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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 00-CP-32-3470

GARY DUBOSE TERRY Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

APPENDIX
VOLUME VI OF VII

Teresa L. Norris
Blume, Weyble & Norris, LLC.
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

Division of Appellate Defense
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201
(803) 734-1330

ATTORNEYS FOR PETITIONER

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

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1 WE'LL FIND OUT WE DON'T NEED THAT WITNESS, SO WE'LL SUBPOENA
2 PEOPLE AND THEN FILTER OUT WHO WE ACTUALLY NEED JUST TO MAKE
3 SURE -- AND THE BIGGEST PURPOSE FOR THAT, YOUR HONOR, IS
4 PARTICULARLY IN A CASE LIKE THIS WHEN YOU'RE GOING TWO WEEKS,
5 WE'LL SUBPOENA PEOPLE TO MAKE SURE THAT WE'VE GOT THEM IN
6 CASE THEY HAVE VACATION PLANS, THAT WE'VE GOT -- MOST OF THEM
7 -- IN FACT, ALMOST ALL OF THEM ARE ON TELEPHONE STANDBY. SO
8 WE'LL CUT THE LARGE MAJORITY OF THEM LOOSE. IT'S IF THEY'RE
9 GOING TO TESTIFY, YOUR HONOR, AND I BELIEVE INSTEAD OF
10 WAITING UNTIL THEY TESTIFY TO HAND OVER INFORMATION, WE DO IT
11 WELL IN ADVANCE.

12 **THE COURT:** ALL RIGHT. A LOT OF THESE -- A LOT OF
13 THESE DOCUMENTS ARE SUBPOENAS, AND I WAS -- I WAS UNCLEAR AS
14 TO WHETHER OR NOT THE STATE WAS OBLIGATED TO PROVIDE THE
15 DEFENSE A COPY OF A SUBPOENA AT THE TIME THAT IT IS SERVED,
16 AND IF THAT'S TRUE THAT THEY'RE NOT REQUIRED, THEN THE
17 ISSUANCE OF A SUBPOENA, IN MY VIEW, QUALIFIES AS WORK
18 PRODUCT. IF THEY ARE REQUIRED, THEN IT DOES NOT. DO YOU
19 AGREE WITH THE SUGGESTION THAT THE STATE IS NOT REQUIRED TO
20 DISCLOSE OR TO SERVE A COPY OF THE SUBPOENA ON THE DEFENSE
21 BEFORE TRIAL?

22 **MR. FLOYD:** THAT'S MY UNDERSTANDING, YOUR HONOR.

23 **THE COURT:** ALL RIGHT. OKAY. ONE OF THE -- ONE OF
24 THE DOCUMENTS THAT IS A SUBPOENA HAS A FAX ATTACHED TO IT,
25 AND IT IS TO SOMEBODY NAMED JOHN THOMAS WHO -- AND WITHOUT --

1 WITHOUT ANY INDICATION OF WHO THAT IS, I'M NOT SURE I CAN
2 DETERMINE IF IT'S -- I MEAN, THIS IS -- THIS IS A MEANINGLESS
3 DOCUMENT, BUT, YOU KNOW, IT'S THE ONE -- ONE OF THE DOCUMENTS
4 WHERE I WAS UNABLE TO DETERMINE WHETHER OR NOT IT WOULD BE
5 COVERED BY WORK PRODUCT.

6 MR. HUBBARD: YOUR HONOR, I DON'T KNOW IF THAT --
7 WAS THAT MR. CHASE'S STACK OR MR. HUMPHRIES'?

8 THE COURT: THIS IS -- WE'RE STILL ON TOM CHASE.

9 MR. HUBBARD: YOUR HONOR, I WISH HE WERE HERE TO
10 ADDRESS THAT. I DON'T KNOW ALL THE PLAYERS. I KNOW IT'S NOT
11 UNCOMMON IN A CASE LIKE THIS -- YOU TALK TO A LOT OF PEOPLE
12 THAT ARE NOT INVOLVED IN, SAY, THE GUILT PHASE BUT
13 POTENTIALLY IN THE PENALTY PHASE, AND UNLESS YOU'RE INVOLVED
14 IN THE ACTUAL TRIAL, YOU MIGHT NOT KNOW WHO THEY ARE. AND
15 OFTENTIMES, YOUR HONOR, IT'S SIMPLY TO TALK TO THEM TO SEE --
16 TO GET OTHER INFORMATION THAT WILL LEAD YOU TO THE NEXT
17 PLACE.

18 THE COURT: DO YOU -- ARE YOU -- DO YOU KNOW
19 ANYTHING ABOUT THE NAME JOHN THOMAS? DOES THAT HAVE ANY
20 SIGNIFICANCE TO YOU?

21 MR. FLOYD: NO, YOUR HONOR.

22 THE COURT: ALL RIGHT. WELL, I THINK -- I THINK
23 FROM LOOKING AT THIS -- WHAT IT APPEARS TO ME IS THAT HE MUST
24 WORK FOR LAW ENFORCEMENT AND THAT THIS IS A REQUEST TO MR.
25 THOMAS TO HAVE THESE SUBPOENAS SERVED. THAT'S WHAT IT LOOKS

1 LIKE. AND SO WITHOUT---

2 **MR. HUBBARD:** YOUR HONOR, I KNOW MR. CHASE WENT
3 THROUGH EVERYTHING IN THIS STACK AND WAS ABLE TO SAY THAT IT
4 WASN'T HIS AND HE'D ASKED OR DIRECTED SOMEBODY TO PREPARE
5 WHAT WAS IN THERE. SO, AGAIN, IF HE'S ISSUING SUBPOENAS,
6 AGAIN, OUR POSITION WOULD BE THAT IT'S IN CASE PREPARATION,
7 TRIAL PREPARATION, AND THAT WE'RE LOOKING TO TALK TO PEOPLE
8 EITHER BEFORE TRIAL OR IN THE PREPARATION OF TRIAL. AND
9 SOMETIMES WE DO GO THROUGH AN OFFICER OR A THIRD PERSON JUST
10 -- OR WHILE WE CONTINUE TO WORK, THEY KNOW WHERE TO FIND
11 PEOPLE.

12 **THE COURT:** ALL RIGHT. I'M GOING TO -- I'M GOING
13 TO -- SPECIFICALLY IDENTIFY THAT AS A -- IT IS USING A FAX
14 TRANSMITTAL SHEET FROM THE SOLICITOR'S OFFICE DATED
15 SEPTEMBER 18TH, '97, 11:55 P.M. TO JOHN THOMAS, AND THERE ARE
16 TWO SUBPOENAS ATTACHED TO IT AND A FAX CONFIRMATION SHEET
17 ATTACHED TO IT, AND I'M RULING THAT IT'S COVERED BY WORK
18 PRODUCT. NOW, THERE ARE SEVERAL DOCUMENTS THAT ARE IN MR. --
19 IS IT CASE?

20 **MR. HUBBARD:** CHASE.

21 **THE COURT:** CHASE. CHASE'S FILE THAT -- THAT MAYBE
22 ARE NOT QUITE AS EASY. THIS IS A TWO-PAGE HANDWRITTEN NOTE.
23 ON THE FIRST PAGE THE -- ALL RIGHT. I'M GOING TO -- I'M
24 GOING TO SAY WHAT I THINK REALLY IF THIS WERE -- IF YOU HAD
25 BEEN REQUIRED TO DO A DETAILED PRIVILEGE LOG, I'M GOING TO

1 GIVE THE INFORMATION THAT WOULD HAVE HAD TO HAVE BEEN
2 INCLUDED ON THE PRIVILEGE LOG AND THEN I'M GOING TO LET THE
3 DEFENSE RESPOND AS THEY -- THE APPLICANT RESPOND AS HE WANTS
4 TO. BUT THE FIRST PAGE IS ENTITLED DEFENDANT'S STATEMENTS,
5 AND IT IS A CHRONOLOGICAL LISTING OF WHAT APPEAR TO BE
6 EXCERPTS FROM THINGS SAID BY THE DEFENDANT.

7 THE SECOND PAGE IS TREATMENT RESPONSES AND, AGAIN,
8 IT IS A CHRONOLOGICAL LISTING OF -- WELL, I MEAN, I DON'T
9 KNOW THAT I CAN CHARACTERIZE IT ANYMORE THAN IT'S
10 CHARACTERIZED IN ITS OWN HEADING. AND THE AFFIDAVIT
11 INDICATES THAT IT WAS PREPARED BY MR. CHASE, AND ON FIRST
12 BLUSH IT APPEARS TO ME TO BE WORK PRODUCT. THERE MAY BE SOME
13 FURTHER INFORMATION -- THAT YOU ALL HAVE A RESPONSE THAT YOU
14 HAVE ABOUT THAT THAT WOULD -- THAT WOULD CHANGE MY RULING.
15 AND THEN THERE IS A TYPEWRITTEN VERSION OF THAT SAME
16 DOCUMENT. THERE IS A DOCUMENT THAT -- I'LL LET YOU LOOK AT
17 THIS, BUT THIS DOES NOT LOOK TO ME LIKE IT IS PRODUCED WITHIN
18 THE SOLICITOR'S OFFICE. THIS LOOKS TO ME LIKE A REPORT THAT
19 IS PRODUCED BY A MEDICAL PROFESSIONAL NOT IN THE EMPLOYMENT
20 OF THE STATE.

