q Okay. And at the time, based upon your feelings about
14 your importance in the case, while that trial was going on,
15 did you ever attempt to contact the Public Defender's
16 office?

17 A Yes, I was speaking -- I spoke to Mr. Bartosh and Ms.
18 Quimby while the case was going on.

19 Q Okay. Did you ask them why you weren't being called as
20 a witness?

21 A I let them know I was available and ready to testify.

22 Q Did you ask them why you weren't being called as a
23 witness?

24 A No.

25 Q Okay.

Rod Tullis - Cross-examination
by Mr. Zelenka

1 A I also didn't ask them what the defense was in the
2 case. So, maybe the information I had wasn't germane to
3 their defense or their theory of the case.

4 MR. ZELENKA: I don't think I have any further
5 questions. Thank you, Your Honor.

6 MR. COLLINS: Very briefly, Your Honor, if I may.

7 REDIRECT EXAMINATION

8 BY MR. COLLINS:

9 Q Mr. Tullis, going back to these handwritten notes that
10 we've talked about, is it your recollection that those would
11 of been notes you got prior to the Public Defender's Office
12 taking over or after the Public Defender's Office took over
13 the---

14 A Prior to.

15 Q Okay. So, those would of been things out of your
16 possession at the time that subpoena was issued?

17 A That's correct.

18 Q All right. And that subpoena appears to have been
19 issued on May 21st of '04, which would of been during the
20 time of the trial, correct?

21 A As I understand it, yes.

22 Q Do you ever recall actually being served with that
23 subpoena?

24 A I don't recall being served with it, no.

25 Q Okay.

Rod Tullis - Redirect examination
by Mr. Collins

1 A But I'm not saying I wasn't. I just don't -- I don't
2 recall it.

3 Q And---

4 A But I know at the time I had no documents or records in
5 my possession. I had turned them all over previously.

6 Q All right. And you, you got to my next question, which
7 was assuming you had been served, would you of had anything
8 to turn over?

9 A Wouldn't have had a thing.

10 Q Along the same lines, there was an ongoing Family Court
11 matter involving Mr. Lindsey at that point as well, correct?

12 A That's correct.

13 Q I believe there was grandparents who were or other
14 family members who were fighting over who would have custody
15 of Mr. Lindsey's children?

16 A Yes.

17 Q Now, at some point you represented him or made an
18 appearance in that particular action on his behalf, correct?

19 A That's correct.

20 Q So, at this point you still had an ongoing
21 attorney/client privilege with Mr. Lindsey?

22 A Yes.

23 Q So, would there have been -- if there had been letters
24 attributable to a Family Court action, would those have been
25 protected by an attorney/client privilege?

Rod Tullis - Redirect examination
by Mr. Collins

1 A They would have been.

2 Q All right. And given the wording of the subpoena,
3 would not have been subject to that subpoena, is that
4 correct?

5 A I just glanced at the subpoena, but I believe that
6 would be correct.

7 Q I believe the subpoena asked for documents that you had
8 in your possession from when you represented him on this
9 particular murder charge?

10 A That's correct.

11 Q Now---

12 A And all those were turned over.

13 Q Everything of that had been turned over?

14 A Yes, sir.

15 Q Jump to the next topic, the, the message that was left
16 on your answering machine.

17 As Mr. Lindsey's attorney, is it correct that
18 immediately after the shooting took place in the parking lot
19 of the Inman Police Department he was immediately placed
20 under medical care and under arrest?

21 A That's my understanding, yes.

22 Q And given---

23 A He was, he was not free from that point of the shooting
24 and, and he's still not till this, till this day.

25 Q At that point in time, would he, in your experience,

Rod Tullis - Redirect examination
by Mr. Collins

1 have had the ability to make any phone calls given his
2 medical care and his, and his arrest?

3 A No.

4 Q Given that information, is it fair to assume that that
5 phone call was made at some point between the time you left
6 at noon that day and the time of the shooting?

7 A Yes.

8 Q All right. And the last topic I've got for you, the
9 criminal domestic violence issues that we've talked about,
10 is it your understanding that you were the, the family
11 attorney and the attorney for Mr. Lindsey?