21 MR. HUBBARD: YOUR HONOR, I DO HAVE A QUESTION ABOUT
22 THAT, AND THE REASON WHY I DO IS THE FONT USED. MR. CHASE
23 ALWAYS USED THE SMALLEST FONT HE COULD. HE -- WOULD IT BE
24 ALL RIGHT TO KEEP THIS ON RESERVE UNTIL HE IS HERE TO ASK HIM
25 IF HE PRODUCED THIS? THIS MAY HAVE BEEN HIS TITLE, THIS

1 HEADING, FOR THIS AREA OF THE MATTER HE WAS GOING TO.

2 THE COURT: YEAH, BUT HE'S GOING TO HAVE TO -- I
3 THINK HE'LL -- HE'LL HAVE TO TELL US MORE THAN WHO PRODUCED
4 IT. HE'LL HAVE TO TELL US WHY.

5 MR. HUBBARD: I THINK HE MAY BE THE ONE THAT
6 ACTUALLY PRODUCED IT---

7 THE COURT: OKAY.

8 MR. HUBBARD: ---IS WHAT I'M SUGGESTING.

9 THE COURT: ALL RIGHT. I'LL LET YOU KEEP THAT
10 DOCUMENT UNLESS THERE'S SOME OBJECTION, AND THEN YOU CAN --
11 ALONG WITH THE OTHER FILE THAT I GAVE YOU A MINUTE AGO, YOU
12 CAN...

13 MR. HUBBARD: YES, SIR.

14 THE COURT: AND NOW I'M GOING TO -- AGAIN, HERE ARE
15 TWO DOCUMENTS THAT I'M GOING TO REVEAL THE INFORMATION THAT
16 WOULD HAVE BEEN PUT ON TO A PRIVILEGE LOG. ONE IS ENTITLED,
17 "LISA DIANE GIBSON-SMITH INTERVIEW, AUGUST 19, 1997." IT'S A
18 THREE-PAGE TYPEWRITTEN DOCUMENT THAT APPEARS TO BE A SUMMARY
19 OF THAT INTERVIEW. AND THEN THERE'S A ONE-PAGE DOCUMENT THAT
20 IS ENTITLED, "INTERVIEW WITH SAMANTHA JACKSON, 9/4/97." IT'S
21 A ONE-PAGE DOCUMENT THAT APPEARS TO BE A -- A SUMMARY OF THAT
22 INTERVIEW.

23 NOW, THERE CLEARLY ARE THINGS ON HERE THAT ARE WORK
24 PRODUCT, BUT IT'S POSSIBLE THAT Y'ALL MAY HAVE OTHER EVIDENCE
25 THAT YOU CAN USE TO ARGUE THAT THERE WOULD BE SOME NEED-BASED

1 REASON FOR GETTING AROUND THAT OR THERE WOULD HAVE BEEN SOME
2 NEED-BASED REASON FOR GETTING AROUND THE WORK PRODUCT
3 PROTECTION. SO THOSE -- THAT'S MY -- THESE ARE MY RULINGS AS
4 TO THE CHASE DOCUMENTS. I'M GOING TO GO AHEAD AND RETURN
5 THESE -- THIS STACK TO YOU.

6 MR. HUBBARD: YES, SIR, YOUR HONOR.

7 THE COURT: YOU COPY THOSE---

8 MR. HUBBARD: YES, SIR.

9 THE COURT: ---ALONG WITH OTHER -- OTHER, YOU KNOW
10 -- AND KEEP A -- KEEP A SEALED PACKAGE THAT THE... IS IT
11 OKAY FOR -- FOR -- WHAT IF -- WHAT IF I WERE TO JUST DIRECT
12 THE SOLICITOR'S OFFICE TO MAINTAIN THE DOCUMENTS THAT THEY
13 CLAIM ARE PRIVILEGED UNTIL YOU GET READY TO DETERMINE -- TO
14 SET THE RECORD FOR APPEAL TO THE SUPREME COURT? AND IF YOU
15 ACTUALLY DECIDE YOU WANT THAT IN THE RECORD, THEN HE CAN COPY
16 THE DOCUMENTS AND WE'LL -- YOU KNOW, YOU CAN -- HE CAN -- I
17 MEAN, I GUESS THERE WILL BE AN AGREEMENT THAT THOSE DOCUMENTS
18 WILL BE FILED WITH THE SUPREME COURT AS PART OF THE RECORD ON
19 APPEAL BUT SEALED.

20 MR. HUBBARD: SO DO YOU WANT ME TO JUST MAINTAIN
21 THEM, YOUR HONOR?

22 THE COURT: WOULD THAT SUIT Y'ALL?

23 MR. FLOYD: THAT'S FINE, YOUR HONOR.

24 THE COURT: ALL RIGHT. SO THOSE WHERE I UPHOLD THE
25 PRIVILEGE, JUST MAINTAIN THOSE, AND IF THEY ASK YOU TO, YOU

1 WILL COPY THEM AND THEY'LL BE SEALED PURSUANT TO -- IF YOU
2 WANT TO GO AHEAD AND PREPARE AN ORDER ON THIS, THEN I'LL BE
3 HAPPY TO DO THAT, HAPPY TO SIGN IT, BUT IT WILL -- IT WILL
4 DIRECT Y'ALL TO MAINTAIN COPIES OF THOSE DOCUMENTS WHERE I
5 UPHOLD THE WORK PRODUCT PROTECTION. AND THEN YOU CAN EITHER
6 TURN OVER THE ORIGINALS OR COPIES OR WHATEVER THE SUPREME
7 COURT WANTS AS PART OF THEIR RECORD ON APPEAL.

8 MR. HUBBARD: YES, SIR.

9 THE COURT: BUT IT WILL REMAIN SEALED UNTIL THE
10 SUPREME COURT UNSEALS THEM.

11 MR. HUBBARD: YES, SIR.

12 MR. FLOYD: YOUR HONOR, MAY I HAVE SOME
13 CLARIFICATION? WHAT EXACTLY WAS THE RULING ON THE DOCUMENTS
14 OF THE INTERVIEW WITH GIBSON AND---

15 THE COURT: I'M RULING THAT THEY'RE -- THAT THEY'RE
16 WORK PRODUCT, BUT BECAUSE THEY ARE INTERVIEWS, YOU MAY HAVE
17 SOME FURTHER POSITION TO TAKE ABOUT IT.

18 MR. FLOYD: WELL, WE WOULD---

19 THE COURT: IN FACT, I'M GOING TO GO AHEAD AND TURN
20 THESE OVER -- THESE BACK OVER TO YOU AS WELL.

21 MR. HUBBARD: YES, SIR.

22 MR. FLOYD: YOUR HONOR -- YOUR HONOR, WE WOULD LIKE
23 TO BE HEARD ON THAT POINT BECAUSE I DON'T THINK YOU COULD DO
24 AN INTERVIEW WITH SOMEONE AND THEN AVOID DISCLOSING THE
25 INFORMATION RECEIVED BY INCORPORATING SOME NOTES OR COMMENTS

1 OR SUGGESTIONS OR TACTICS TO CONVERT IT TO WORK PRODUCT.

2 **THE COURT:** WELL, I THINK THAT WHEN YOU GO OUT AND
3 INTERVIEW A WITNESS -- WHEN ANYBODY GOES OUT AND INTERVIEWS A
4 WITNESS, THAT INTERVIEW AND WHAT'S DISCLOSED WITHIN IT ARE
5 WORK PRODUCT. AND NOW IF THEY GIVE A FORMAL STATEMENT, THEN
6 THAT CAN BE DIFFERENT, BUT IF THEY -- IF THEY'RE NOTES FROM
7 AN INTERVIEW, THEN THERE'S A LIMITED WAY IN WHICH YOU CAN GO
8 ABOUT GETTING THE CONTENT OF THOSE NOTES. SO MY RULING IS
9 GOING TO BE THAT IT IS WORK PRODUCT, AND IF YOU HAVE ANYTHING
10 ELSE THAT YOU WANT TO COME BACK WITH, THEN YOU CAN COME BACK
11 WITH THAT. BUT AS FAR AS IT BEING WORK PRODUCT IN THE FIRST
12 PLACE, THAT'S GOING TO BE MY RULING.

13 **MR. FLOYD:** YOUR HONOR, A COUPLE OF COMMENTS ON
14 THAT. RULE 5(C), CRIMINAL RULES WHICH GOVERNS DISCLOSURE OF
15 DOCUMENTS, SAYS THE PROSECUTION SHALL PERMIT THE DEFENDANT TO
16 INSPECT AND COPY BOOKS, PAPERS, AND SO FORTH WHICH ARE IN THE
17 POSSESSION, CUSTODY, OR CONTROL OF THE PROSECUTION AND WHICH
18 ARE MATERIAL TO THE PREPARATION OF HIS DEFENSE OR ARE
19 INTENDED TO USE BY THE PROSECUTION AS EVIDENCE IN CHIEF AT
20 THE TRIAL. YOUR HONOR, THAT'S VERY BROAD. THERE'S NOTHING
21 IN THERE THAT SAYS EXCEPT WORK PRODUCT, AND SO IT'S OUR
22 POSITION THAT ANY INFORMATION LIKE THAT SHOULD BE DISCLOSED
23 TO US. IT MAY BE BRADY MATERIAL; WE DON'T KNOW. BUT IF IT
24 -- BUT IF THEY OBTAIN EVIDENCE IN A CASE, THEN THEY'RE
25 SUPPOSED TO DISCLOSE IT TO THE DEFENSE NO MATTER WHERE THEY

1 OBTAINED IT FROM.

2 THE COURT: RIGHT. NOW, I HAVE NOT REVIEWED IT FOR
3 THE PURPOSE OF DETERMINING WHETHER OR NOT IT'S BRADY
4 MATERIAL. I DON'T KNOW ENOUGH ABOUT THE CASE TO DO THAT YET,
5 BUT THAT WOULD BE---

6 MR. FLOYD: I MEAN, BOTH OF THESE PEOPLE WERE
7 WITNESSES AT THE TRIAL.

8 THE COURT: RIGHT. IT WOULD BE THE INFORMATION
9 CONTAINED OR REVEALED IN THE INTERVIEW THAT WOULD BE BRADY
10 MATERIAL. IT WOULD NOT BE THE NOTES THAT COME OUT OF THE
11 INTERVIEW. THE NOTES WOULD BE EVIDENCE OF THE -- OF THE
12 INFORMATION THAT, IF NECESSARY, I CAN CONDUCT AN IN CAMERA
13 REVIEW ABOUT BRADY, BUT THE NOTES THEMSELVES -- THESE
14 DOCUMENTS THAT I JUST HANDED BACK TO THEM, THE TWO
15 INTERVIEWS, THOSE ARE NOT -- THEY DO NOT APPEAR TO ME TO BE
16 STATEMENTS OF THE WITNESS. THESE ARE NOTES OF THE LAWYER
17 COMING OUT OF AN INTERVIEW, AND THOSE ARE PROTECTED. AND
18 THERE ARE WAYS IN WHICH YOU MIGHT COULD GET SOME OF THE
19 CONTENTS OF THOSE NOTES, BUT THE NOTES THEMSELVES ARE
20 PROTECTED. THAT'S MY RULING.

21 MR. FLOYD: I UNDERSTAND THAT, YOUR HONOR, BUT THE
22 PROBLEM IS WE HAVE NO WAY OF KNOWING WHETHER OR NOT---

23 THE COURT: I KNOW. THAT'S WHY I TURNED IT BACK
24 OVER TO YOU. I HAVE NO WAY OF KNOWING EITHER, BUT YOU, BASED
25 ON WHAT YOU KNOW ABOUT THE CASE, HAVE NOW GOT TO LATER ON,

1 NOT RIGHT NOW, TAKE A DIFFERENT POSITION ABOUT HOW YOU CAN
2 GET ACCESS TO THE CONTENTS OF THOSE NOTES. BUT THAT'S THE --
3 THAT'S IT FOR RIGHT NOW BECAUSE I'VE ALREADY RULED THEY'RE
4 WORK PRODUCT. AND THEN YOU'VE GOT AT LEAST TWO DIFFERENT
5 WAYS THAT YOU CAN ARGUE THAT YOU CAN GET INTO THE CONTENTS OF
6 THOSE NOTES, BUT WE'LL DO THAT SOME OTHER TIME. IF YOU WANT
7 TO DO THAT, YOU JUST BRING IT TO MY ATTENTION.

8 MR. FLOYD: THANK YOU, YOUR HONOR. AND THOSE WERE
9 FROM MR. CHASE?

10 MR. HUBBARD: RIGHT.

11 THE COURT: NOW, AS FAR AS MR. HUMPHRIES, HERE --
12 THE VAST MAJORITY OF WHAT MR. HUMPHRIES HAS IS ALSO JUROR
13 INFORMATION, SUBPOENAS THAT HAVE ACTUALLY ARE -- AND OTHER
14 STUFF THAT HAS ALREADY BEEN PRODUCED AND ATTORNEY NOTES THAT
15 RELATE TO THEMES AND TRIAL PREPARATION AND THINGS THAT ARE
16 CLEARLY WITHIN THE SCOPE OF THE WORK PRODUCT PRIVILEGE.
17 THERE ARE SEVERAL THINGS THAT I HAVE QUESTIONS ABOUT, NONE OF
18 WHICH APPEAR TO ME TO HAVE ANY SIGNIFICANCE AT ALL BUT --
19 WELL -- WELL, ACTUALLY IN THIS -- IN THIS STACK THERE WERE
20 ONLY THREE THINGS. THERE WAS SOME SUBPOENAS WHICH WE'VE --
21 I'M RULING ON THE -- I'M RULING THAT THE SUBPOENAS ARE
22 PROTECTED.

23 THERE IS A DOCUMENT THAT IS ENTITLED, "TRIAL ROSTER,
24 LEXINGTON COUNTY CLERK OF COURT OR COURT OF GENERAL
25 SESSIONS," DATE, NAME OF THE JUDGE, NAME OF THE SOLICITOR---

1 MR. HUBBARD: YOUR HONOR, WE CERTAINLY DON'T HAVE AN
2 OBJECTION THERE. THAT'S PROBABLY A DUPLICATE OF WHAT WAS
3 ALSO PRINTED OUT---

4 THE COURT: IT'S GOT THE JUDGE'S BUSINESS CARD
5 ATTACHED TO IT. I MEAN, IT'S---

6 MR. HUBBARD: RIGHT.

7 THE COURT: IT IS---

8 MR. HUBBARD: WE WOULD INFORM---

9 THE COURT: IT IS -- THERE'S A SEVERE COMPETITION
10 HERE TO DETERMINE WHETHER IT IS -- WHICH IS MORE TRUE. IS IT
11 -- IS IT MORE IRRELEVANT THAN NON-WORK PRODUCT OR IS IT MORE
12 WORK PRODUCT THAN IRRELEVANT? BUT IN ANY EVENT, IT DOESN'T
13 HAVE ANY SIGNIFICANCE TO THE -- TO THE ISSUES HERE. IF Y'ALL
14 WANT IT, HE SAYS YOU CAN HAVE IT.

15 MR. FLOYD: THANK YOU, YOUR HONOR.

16 THE COURT: AND THE OTHER THING IS A LETTER FROM
17 BETH FULLWOOD TO FRAN HUMPHRIES DATED MARCH 24TH, 1997, THAT
18 HAS THE LAWYER'S NOTES ON IT, AND THE ONLY REASON THAT I
19 SINGLED IT OUT IS BECAUSE IT'S NOT STAMPED COPY. I WOULD
20 ASSUME THAT THIS WOULD HAVE BEEN SOMETHING THAT YOU WOULD
21 HAVE GIVEN THEM A COPY OF WITHOUT THE NOTES, BUT I'M NOT
22 POSITIVE. BUT AS FAR AS THE NOTES ARE CONCERNED, THE NOTES
23 ARE WORK PRODUCT. THE LETTER -- IF YOU DON'T HAVE THAT
24 LETTER, YOU CAN GET A COPY OF IT. YOU CAN COME GET THAT
25 STUFF, AND THAT'S EVERYTHING.

1 MR. HUBBARD: YES, SIR, YOUR HONOR. WOULD YOU LIKE
2 US TO PUT IT BACK? THANK YOU.

3 THE COURT: ALL RIGHT. NOW, HOW LONG IS IT GOING TO
4 TAKE YOU TO PUT UP DUFFIE STONE?

5 MR. FLOYD: MY GUESS IS ABOUT AN HOUR.

6 THE COURT: AN HOUR. ALL RIGHT. ON DIRECT OR THE
7 WHOLE THING?

8 MR. FLOYD: PROBABLY ON DIRECT.

9 THE COURT: ARE YOU -- DO YOU ANTICIPATE A LENGTHY
10 CROSS?

11 MR. SALTER: YOUR HONOR, IT WOULD DEPEND OBVIOUSLY
12 ON WHAT COMES OUT ON DIRECT INFOR -- DIRECT EXAMINATION.

13 THE COURT: OKAY. WELL, SOLICITOR STONE, LET ME ASK
14 YOU WHAT -- DON'T YOU HAVE SOME SORT OF MEETING YOU NEED TO
15 GET TO?

16 MR. STONE: I'M FINE, YOUR HONOR.

17 THE COURT: I'M SUPPOSED---

18 MR. STONE: IF WE NEED TO GO AHEAD, I CAN -- I'M
19 FINE.

20 THE COURT: ALL RIGHT. WELL, IT SOUNDS LIKE WE'LL
21 BE AFTER LUNCH UNLESS WE JUST BUST IT TO GET -- TO GET TO
22 ABOUT 1:30 OR SO. IS THAT GOING TO MESS UP YOUR SCHEDULE TOO
23 MUCH?

24 MR. STONE: NO, SIR. DO YOU THINK I'LL BE OUT OF
25 HERE BY 4:00 THIS AFTERNOON?

1 **THE COURT:** I THINK SO. IS THAT WHEN YOU NEED TO
2 GET OUT?

3 **MR. STONE:** YES, SIR.

4 **THE COURT:** ALL RIGHT.