12 A That's correct.

13 Q So, if he had a criminal domestic violence charge, you
14 would have been his attorney?

15 A Yes.

16 Q At any point during those years that you represented
17 him, was Mr. Lindsey ever convicted of criminal domestic
18 violence against Mrs. Lindsey or anyone else?

19 A Not that I'm aware of, no.

20 Q And as a matter of fact, the charge that was pending in
21 Spartanburg City that was subsequently dismissed, was that a
22 criminal domestic violence first offense?

23 A Yes.

24 Q All right. Which was held in Municipal Court?

25 A That's correct.

1 MR. COLLINS: Your Honor, I have no further questions
2 for Mr. Tullis. Thank you, sir.

3 THE COURT: You can step down.

4 WITNESS: Thank you.

5 THE COURT: It's been a long day.

6 You ready to stop? Are we---

7 MR. VIETH: That's up to you.

8 THE COURT: Are we where you expected to get today?

9 MR. VIETH: Yes. Well, we're real close to it. I'm
10 not rushing anything. We've got some fact witnesses. But
11 they'll be about the history of, of the family. It may take
12 a little longer. But it's up to the Court. I mean we can
13 go on to six o'clock if you want to.

14 THE COURT: I'd rather not.

15 MR. VIETH: That suits me cause I, I was going with the
16 Court's pleasure.

17 THE COURT: If you got somebody who's pushed to get in
18 today, that's a different story.

19 MR. VIETH: No, Your Honor, we are, we are not. We're
20 fine.

21 THE COURT: All right. Let's fire back up at 9:30.

22

23

24 (Whereupon, Court was in recess for the evening.)

25

1 Tuesday, July 20th, 2010

2
3 (Whereupon, a letter was marked as Applicant's Exhibit
4 No. 24 and received into evidence at this time.)

5 THE COURT: Counsel, could I meet with y'all up here
6 please?

7 (Whereupon, a bench conference was held at this time.)

8 THE COURT: What we're talking about, so you folks can
9 make your plans, we've got to break a little earlier for
10 lunch today because I got to get my eyes repaired that I
11 broke yesterday, and I don't want to hear anybody say that
12 justice is suppose to be blind.

13 MR. VIETH: All right. We ready to proceed?

14 THE COURT: Ready to go.

15 MR. VIETH: Your Honor, Applicant would call Jim Aiken
16 to the stand.

17 Come up over there please, sir.

18 THE COURT: If you'll come around right here.

19 WITNESS: Very well, Your Honor.

20 THE COURT: I'll administer the oath. Need you to
21 place your left-hand on the Bible and raise your right.

22 ROB AIKEN, being first duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. VIETH:

Rob Aiken - Direct examination
by Mr. Vieth

1 Q Mr. Aiken, would you state your name please, sir?

2 A My name is James Evans Aiken.

3 Q All right.

4 A A-I-K-E-N.

5 Q Where do you live, sir?

6 A Brevard, North Carolina.

7 Q Okay. And what is your occupation, Mr. Aiken?

8 A I'm currently president of James C. Aiken & Associates,
9 Inc.

10 Q And what does your company do?

11 A Consulting concerns as relates to death penalty
12 proceedings as well as prison and jail security.

13 Q All right. Would you please go into your employment
14 history concerning prison adaptability, prison make-up, and
15 prison classification?

16 A Very well, sir. I started working in corrections when
17 I graduated from Benedict College, Columbia, South Carolina,
18 in 1971. I actually graduated in '72, but I went to work in
19 '71 with the South Carolina Department of Corrections in the
20 capacity of a substance abuse counselor at the Manning
21 Correctional Institution in Columbia. From there I was
22 promoted to the rank of administrative assistant to a warden
23 of that same facility. From there I was promoted to deputy
24 warden of that same facility.

25 In all of those capacities I had direct contact with

Rob Aiken - Direct examination
by Mr. Vieth

1 inmate population, within the management of that population,
2 as well as classifying that inmate population, breaking up
3 fights, disciplinary, contraband, searches, security aspects
4 of a correctional facility.