5 **MR. FLOYD:** YOUR HONOR---

6 **THE COURT:** I'M SUPPOSED TO HAVE A MEETING WITH A
7 BUNCH OF LAWYERS IN A CIVIL CASE AT 12:30 FOR LUNCH, SO I WAS
8 GOING TO BREAK FOR LUNCH FROM 12:30 TO 2. AND I COULD DELAY
9 THAT A LITTLE BIT, BUT IF IT'S STILL GOING TO BRING US BACK
10 AFTER LUNCH, I'D RATHER JUST GO AHEAD AND BREAK AT 12:30.

11 **MR. FLOYD:** THANK YOU, YOUR HONOR. ONE MATTER. IN
12 FACT, DO YOU JUST WANT TO TAKE CARE OF A COUPLE OF MATTERS?

13 **THE COURT:** WELL, LET ME ASK YOU THIS: IF -- WOULD
14 YOU BE READY -- ARE YOU READY TO GO AHEAD AND PUT HIM UP NOW
15 OR DO WE HAVE SOME OTHER STUFF THAT WE NEED TO DO?

16 **MR. FLOYD:** WELL, THERE'S A COUPLE OF THINGS WE NEED
17 TO DO. ONE IS WE HAVE DISCUSSED SOME AMENDMENTS TO THE
18 P.C.R. WITH MR. SALTERS, AND I ASSUME THAT YOUR HONOR HAS PUT
19 THOSE ON THE RECORD AND SO---

20 **THE COURT:** ARE THERE ANY -- IS THERE ANY OPPOSITION
21 TO THEM AMENDING THE APPLICATION?

22 **MR. SALTER:** NOT WITH RESPECT TO THE MATTERS HE AND
23 I DISCUSSED ON FRIDAY, YOUR HONOR.

24 **THE COURT:** ALL RIGHT. I GRANT YOUR MOTION TO
25 AMEND. IS IT WRITTEN? IS IT IN WRITTEN FORM?

1 MR. FLOYD: NO, IT'S NOT AT THIS POINT. IF YOU
2 WOULD LIKE---

3 THE COURT: WELL, LET'S JUST -- MAYBE AFTER -- IF
4 YOU CAN DO IT BRIEFLY NOW OR YOU CAN DO IT LATER. YOU CAN
5 TELL ME WHAT THE AMENDMENTS ARE, AND YOU DON'T HAVE TO GET
6 INTO TOO MUCH DETAIL. YOU'RE JUST AMENDING IT TO ADD A
7 COUPLE OF EXTRA CLAIMS?

8 MR. FLOYD: YES, YOUR HONOR.

9 THE COURT: DO YOU WANT TO JUST TELL ME WHAT THOSE
10 ARE NOW?

11 MR. FLOYD: YES, YOUR HONOR. A COUPLE OF THINGS WE
12 DID. THERE WASN'T -- THERE IS A GENERAL -- A COUPLE OF
13 GENERAL CLAIMS FOR INEFFECTIVE ASSISTANCE OF COUNSEL, AND I
14 PROBABLY EXPANDED ON THOSE A LITTLE MORE WITH MR. SALTERS
15 (SIC) TO GIVE HIM A LITTLE DETAIL ON -- ON SOME -- ON SOME
16 ISSUES THAT---

17 THE COURT: OKAY. ALL RIGHT. WELL, I DON'T -- I
18 DON'T THINK IT'S NECESSARY FOR YOU TO LIST THOSE DETAILS
19 RIGHT NOW.

20 MR. FLOYD: OH, OKAY. YOUR HONOR, THE OTHER MATTERS
21 OTHER THAN THOSE MATTERS... YOUR HONOR, ONE, BECAUSE IT'S
22 PRETTY SIGNIFICANT WE THINK IS THAT THERE WAS NO BATSON OR
23 J.E.B. MOTION MADE AT THE JURY SELECTION PROCESS, EVEN THOUGH
24 THE STATE STRUCK THE ONLY BLACK AND ALL OF THE OTHER STRIKES
25 WERE ALL WOMEN. THAT'S AN ISSUE THAT WE THOUGHT WAS

1 IMPORTANT ENOUGH THAT WE PROBABLY SHOULD GO AHEAD AND BRING
2 THAT OUT. YOUR HONOR, AS TO---

3 **THE COURT:** WELL, LET ME -- HERE'S THE PURPOSE OF MY
4 QUESTION. CAN WE GET RIGHT INTO MR. STONE'S TESTIMONY OR DO
5 WE NEED TO LET HIM GO AND THEN JUST START HIM AFTER LUNCH?

6 **MR. FLOYD:** IT'S WHETHER YOU WANT TO BREAK IT UP,
7 YOUR HONOR. THAT'S UP TO YOU.

8 **THE COURT:** ALL RIGHT. WELL, I'D -- I'D SAY THAT
9 UNLESS YOU HAVE SOMETHING BY WAY OF INTRODUCTION THAT YOU
10 REALLY NEED TO GET INTO NOW, LET'S GO AHEAD AND START WITH
11 HIM. WOULD THAT -- IS IT -- DOES IT MAKE ANY DIFFERENCE TO
12 YOU?

13 **MR. STONE:** THAT'S CORRECT.

14 **THE COURT:** ALL RIGHT. AND THEN---

15 **MR. FLOYD:** I CAN JUST GIVE YOU THE AMENDMENTS
16 LATER, YOUR HONOR.

17 **THE COURT:** THE AMENDMENTS CERTAINLY CAN COME LATER
18 IF THERE'S -- IF THERE'S ANY KIND OF -- WERE YOU INTENDING TO
19 MAKE ANY KIND OF OPENING STATEMENT OR ANYTHING LIKE THAT?

20 **MR. FLOYD:** NO, YOUR HONOR. WE WOULD PREFER, IF
21 IT'S CONVENIENT WITH THE COURT AND ACCEPTABLE, TO DOING A
22 POST-HEARING BRIEF AT THE CONCLUSION OF THE TESTIMONY.

23 **THE COURT:** WELL, WE'LL -- ALL RIGHT. WE'LL TAKE
24 THAT UP WHEN WE'RE DONE. ALL RIGHT. PUT UP STONE THEN.

25 **MR. FLOYD:** YOUR HONOR, WE CALL MR. DUFFIE STONE.

2516

1 I. MCDUFFIE STONE, III, AFTER BEING DULY SWORN,
2 TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION

4 BY MR. FLOYD:

5 Q. WOULD YOU STATE YOUR NAME FOR THE RECORD?

6 A. ISAAC MCDUFFIE STONE, III.

7 Q. AND, MR. STONE, WHAT TYPE OF WORK DO YOU DO NOW?

8 A. I'M THE SOLICITOR FOR THE FOURTEENTH JUDICIAL
9 CIRCUIT.

10 Q. AND WERE YOU ONE OF THE APPOINTED LAWYERS FOR MR.
11 TERRY?

12 A. I WAS.

13 Q. NOW, AT THAT POINT IN TIME WERE YOU IN PRIVATE
14 PRACTICE?

15 A. I WAS.

16 Q. BEFORE YOU WERE IN PRIVATE PRACTICE, WHAT TYPE OF
17 WORK DID YOU DO?

18 A. I STARTED IN 1988 WITH JUDGE SIDNEY FLOYD, CIRCUIT
19 COURT JUDGE. I WAS A LAW CLERK FOR HIM FOR A SHORT AMOUNT OF
20 TIME. THEN I WENT TO WORK WITH THE RICHLAND COUNTY
21 SOLICITOR'S OFFICE FROM JANUARY OF 1989 UNTIL BEGINNING OF
22 1993. SOMETIME AROUND 1993 I BECAME THE DIRECTOR FOR THE
23 SOUTH CAROLINA SENTENCING GUIDELINES COMMISSION. I WAS -- I
24 HELD THAT POSITION FOR A YEAR AND THEN WENT INTO PRIVATE
25 PRACTICE WITH PAUL REEVES AND ROBERT LEWIS.

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1 Q. OKAY. DO YOU RECALL WHEN IT WAS THAT YOU WENT INTO
2 PRIVATE PRACTICE?

3 A. IT WOULD HAVE BEEN SOMETIME IN '94, I BELIEVE.

4 Q. AND WHEN WERE YOU APPOINTED IN THIS CASE?

5 A. I DO NOT RECALL THE EXACT APPOINTMENT DATE.

6 Q. DO YOU RECALL ABOUT HOW LONG YOU HAD BEEN IN PRIVATE
7 PRACTICE WHEN YOU RECEIVED THE APPOINTMENT?

8 A. I DON'T.

9 Q. AND PRIOR TO THIS APPOINTMENT, HAD YOU EVER HANDLED
10 A DEATH PENALTY CASE?

11 A. NO, SIR.

12 Q. PRIOR TO THIS APPOINTMENT HAD YOU -- HOW MUCH TRIAL
13 EXPERIENCE HAD YOU HAD AS A DEFENSE LAWYER?

14 A. AS A DEFENSE LAWYER PROBABLY -- WELL, IT DEPENDS ON
15 WHEN I LEFT THE SENTENCING GUIDELINES COMMISSION, I GUESS.
16 THAT WOULD HAVE BEEN SOMETIME IN '94. I WENT DIRECTLY INTO
17 CRIMINAL DEFENSE WORK ALONG WITH CIVIL DEFENSE AS WELL, AND I
18 DON'T RECALL EXACTLY HOW MUCH OR HOW MANY YEARS.

19 Q. DO YOU RECALL -- DO YOU RECALL WHETHER OR NOT YOU
20 HAD TRIED ANY CASES AS A DEFENSE ATTORNEY BEFORE THIS CASE?

21 A. I'M SURE I HAD, BUT I COULDN'T TELL YOU RIGHT NOW TO
22 BE SURE. THE GOAL, AT LEAST IN PRIVATE PRACTICE, WAS TO GET
23 MOST OF THE CASES WORKED OUT, BUT I DON'T RECALL HOW MANY OF
24 THOSE I TRIED BEFORE THIS CASE.

25 Q. DO YOU KNOW WHETHER YOU TRIED ANY?

1 A. I DON'T RECALL.

2 Q. OKAY. NOW, ONCE YOU WERE APPOINTED TO REPRESENT MR.
3 TERRY---

4 A. OH, YEAH, I APOLOGIZE; I DO ACTUALLY. THE -- I KNOW
5 I'D REPRESENTED GENERAL SESSIONS AND MAGISTRATE COURT CASES.
6 I THINK I HAD ALSO BEEN APPOINTED TO REPRESENT AN INMATE ON A
7 PRISON RIOT CASE THAT I BELIEVE WENT TO TRIAL BEFORE THIS,
8 BUT I CAN'T RECALL EXACTLY WHEN THAT WAS, AND THAT CASE
9 LASTED A FULL WEEK, MAYBE A WEEK AND A HALF. WE ACTUALLY HAD
10 QUESTIONINGS FOR THE INDIVIDUAL JURORS WHICH WAS RELATIVELY
11 UNIQUE, BUT I DON'T RECALL EXACTLY HOW MANY OTHER THAN THAT,
12 BUT I DO -- I DO BELIEVE THOSE HAPPENED BEFORE THE TERRY
13 CASE.

14 Q. AT THAT TIME WERE YOU CERTIFIED AS DEATH-PENALTY
15 QUALIFIED?

16 A. I DON'T BELIEVE THAT CERTIFICATION WAS IN PLACE AT
17 THAT TIME. I DON'T RECALL.

18 Q. DID YOU MEET WITH MR. TERRY BEFORE THE TRIAL?

19 A. I DID.

20 Q. ON HOW MANY OCCASIONS?

21 A. I DON'T RECALL. I REMEMBER MEETING WITH HIM
22 INITIALLY AT THE RICHLAND COUNTY DETENTION CENTER,
23 INTERESTINGLY ENOUGH. APPARENTLY THEY WERE KEEPING MOST OF
24 THE LEXINGTON COUNTY INMATES IN RICHLAND COUNTY AT THE
25 SPECIAL HOUSING UNIT. AT THAT TIME THE JAIL WAS ON HUGER

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1 STREET, AND I RECALL MEETING HIM AFTER BEING APPOINTED
2 RELATIVELY QUICKLY AFTER I GOT THE PHONE CALL FROM THE JUDGE.
3 THE -- I REMEMBER MEETING HIM THERE. I MET WITH HIM WHEN HE
4 WAS MOVED TO, I BELIEVE, SAFEKEEPING OR SOME STATUS IN THE
5 DEPARTMENT OF CORRECTIONS. I MET WITH HIM AT THE PRISON. I
6 ALSO SENT BOTH THE PSYCHIATRIST THAT WE HAD HIRED, DR. DONNA
7 SCHWARTZ-WATTS, AS WELL AS OUR INVESTIGATOR, TOMMY DAVIS, TO
8 MEET WITH HIM AND NUMEROUS TIMES, BUT TO BE ABLE TO TELL YOU
9 EXACTLY HOW MANY TIMES, I CAN'T RECALL.

10 Q. NOW, IN THIS EVIDENCE THAT YOU RECEIVED, WAS THERE A
11 STATEMENT GIVEN BY MR. TERRY?

12 A. YES, SIR.

13 Q. I'M SORRY, JUDGE. THERE'S EVIDENCE I WAS LOOKING
14 FOR, AND IT'S IN THE COURTROOM. WHAT WAS YOUR THEORY OF
15 DEFENSE IN THE CASE? SHE'S GOING TO LOOK FOR THE STATEMENTS,
16 AND THEN I'LL HAVE YOU IDENTIFY THEM.

17 A. WE HAD A -- THE PUBLIC DEFENDER, BETH FULLWOOD, AND
18 I MET A NUMBER OF TIMES TRYING TO FIGURE OUT WHAT THE BEST
19 WAY TO APPROACH THIS CASE WAS. IT WAS A VERY GOOD CASE FOR
20 THE STATE AS FAR AS GUILT. THE ISSUE THAT WE WERE HAVING TO
21 FACE WAS TO MAKE SURE THAT WE COULD TRY THE CASE IN BOTH THE
22 GUILT PHASE AND THE PENALTY PHASE BECAUSE WE FELT LIKE WE
23 WERE GOING TO GET TO THE PENALTY PHASE RELATIVELY EASILY.

24 I REMEMBER THAT WE HAD -- THAT THE STATE HAD D.N.A.,
25 A D.N.A. MATCH. THEY HAD A FINGERPRINT ON THE PHONE BOX

1 OUTSIDE OF THE HOUSE, AND THEY HAD A VIDEOTAPED 45-MINUTE
2 CONFESSION FROM THE CLIENT. THAT WAS PRETTY STRONG EVIDENCE
3 SHOWING GUILT AND, THEREFORE, THE ISSUE BECAME: HOW DO WE
4 BUY CREDIBILITY IN THE FIRST PART OF THIS CASE AND THEN MOVE
5 IT TO THE SENTENCING? IF IT MOVES TO SENTENCING, HOW DO
6 WE -- HOW ARE WE ABLE TO SPEAK TO THE JURY AND GET THEM TO
7 GIVE HIM SOMETHING OTHER THAN THE DEATH PENALTY?

8 THE FRONT PART OF THE CASE, THE GUILT PART OF THE
9 CASE, WE SPLIT UP. THE CROSS-EXAMINATION WILL BE IN THE
10 RECORD, WHO HANDLED EXACTLY WHAT WITNESS, BUT WE ATTACKED THE
11 FINGERPRINT BASED ON THE NUMBER OF POINTS OF IDENTIFICATION
12 THAT THE WITNESS TESTIFIED TO. AS I RECALL - AND IT'S BEEN A
13 WHILE OBVIOUSLY - BUT I RECALL THERE WAS ABOUT A SEVEN-POINT
14 IDENTIFICATION ON THE FINGERPRINT. WE HAD TO BREAK INTO
15 THAT. AND THE CROSS-EXAMINATION THERE WAS TO TRY TO GET THE
16 S.L.E.D. AGENT TO ESTABLISH THAT SEVEN POINTS WAS THE MINIMUM
17 AMOUNT OF POINTS THAT HE WOULD EVER IDENTIFY. IN FACT, I
18 BELIEVE WE FINALLY GOT HIM TO ADMIT THAT HE'D NEVER MADE A
19 POSITIVE IDENTIFICATION ON IT -- ON ANY FINGERPRINT WITH LESS
20 THAN SEVEN POINTS.

21 THE -- THE D.N.A. BETH FULLWOOD DID A TREMENDOUS
22 AMOUNT OF RESEARCH ON AND SHE DID THE CROSS-EXAMINATION ON
23 THE D.N.A. TRYING TO GET THAT ESTABLISHED AS SOMETHING THAT
24 WAS NOT DEFINITE. THE CONFESSION WAS A LITTLE BIT MORE
25 DIFFICULT TO GET AROUND.

1 Q. OKAY. IS THAT THE CONFESSION WHICH I HAVE JUST
2 HANDED YOU UP THERE?

3 A. I'M SURE IT IS. I HAVEN'T READ THIS DOCUMENT THAT
4 YOU HANDED ME, BUT THAT'S PART OF IT. AGAIN, I RECALL IT
5 BEING VIDEOTAPED, AND I RECALL IT LASTING ABOUT 45 MINUTES.
6 SO THIS WOULD BE THE, I GUESS, WRITTEN PORTION OF THAT.

7 Q. NOW, WOULD YOU AGREE WITH ME THAT, ACCORDING TO THE
8 ALLEGED CONFESSION, THAT ANY SEX -- SEXUAL ACTIVITY WITH THE
9 DECEDENT WAS CONSENSUAL?

10 A. I BELIEVE SO. AGAIN, I HAVEN'T READ THIS YET, BUT I
11 RECALL THAT MR. TERRY'S POSITION WAS THAT HE HAD HAD SEX WITH
12 HER. WHEN HE GOT READY TO LEAVE, SHE GOT MAD AT HIM FOR SOME
13 REASON AND THAT HE HAD ENDED UP KILLING HER AFTER THAT, IF
14 I'M NOT MISTAKEN.

15 Q. AND, IN FACT, THE CONFESSION, AS YOU JUST INDICATED,
16 RAISES THE ISSUE OF MANSLAUGHTER RATHER THAN MURDER, DOESN'T
17 IT?