5 From there I was promoted to the rank of deputy warden
6 at the Central Correctional Institution, C.C.I., in
7 Columbia. This facility, at that particular time, housed
8 the most dangerous predator inmate population within the
9 South Carolina criminal justice system. We also took in
10 inmates that were too disruptive even in a county facility.
11 Also we had death row population. We had inmates that were
12 in pretrial status also to be evaluated psychologically.
13 This facility housed about 1,800 inmates.

14 From there I was promoted to the rank of warden of the
15 Women's Correctional Center. In that capacity I was the
16 chief executive officer of that facility in charge of all
17 aspects of security, classification of inmate population,
18 management of inmate population, policy interpretation, as
19 well as to monitor the security of their facility. I
20 managed the work force to include security, administration,
21 and support services.

22 From there I was promoted to the rank of warden at the
23 Central Correctional Institution, the same institution I
24 referred to previously. Also while there as warden of that
25 facility I was responsible to carry out executions. I

Rob Aiken - Direct examination
by Mr. Vieth

1 performed two executions personally while I was warden of
2 the Central Correctional Institution.

3 From there I was promoted to the rank of deputy
4 regional administrator of the Midlands Correctional Region.
5 We had approximately 15, 16 prisons under my control and
6 command. Again, throughout my whole career was involved
7 with the classification and management of inmate population
8 to include the management or disruptive, dangerous predator
9 inmate population and classification of them to insure the
10 appropriate level of security is surrounded for those people
11 for the protection of staff inmates as well as the general
12 public.

13 From there I was promoted to the rank of commissioner
14 of corrections for the State of Indiana. I was in charge of
15 all correctional activities to include juvenile corrections
16 as well as adult corrections. I was the chief executive
17 officer. I developed, implemented, and monitored policy as
18 it related to all aspects of management of inmate
19 population. Everything from classification to disturbance
20 control as well as gang management, et cetera.

21 From there I was promoted to the rank of director of
22 corrections for the United States Virgin Islands.
23 Throughout my career I've focused on making correctional
24 institutions more efficient and safer for staff as well as
25 inmate population and the general community. And I went

Rob Aiken - Direct examination
by Mr. Vieth

1 into the Virgin Islands to restore that system also just
2 like I had done in Indiana, and also to give me some
3 knowledge because I, as it relates to drug cartels as well
4 as national and international gangs and terrorists
5 organizations. It's my understanding, to which it came
6 true, that a lot of these people that were coming into the
7 country to do some violence against our folks came in
8 through places like the Virgin Islands and as well as Puerto
9 Rico, et cetera.

10 Reverting back a little bit, I started in 1986 I think
11 it was. I was approached by the United States Department of
12 Justice, the National Institution of Corrections, and the
13 National Academy of Corrections to evaluate as well as
14 deliver expert technical assistance of correctional
15 agencies, county jails all the way through to the Federal
16 Bureau of Prisons as well as state prisons as it relates to
17 classification of inmate population, management of the hard
18 to manage violent inmates, teaching wardens how to be
19 wardens, teaching existing wardens how to be better wardens,
20 teaching wardens how to be wardens for super maximum
21 security institutions.

22 And, for example, that, part of that classroom delivery
23 was delivered at a place called D.X.A., Administrative
24 Maximum, which is the most secure prison in the world in my
25 estimation. All the international terrorists are being held

Rob Aiken - Direct examination
by Mr. Vieth

1 there, and it's a very very sophisticated high security
2 facility.

3 Also I was involved in the avoidance of critical
4 incidents to include hostage situations, riots, and those
5 kinds of things that take place within prisons. I also
6 taught about gang management and security threat groups. I
7 also was involved in insuring the technical aspects over
8 security delivery system was fully interrogated to reduce
9 the probability of critical events.

10 And finally, in 2004, I was appointed by the leadership
11 of the House and the leadership of the Senate and the
12 President of the United States for Prison Rape Elimination
13 Commission. This was a commission that was appointed by
14 Congress, I understand a unanimous vote by Congress and it
15 was signed into law by President George Bush. This nine
16 member commission to which I was a member of was required to
17 develop standards for all jails, prisons, on the state,
18 federal, and local level, and these standards should be
19 coming out within the next year.