18 A. YES, SIR.

19 Q. AND THE CONFESSION ALSO NEGATES THE CHARGE OF
20 BURGLARY, DOES IT NOT?

21 A. IT DOES.

22 Q. NOW, DO YOU RECALL GIVING YOUR OPENING STATEMENT IN
23 THE MATTER?

24 A. I DO.

25 Q. I'M GOING TO REFER YOU -- DID THEY PROVIDE YOU WITH

1 A COPY OF THE TRANSCRIPT---

2 A. NO, SIR.

3 Q. ---UP THERE FOR YOU? DO YOU RECALL WHEN YOU MADE
4 YOUR OPENING STATEMENT INDICATING TO THE JURY THAT GARY TERRY
5 HAD CONFESSED---

6 A. YES.

7 Q. ---THAT HE DID IT AND THAT HE KILLED HER AND THAT HE
8 HAD SEXUAL INTERCOURSE WITH HER? DO YOU RECALL THOSE WORDS?

9 A. I RECALL TELLING THEM THAT HE HAD CONFESSED, YES.

10 Q. NOW, BEFORE THE TRIAL ACTUALLY STARTED IN THE
11 TESTIMONY STAGE, DID YOU HAVE A JACKSON/DENNO HEARING?

12 A. YES.

13 Q. AND AT THAT POINT IN TIME DID THE STATE ATTEMPT TO
14 QUALIFY THE CONFESSION?

15 A. YES.

16 Q. NOW, AS A RESULT OF THAT, WERE YOU UNDER THE
17 IMPRESSION THAT THE STATE WAS GOING TO INTRODUCE THE
18 CONFESSION?

19 A. I WAS.

20 Q. AND YOU AND MS. FULLWOOD WERE OPERATING UNDER THAT
21 ASSUMPTION?

22 A. I WAS.

23 Q. NOW, HAD YOU ANTICIPATED THAT THE STATE WAS NOT
24 GOING TO INTRODUCE THE CONFESSION, WOULD YOU HAVE ARGUED TO
25 THE JURY THAT YOUR CLIENT HAD CONFESSED?

1 A. I DOUBT VERY SERIOUSLY I WOULD HAVE DONE THAT. I
2 DON'T -- YOU KNOW, WHEN YOU -- WHEN YOU DEVELOP A THEORY AND
3 -- AND, GOODNESS, I CAN PRETTY MUCH BANK ON THE FACT THAT
4 THERE'S PROBABLY A HUNDRED DIFFERENT WAYS TO TRY AN
5 INDIVIDUAL CASE, BUT WHEN YOU GO WITH ONE THEORY, YOU GET
6 FOCUSED ON THAT, IF YOU DECIDE THAT'S THE BEST ONE, AND FOR
7 ME TO LOOK BACK NOW AND SAY, "WHAT IF THAT'S NOT THE CASE?"
8 IT'S KIND OF DIFFICULT.

9 I CAN TELL YOU THAT WHEN I DID THAT IN THE OPENING
10 ARGUMENT I DID IT BECAUSE I WAS TRYING TO BE THE FIRST ONE TO
11 SAY IT. I WAS AGAIN TRYING TO BUY CREDIBILITY WITH THE JURY,
12 AND I ALSO WAS TRYING TO CALL THEIR ATTENTION TO THE FACT
13 THAT HE HAD CONFESSED TO ANOTHER CASE THAT WE KNEW FOR A FACT
14 AND THAT LAW ENFORCEMENT KNEW FOR A FACT HE DIDN'T DO. HE
15 HAD -- HE WAS IN THE DEPARTMENT OF -- HE WAS IN SOME FACILITY
16 AND HE HAD -- MR. TERRY APPARENTLY HAD -- HAD DISCUSSED WITH
17 ANOTHER INMATE THAT HE WOULD -- MR. TERRY WOULD TAKE THE
18 BLAME FOR A CRIME THAT THE OTHER INMATE COMMITTED, AND AS A
19 RESULT OF THAT, THE OTHER INMATE WOULD BE FREED.

20 HE WOULD GET, I BELIEVE, A BULLDOZER AND BULLDOZE
21 DOWN THE WALL IN WHICH GARY TERRY WAS BEING HELD AND HE WOULD
22 HELP HIM ESCAPE. PRETTY OBVIOUS THAT THAT CONFESSION WASN'T
23 REAL AND WE WERE TRYING TO BRING THAT OUT AS, YEAH, SURE, HE
24 CONFESSED TO THIS CASE, BUT HE ALSO CONFESSED TO SOMETHING
25 ELSE THAT EVERYBODY KNOWS HE DIDN'T DO.

1 Q. I UNDERSTAND THAT AND I AGREE WITH YOU. NOW, JUST
2 SO WE HAVE IT PLAIN FOR THE RECORD, I'M GOING TO PASS YOU UP
3 PAGE 1284 HERE, AND I HIGHLIGHTED IT. NOW, AT THE TIME YOU
4 MADE THE OPENING STATEMENT, MR. TERRY WAS CHARGED WITH
5 MURDER, CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE---

6 A. RIGHT.

7 Q. ---BURGLARY IN THE FIRST DEGREE, AND TAMPERING WITH
8 THE TELEPHONE WIRE. IS THAT CORRECT?

9 A. YES.

10 Q. AND THE JURY HAD BEEN TOLD THAT, HAD THEY NOT?

11 A. YES.

12 Q. AND WOULD YOU READ WHAT YOU SAID IN YOUR OPENING
13 STATEMENT, JUST THE HIGHLIGHTED PORTION?

14 A. JUST THE HIGHLIGHTED PART? "THEY HAVE A CONFESSION.
15 THEY HAVE THAT STATEMENT, PARTS OF WHICH THEY DON'T EVEN
16 BELIEVE. THEY'RE GOING TO ASK YOU TO BELIEVE IT."

17 Q. IS THAT THE HIGHLIGHTED PORTION?

18 A. YES, IT IS.

19 Q. THIS HIGHLIGHTED PORTION.

20 A. YOU WANT TO READ THIS ONE, TOO? OKAY. "LADIES AND
21 GENTLEMEN, GARY TERRY OVER HERE TOLD THE POLICE HE DID IT.
22 HE TOLD THE POLICE THAT HE HAD SEXUAL INTERCOURSE WITH URAI
23 JACKSON. HE TOLD THE POLICE THAT HE KILLED HER. OKAY. IT'S
24 CALLED A CONFESSION, AND HE MADE ONE. HE TOLD THE POLICE HE
25 DID IT. SO WHAT IN THE WORLD ARE WE DOING HERE?"

1 Q. NOW, WOULD YOU AGREE WITH ME THAT THE EVIDENCE THAT
2 THE STATE HAD IN THIS CASE WAS ALL CIRCUMSTANTIAL?

3 A. NO. WELL -- AND FROM THE STANDPOINT OF WAS THERE --
4 THERE WASN'T ANYONE WHO SAID, "YES, I SAW GARY TERRY DOING
5 IT." FROM THAT STANDPOINT OF DIRECT, YES. CIRCUMSTANTIAL
6 THOUGH, AT LEAST IN MY MIND, IS GOING TO BE SOMETHING THAT
7 LEAVES OUT D.N.A. AND FINGERPRINTS, BUT THAT'S -- I GUESS
8 THAT'S TECHNICALLY CIRCUMSTANTIAL.

9 Q. WELL, OF COURSE, IF MR. TERRY HAD SOME REASON FOR
10 BEING THERE OTHER THAN TO COMMIT SOME TYPE OF CRIMINAL ACT---

11 A. RIGHT.

12 Q. ---HIS PRESENCE WOULD BE REFLECTED WITH FINGERPRINTS
13 AND D.N.A., WOULD IT NOT?

14 A. SURE.

15 Q. OKAY. NOW, LET'S BACK UP FOR JUST A MOMENT. DO YOU
16 RECALL THE JURY SELECTION PROCESS?

17 A. VAGUELY. I REMEMBER BITS AND PIECES OF IT VERY WELL
18 BUT THE ENTIRE PROCESS, NO.

19 Q. DO YOU RECALL THAT THE STATE IN THEIR JURY STRIKES
20 STRUCK ONLY WOMEN AND A BLACK, FIVE WOMEN AND ONE BLACK? DO
21 YOU RECALL THAT?

22 A. I DON'T KNOW, BUT IF THAT'S WHAT THE RECORD
23 REFLECTS, THEN THAT'S CERTAINLY RIGHT.

24 Q. ARE YOU FAMILIAR WITH THE BATSON DOCTRINE, BATSON V.
25 KENTUCKY?

1 A. YES.

2 Q. DID YOU MAKE AN ARGUMENT ACCORDING TO BATSON IN
3 RESPONSE TO THE STATE'S STRIKING OF THE BLACK JUROR?

4 A. NO, I DON'T BELIEVE WE DID.

5 Q. DO YOU REMEMBER WHY?

6 A. I REMEMBER LOOKING AT THE JURY AND MS. FULLWOOD WHO
7 HAD MUCH MORE EXPERIENCE WITH THE LEXINGTON COUNTY JURY THAN
8 I DID AND DISCUSSING THAT WE ACTUALLY LIKED THIS JURY, THAT
9 WE THOUGHT THIS WAS A GOOD SELECTION OUT OF WHAT WE HAD TO
10 DEAL WITH, AND WE HAD CONFIDENCE THAT THEY WOULD BE THE BEST
11 12 WE COULD GET OUT OF THAT CROWD. I REMEMBER THAT AS A --
12 AS A STRATEGY DECISION WHETHER OR NOT -- THE EXACT COUNT OF
13 THE JURORS AND THINGS LIKE THAT I DON'T RECALL.

14 Q. AND ARE YOU FAMILIAR WITH J.E.B. VERSUS ALABAMA
15 CONCERNING THE STRIKING OF JURORS BASED UPON SEX?

16 A. YES.

17 Q. AND YOU MADE NO MOTION EVEN THOUGH THE DEFENSE -- I
18 MEAN, EVEN THOUGH THE STATE STRUCK ALL WOMEN.

19 A. RIGHT.

20 Q. NOW, DO YOU RECALL A JUROR NAMED GEORGIA MILLER,
21 JUROR NUMBER 163?

22 A. I DON'T.

23 COURT REPORTER: I'M SORRY. GEORGIA WHAT?

24 MR. FLOYD: GEORGIA MILLER.

25 THE COURT: WHEN YOU GET TO A GOOD STOPPING POINT,

1 LET'S GO AHEAD AND BREAK FOR LUNCH, JUST WHENEVER IN THE NEXT
2 FEW MINUTES.

3 MR. FLOYD: ALL RIGHT.

4 BY MR. FLOYD:

5 Q. I'M GOING TO SHOW YOU PAGE 374 OF THE TRANSCRIPT,
6 LINES 4 THROUGH 7, AND COULD YOU PUBLISH HER RESPONSE?

7 A. WHO IS THIS? I'M SORRY?

8 Q. GEORGIA MILLER.

9 A. GEORGIA MILLER? LINES 4 THROUGH?

10 Q. THROUGH THE END OF THE RESPONSE THERE.

11 A. OKAY.

12 Q. SEVEN.

13 A. "IF HE WAS -- IF HE DID INTENTIONALLY MURDER
14 SOMEBODY AND KNEW THAT HE DID IT AND HE KNEW IT WAS WRONG, I
15 DON'T WANT TO GIVE HIM DEATH, BUT THAT'S WHAT WOULD HAPPEN,
16 BUT I CAN'T SAY NOW BECAUSE I DON'T KNOW."

17 Q. OKAY. DID YOU OR YOUR CO-COUNSEL MAKE ANY OBJECTION
18 OR MOTION TO STRIKE MS. MILLER FOR CAUSE?

19 A. I DON'T RECALL.

20 Q. OKAY. DO YOU FEEL LIKE THAT'S A COMMENT THAT SHOULD
21 GIVE RISE TO A MOTION TO STRIKE FOR CAUSE?

22 A. WELL, IT CERTAINLY ASKS FOR SOME CLARIFICATION. I
23 DON'T KNOW IF... BUT I DON'T RECALL IF WE DID THAT OR NOT.

24 MR. SALTER: YOUR HONOR, I'M GOING TO OBJECT AT THIS
25 POINT. I DON'T BELIEVE THERE'S ANY ALLEGATION THAT COUNSEL

1 WAS INEFFECTIVE FOR NOT MOVING TO STRIKE A JUROR FOR CAUSE.
2 THOSE ARE NOT -- THAT IS NOT AMONG THE AMENDMENTS THAT WE
3 DISCUSSED ON FRIDAY.

4 MR. FLOYD: THAT IS SOMETHING WE CAME UP WITH OVER
5 THE WEEKEND IN OUR FINAL MEETING.

6 THE COURT: BUT WHAT?

7 MR. FLOYD: IN OUR FINAL MEETING IN PREPARATION---

8 THE COURT: OH, IN YOUR FINAL MEETING. SO YOU ALSO
9 WANT TO AMEND YOUR APPLICATION TO ASSERT INEFFECTIVENESS FOR
10 FAILURE TO ASK TO HAVE GEORGIA MILLER STRICKEN FOR CAUSE?

11 MR. FLOYD: THAT'S CORRECT, YOUR HONOR. THAT WILL
12 BE ONE OF THE GROUNDS---

13 THE COURT: NOW, WHEN YOU -- YOU'RE SAYING THAT --
14 THAT SHE'S ESSENTIALLY NOT DEATH-PENALTY QUALIFIED.

15 MR. FLOYD: THAT'S CORRECT, YOUR HONOR. SHE WAS
16 SEATED.

17 THE COURT: ALL RIGHT. WELL, LET ME ASK YOU THIS
18 QUESTION. THE JUDGE, THE TRIAL JUDGE, WHETHER HE'S ASKED TO
19 DO SO OR NOT, HAS GOT TO MAKE A RULING AS TO EACH JUROR IN A
20 DEATH PENALTY CASE AS TO WHETHER OR NOT THEY ARE QUALIFIED
21 PURSUANT TO STATE AND FEDERAL LAW.

22 MR. FLOYD: YES, YOUR HONOR.

23 THE COURT: RIGHT? SO JUDGE CLARY, PURSUANT TO THAT
24 REQUIREMENT, WOULD HAVE RULED THAT SHE -- THAT THIS
25 PARTICULAR JUROR WAS QUALIFIED.

1 MR. FLOYD: I AGREE, YOUR HONOR. I THINK EACH JUROR
2 HE---

3 THE COURT: AND WAS THAT ISSUE RAISED -- AND IF THAT
4 -- AND IF JUDGE CLARY HAD BEEN WRONG, THAT ISSUE COULD HAVE
5 BEEN RAISED ON APPEAL.

6 MR. FLOYD: I'M NOT SURE IT COULD IF THE DEFENSE
7 COUNSEL DIDN'T BRING IT TO HIS ATTENTION---

8 MR. SALTER: YOUR HONOR---

9 MR. FLOYD: ---ON THAT POINT, YOUR HONOR.

10 MR. SALTER: YOUR HONOR, I WOULD TAKE THE POSITION
11 AS THE ATTORNEY FOR THE RESPONDENT, THE STATE, ON APPEAL
12 THAT, NO, IT WAS NOT PRESERVED.

13 THE COURT: IT WAS NOT PRESERVED?

14 MR. SALTER: IF, IN FACT, IT HAD NOT BEEN RAISED BY
15 COUNSEL -- COUNSEL. YES, SIR.

16 THE COURT: INTERESTING. I DON'T KNOW IF I AGREE
17 WITH THAT BUT... SO YOUR POSITION IS THAT IT'S AN -- IT'S AN
18 -- IT'S AN ERROR OF TRIAL COUNSEL AND NOT APPELLATE COUNSEL
19 OR BOTH?

20 MR. FLOYD: I THINK IT WOULD HAVE TO BE ARGUED AT
21 THE TRIAL LEVEL TO BE RAISED BY APPELLATE COUNSEL.

22 THE COURT: OKAY. SO YOUR POSITION IS THAT IT WAS
23 AN ERROR OF TRIAL COUNSEL.

24 MR. FLOYD: YES, YOUR HONOR.

25 THE COURT: ALL RIGHT. DO YOU HAVE ANY OBJECTION TO

1 HIS AMENDING THE APPLICATION TO INCLUDE THAT CLAIM?

2 MR. SALTER: YES, SIR, YOUR HONOR, BECAUSE THIS IS
3 NOT SOMETHING THAT WAS PREVIOUSLY DISCUSSED. I MEAN, WE'VE
4 ALREADY SAT DOWN AND DISCUSSED THE CASE AT GOOD LENGTH, BOTH
5 THE TRIAL---

6 THE COURT: THE QUESTION WOULD BE WHETHER OR NOT
7 THERE'S ANY PREJUDICE TO YOU IN HAVING THE AMENDMENT -- IN
8 HAVING THAT CLAIM ASSERTED AT THIS LATE DATE, I MEAN, AND
9 ISN'T IT BASICALLY GOING TO REVOLVE -- THE ANSWER TO THAT
10 QUESTION IS RIGHT THERE IN THE RECORD. WE CAN ALL SIT THERE
11 AND READ IT AND DETERMINE WHETHER OR NOT SHE WAS QUALIFIED OR
12 NOT QUALIFIED?

13 MR. SALTER: YES, SIR, YOUR HONOR.

14 THE COURT: SO IS THERE ANY PREJUDICE TO THE STATE
15 IN HAVING IT -- THE CLAIM RAISED AT THIS LATE HOUR?

16 MR. SALTER: NO, SIR, YOUR HONOR, I GUESS NOT.

17 THE COURT: ALL RIGHT. THEN I WILL ALLOW THE
18 AMENDMENT.

19 MR. FLOYD: THANK YOU, YOUR HONOR. WOULD YOU LIKE
20 TO TAKE THIS OPPORTUNITY TO BREAK?

21 THE COURT: YES, SIR. THAT WOULD BE GOOD. ALL
22 RIGHT. WE'LL START BACK AT 2:00.

23 MR. FLOYD: THANK YOU, YOUR HONOR.

24 (WHEREUPON, A LUNCH BREAK WAS TAKEN.)

25 THE COURT: BE SEATED. ALL RIGHT. MR. FLOYD,

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1 WHENEVER YOU'RE READY.