20 I've completed my work, at least I thought I did. I'm
21 still working with the attorney general in, in opening,
22 finalizing should we say, these standards. Failure to
23 comply with these standards, Governments will lose partial
24 federal funding. This commission was also granted the power
25 of subpoena so we could hold public hearings and review any

Rob Aiken - Direct examination
by Mr. Vieth

1 records.

2 Q All right. Sir, with that tremendous background, have
3 you ever testified as an expert in either state or federal
4 court or both as to prison classification, future dangerous
5 issues, prison adaptability issues?

6 A Yes, I have, sir, on the federal as well as state
7 level. Everywhere from rape, so called domestic murder all
8 the way through the international terrorism.

9 Q All right, sir. And, Mr. Aiken, in that capacity did I
10 ask you if you had time in your schedule to look at and
11 review the files of Marion Lindsey?

12 A That's correct, sir.

13 Q Have you ever met Mr. Lindsey?

14 A No, I have not, sir.

15 Q And is it necessary for you to meet a person before you
16 testify about prison adaptability or future dangerousness?

17 A No, sir, it's not. I've classified thousands and
18 thousands of inmates without having an interview. In fact,
19 what I do is rely on the official records. In some
20 instances I do interview the inmate to further validate
21 what's already in the record.

22 Q All right. And what records were you provided?

23 A I was provided the Spartanburg County Detention records
24 as well as the South Carolina Department of Corrections
25 records during the time that he was incarcerated for

Rob Aiken - Direct examination
by Mr. Vieth

1 approximately seven and a half months on a one year sentence
2 plus one year for probation. I did look at his death row
3 records, but I did not include that in formulating my
4 opinion.

5 Q All right. So, you had the South Carolina, the
6 Spartanburg County Detention records from the date of the
7 arrest until the date of his trial, 2002, 2004?

8 A That's correct, sir.

9 Q And then you also had provided to you the South
10 Carolina Department of Corrections records for the period of
11 time he spent for the assault and battery with intent to
12 kill case where he got a one year sentence?

13 A That is correct, sir.

14 Q Okay. And based upon your evaluation of those records,
15 tell the Court your observations of this case.

16 A My observations is that this individual obviously has
17 been causing, called, been guilty of crimes of violence
18 within the community, and that the South Carolina Department
19 of Corrections has and can manage this type of offender for
20 the remainder of his life without causing unreasonable risk
21 of harm to staff, inmates, as well as the general community.

22 Q Okay. And what factors lead you to that conclusion,
23 Mr. Aiken?

24 A Factors number one is that he's pulled time before, and
25 sorry for the colloquial terms, but he's been sentenced and

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1 confined before. Number two is that the Department of
2 Corrections has the capability to appropriately classify
3 him, to evaluate his behavior, to evaluate his potential
4 behavior. They have the necessary staff, the equipment, as
5 well as the expertise and knowledge to manage this type of
6 inmate.

7 This particular inmate does not have relationships
8 with, for example, security threat groups or gangs. He has
9 not demonstrated a propensity towards what we call random
10 and systemic violence against other persons while he's in
11 prison.

12 Prisons are dangerous places and these things can
13 happen. Airplanes do crash. But the point is, is that the
14 South Carolina Department of Corrections can adequately
15 manage him based on his criminal history, his age, as well
16 as the type of offense he's been charged with which would
17 keep him in confinement status for the remainder of his
18 life.

19 Q All right, sir. Do you consider life imprisonment
20 without any possibility of parole to be a severe sentence?

21 A It is a very severe sentence. Most people think, kind
22 of like a television program, it goes off in an hour. But
23 in a person with serving life without parole, they're on the
24 shelf as we call it. When you go to grandma's house and you
25 see their figurine, as a child, sitting up on a, above the

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1 fireplace, and then your children come and look at them, and
2 they are grown now and that same figurine is sitting there
3 day after day, month after month, year after year, decade
4 after decade, and that's what happens within the prison is
5 the same redundancy over and over again, and it reduces you
6 to the lowest common denominator.

7 Q I understand.

8 And if you would of the, testified in the first trial,
9 your, you would of rendered an opinion to the jury that,
10 that what?

11 A It would be the same opinion that I'm rendering today,
12 sir.

13 Q Okay. Mr. Aiken, I ask you if you have ever had an
14 occasion to be familiar with the American Bar Association
15 guidelines for the appointment and performance of defense
16 counsel in death penalty cases at all?

17 A I've heard of that, yes, sir, but I have not read it in
18 depth, no, sir.

19 Q All right, sir. I'm gonna refer to that document,
20 which is a Court Exhibit, on Page 1056 and this is under a
21 category, Mr. Aiken, of Guidelines 10.11, defense case
22 concerning penalty, and specifically I'm gonna read this to
23 you, which is letter the F. In deciding which witnesses and
24 evidence to prepare concerning penalty, the areas counsel
25 should consider include the following, and I'm going over

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1 two, expert and lay witnesses along with supporting
2 documentation such as school records, military records, to
3 provide medical, psychological, sociological, cultural, and
4 other insights into the client's mental and/or emotional
5 state and life history that may explain or lessen the
6 client's culpability for the underlying offenses and to give
7 a favorable opinion as to the client's capacity for
8 rehabilitation or adaptation to prison.

9 Given that opinion, that guideline, you would be the
10 only type of person, I assume, that could give an opinion?

11 MR. ZELENKA: Object. Goes beyond the level of
12 expertise.

13 MR. VIETH: All right. Well, I'm -- it's going through
14 the guidelines. I'll, I'll rephrase the question.

15 To give a favorable opinion as to a client's capacity
16 for adaptation to prison, you are qualified to do that?

17 A Yes, sir, I am.

18 Q Do you know, of your own knowledge and expertise, if
19 lay witnesses are able to give that opinion?

20 A Not to my knowledge, sir.

21 Q Okay. That's all the questions I have. Answer any
22 questions that the government may have, the State may have.

23 CROSS-EXAMINATION

24 BY MR. ZELENKA:

25 Q Mr. Aiken, how are you today?

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1 A I'm doing fine, sir, and you?

2 Q Fine, thank you.

3 Approximately how many cases in the State of South
4 Carolina have you testified at in a jury trial situation
5 when the State was seeking the death penalty?

6 A I, I couldn't even guess at this point. Certainly I
7 would say more than ten at least.

8 Q Okay. And how many cases have you testified in in a
9 post-conviction relief setting about the adaptability to
10 prison life of a defendant who had already been sentenced to
11 death?

12 A Certainly more than -- I think at least two or three or
13 maybe even more, sir.

14 Q Okay. In each of those cases, you gave a general
15 opinion that the Department of Corrections has the capacity
16 and ability to house every individual essentially in a, in a
17 box based upon the particular crime they had committed,
18 isn't that correct?

19 A Well, government or certain security status, yes, sir,
20 and I have rendered opinions that were probably adverse and
21 I was not called to testify.

22 Q Okay. But essentially it's your opinion that inmates
23 can be managed by the South Carolina Department of
24 Corrections to avoid injury to other inmates, the general
25 public, and prison guards because the Department of

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1 Corrections has authority to house, in various levels, up to
2 maximum, correct?

3 A Well, yes, sir, partially I agree with you. Number one
4 is you never say never in this business. You're dealing
5 with human elements and, no, I don't have a crystal ball and
6 yes, planes still crash. But the point is, is that the vast
7 majority of people that are incarcerated within the South
8 Carolina Department of Corrections can be incarcerated.
9 Now, whether or not I will say that this person may be at
10 the highest level of probability to cause a risk to staff
11 inmates as well as the general community and I have rendered
12 that type of opinion and asked not to testify.

13 Q Okay. And you have testified that one of those factors
14 is the Department of Corrections, when necessary, can use
15 lethal force against an inmate to control them, correct?

16 A Yes, sir, the South Carolina Department of Corrections
17 has that ability and, and certainly all correctional
18 agencies within the United States have that legal authority
19 to my knowledge.

20 Q Okay. And you would agree that, that the best
21 predictor of future behavior is past behavior, wouldn't you?

22 A Yes, sir, but it's a three legged stool there. It's
23 the community behavior that will drive and that is convicted
24 of murder, that murder conviction stays. The institutional
25 behavior, which you alluded to, as well as the ability of

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1 the correctional agency to manage that behavior.

2 Q Okay. And in your review of, of this defendant's
3 materials, you had access to and reviewed his record from
4 1995 through 1996, correct?

5 A When he was at Dutchman and I think he came in at
6 Perry, if I'm not, not mistaken, sir.

7 Q Okay.

8 A Is that what you're referring to?

9 Q Yes.

10 A Okay.

11 Q And that was for the crime of assault and battery with
12 intent to kill, correct?

13 A That is correct, sir.

14 Q Did you review the circumstances of the assault and
15 battery with intent to kill?

16 A My understanding that it was an altercation on a
17 highway where shots were fired and the victim sustained a
18 gunshot wound to the arm if I'm not mistaken, sir.

19 Q Okay. The defendant, Marion Lindsey, shot into another
20 vehicle at that time, correct?

21 A Well, the person was shot and, and he was found guilty
22 of that and was sentenced to one year plus one year
23 probation to the best of my knowledge, sir.

24 Q All right. And did you get any information that the
25 defendant, from defense counsel, the defendant had other

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1 incidents where he had been violent?

2 A Well, criminal domestic violence is apart of that and I
3 considered that in formulating my opinion, sir.

4 Q Okay. Did they give you any information about other
5 charges that he had been presented with that also involved
6 crimes of violence that he wasn't convicted of?

7 A He had been arrested. I don't -- I didn't see though
8 the end determination of it.

9 Q Okay. You just knew he been arrested for other crimes
10 of violence?

11 A I, I assumed such, sir, yes, sir.

12 Q Okay. Did you find it necessary or important to talk
13 to the defendant about those other incidents?

14 A No, sir, I was looking at adjudications and the
15 official records.

16 Q Okay. You weren't aware that he had had other criminal
17 assaults against individuals when he had motivation for
18 doing that in his mind?

19 A Are you asking about adjudication for such or was he
20 arrested?

21 which one are you referring to?

22 Q whether he was arrested for it.

23 A Only arrest -- well, I'm just -- he was not adjudicated
24 and, so, therefore, I did not put major weight on that even
25 though I weigh everything.

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1 Q All right.

2 A Being found guilty of something and being accused of
3 something are two different and distinct issues.

4 Q Certainly.

5 But making a determination to whether the individual
6 had actually done that, you had a source with Mr. Lindsey to
7 ask him whether he could, he did do what he was charged
8 with, correct?

9 A If I felt that that was necessary and I, I didn't.

10 Q Okay. And you didn't think it was necessary to hear,
11 so, you didn't, correct?

12 A We're still talking about the same thing and for, and
13 the reason why is very simple. He's accused of murder and
14 he is going to be in prison for the remainder of his life.

15 Q Okay.

16 A And that's the assumption that I made.

17 Q In those prison records, did you see indications that
18 he was recommended for consulting treatment for anger
19 management?

20 Did you see that information?

21 A I saw a phrase in there referring him to anger
22 management, yes, sir.

23 Q And what would that be in correctional terms?

24 A Well, he was serving a previous sentence and that was
25 in the form of rehabilitation and reintegration back to the

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1 community at that particular time.

2 Q Did the indication for anger management suggest that he
3 had a short fuse, would act violently and inappropriately in
4 situations?

5 A Well, the potential for violence is certainly there
6 because he was serving the sentence for assault and battery
7 with intent to kill, and what anger management pertained, at
8 that particular time to my knowledge, was preparing a person
9 for reintegration to society with normal people, law abiding
10 people, and how to demonstrate that behavior while in the
11 community.

12 Q Okay.

13 A To prepare for return.

14 Q Well, in your review of his records, you saw
15 indications that he had acted violently towards other
16 individuals, didn't you?

17 A Yes, he got into fights and things of that nature, yes,
18 sir.

19 Q Okay. Got into fights in February 1996, correct, while
20 he was housed at Dutchman?

21 A That is correct, sir.

22 Q March 24th, 1996, was charged with fighting another
23 inmate, correct?

24 A I don't remember the exact date. But approximately,
25 yes, sir, I do.