2 MR. FLOYD: THANK YOU, YOUR HONOR.

3 BY MR. FLOYD:

4 Q. MR. STONE, ONCE THE STATE FAILED TO PUT UP THE
5 CONFESSION, YOU DID MAKE AN EFFORT TO TRY TO GET THE
6 CONFESSION IN, DID YOU NOT?

7 A. YES.

8 Q. AND DID YOU FEEL THAT THE -- THE CONFESSION WAS
9 POTENTIALLY HELPFUL TO MR. TERRY?

10 A. I MUST HAVE. I CAN'T -- IN LIMITED CIRCUMSTANCES IT
11 MUST HAVE BEEN SOMETHING THAT WE WANTED IN OTHER THAN JUST
12 THE FACT THAT WE STARTED OUT WITH OUR OPENING TALKING ABOUT
13 THE CONFESSION WHICH SORT OF PUTS YOU BEHIND THE EIGHT BALL
14 TO BEGIN WITH. BUT I'M SURE THERE WAS SOMETHING AT LEAST
15 THAT WE WANTED TO GET IN AS FAR AS BEING ABLE TO GET A
16 VOLUNTARY MANSLAUGHTER CHARGE, BUT I CAN'T RECALL---

17 Q. OKAY.

18 A. ---THE EXTENT OF THAT.

19 Q. WOULD YOU AGREE WITH ME - AND YOU COULD CERTAINLY
20 REFRESH YOURSELF WITH THE STATEMENT - THAT THE STATEMENT
21 BASICALLY RAISED THE ISSUE OF MANSLAUGHTER BECAUSE OF
22 PROVOCATION, CONSENSUAL SEXUAL RELATIONSHIP AND---

23 A. I THINK SO. I THINK SO. I DON'T -- I MEAN, YOU CAN
24 TAKE THE STATEMENT FOR WHATEVER IT'S WORTH. THE -- YOU KNOW,
25 THE OVERALL CONCEPT OF THE CONFESSION, OF COURSE, IS THAT HE

1 ADMITTED KILLING HER, AND THAT IN ITSELF WAS -- WAS BAD
2 ENOUGH. BUT IT CERTAINLY APPEARS THAT THERE IS AT LEAST AN
3 ARGUMENT TO BE MADE OF VOLUNTARY MANSLAUGHTER BY GOING
4 THROUGH THE CONFESSION.

5 Q. OKAY. NOW, ONCE YOU TRIED TO GET IT IN, THOUGH, THE
6 COURT RULED THAT YOU WOULD NOT BE ABLE TO PUT IT IN THROUGH
7 YOUR -- THROUGH EITHER SCOTTIE FRIER WHO TOOK THE
8 STATEMENT---

9 A. RIGHT.

10 Q. ---OR IN ANY OTHER WAY---

11 A. RIGHT.

12 Q. ---IN YOUR CASE. IS THAT CORRECT?

13 A. THAT'S CORRECT.

14 Q. DO YOU RECALL THE LEGAL ARGUMENT INVOLVED IN THAT
15 PROCEEDING?

16 A. HEARSAY. AND, IN FACT -- AND I LOOK BACK AT THIS
17 STATEMENT AND I SEE -- I THINK I WANTED IT IN IN LIMITED -- I
18 THINK IT'S IMPORTANT -- IT WOULD HAVE BEEN A HELP TO GET IT
19 IN IN THE CONTEXT OF SAYING THAT THE SEXUAL -- THAT THE SEX
20 WAS CONSENSUAL AND THAT ALL OF A SUDDEN SOMETHING HAPPENED,
21 ALTHOUGH THERE IS STILL A LOT OF BAD STUFF IN THE CONFESSION,
22 AND -- AND WHAT I WAS TRYING TO DO WAS, I THINK, TRYING TO
23 GET PARTS OF IT IN. BUT IT WAS HEARSAY. IT'S NOT A PARTY
24 OPPONENT, SO IT DOESN'T COME IN UNDER THAT EXCEPTION AND,
25 QUITE FRANKLY, I COULDN'T COME UP WITH A GOOD ENOUGH HEARSAY

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1 EXCEPTION THAT -- TO GET IT IN.

2 Q. OKAY. DID YOU -- YOUR HONOR, WOULD YOU LIKE TO
3 REVIEW THE STATEMENT SINCE THERE'S BEEN SO MUCH---

4 THE COURT: SURE.

5 MR. FLOYD: ---TESTIMONY ABOUT IT? YOU'LL PROBABLY
6 HEAR IT A LOT.

7 BY MR. FLOYD:

8 Q. DID YOU DISCUSS WITH ANY POTENTIAL WITNESSES THE
9 POSSIBILITY OF DEVELOPING ANY CORROBORATING EVIDENCE THAT MAY
10 HAVE MADE THE STATEMENT ADMISSIBLE?

11 A. WE COULD NOT FIND ANY CORROBORATING WITNESSES FOR
12 ANYTHING, AND I SAY THAT AS A BLANKET STATEMENT BECAUSE TO BE
13 ABLE TO TELL YOU SPECIFICALLY EVERY PERSON WE TALKED TO OR
14 EVERY PERSON I HAD TOMMY DAVIS, OUR INVESTIGATOR, TALK TO,
15 IT'S VERY DIFFICULT FOR ME TO COME TO THAT -- COME AWAY WITH
16 THAT THIS FAR AWAY. BUT SPECIFICALLY EVERYTHING THAT -- THAT
17 BETH AND I DID, MS. FULLWOOD AND I DID, AS FAR AS
18 INVESTIGATING THE CASE, THE MORE WE INVESTIGATED IT, THE
19 WORSE THE CASE GOT AND -- FOR US. AND SO I COULDN'T FIND ANY
20 CORROBORATING EVIDENCE ONE WAY OR THE OTHER FOR ANYTHING IN
21 THIS CASE.

22 Q. DID YOU TALK TO GARY'S MOTHER, PATRICIA TERRY?

23 A. I DON'T RECALL IF I DID OR NOT. I CAN'T TELL YOU.

24 Q. DO YOU RECALL WHETHER OR NOT YOU TALKED TO HIS WIFE,
25 LOUANNE TERRY?

1 A. I DON'T RECALL.

2 Q. SO YOU HAVE NO RECOLLECTION WHETHER OR NOT THEY WERE
3 ABLE TO PROVIDE YOU ANY CORROBORATION.

4 A. YOU KNOW, I'M SURE I DID, BUT I CAN'T SIT HERE AND
5 TELL YOU SPECIFICALLY YES OR NO, SO I CAN'T HELP THAT.

6 Q. DO YOU RECALL THAT DR. JOHN CARTER WAS THE FORENSIC
7 PATHOLOGIST IN THE CASE?

8 A. IF THAT'S -- IF THAT'S IN THE RECORD, THAT'S --
9 THAT'S CORRECT.

10 Q. I'M GOING TO SHOW YOU A COUPLE OF PORTIONS OF HIS
11 TESTIMONY.

12 A. SURE.

13 Q. ON PAGE 40 -- I'M SORRY.

14 A. 1049? OKAY. YES. DO YOU WANT ME TO READ THE
15 HIGHLIGHTED AREAS?

16 Q. YEAH. YES. THE FIRST PART ABOUT WHAT HE SAID ABOUT
17 THE ASSAILANT.

18 A. "OKAY. AND THESE BLOWS WOULD HAVE BEEN MOST LIKELY
19 ADMINISTERED BY THE ASSAILANT WITH HIS OR HER RIGHT HAND?"

20 "YES."

21 Q. THEN DOWN AT THE BOTTOM ABOUT THE VAGINAL AREA.

22 A. "ALL RIGHT. NOW, DID YOU FIND ANY EVIDENCE OF
23 BRUISES, SCRAPES, TEARS OR CUTS IN MS. JACKSON'S VAGINAL
24 AREA? DID YOU?" "THAT'S CORRECT."

25 Q. OKAY. AND YOU MIGHT HAVE BEEN CROSSING HIM AT THAT

2535

1 POINT, MR. STONE, AND YOU BROUGHT OUT TWO GOOD POINTS THERE.
2 IS THAT---

3 A. RIGHT.

4 Q. IS THAT CORRECT?

5 A. RIGHT.

6 Q. ALL RIGHT. NOW, DID YOU---

7 A. I'M SORRY. YES.

8 Q. THAT'S ALL RIGHT. DID YOU GET ANY EVIDENCE AS TO
9 WHETHER OR NOT GARY TERRY WAS RIGHT-HANDED OR LEFT-HANDED?

10 A. DO I KNOW IF HE WAS RIGHT-HANDED OR LEFT-HANDED? I
11 BELIEVE HE WAS LEFT-HANDED.

12 Q. DID YOU EVER PUT UP ANY EVIDENCE THAT HE WAS
13 LEFT-HANDED?

14 A. IT DEPENDS ON HOW YOU LOOK AT IT. LET ME BE QUITE
15 FRANK WITH YOU ON THAT. THE -- MS. FULLWOOD AND I DISCUSSED
16 TRYING TO FIGURE OUT A WAY TO GET THE EVIDENCE IN THAT HE WAS
17 LEFT-HANDED, THAT GARY TERRY WAS LEFT-HANDED. HE -- AND WE
18 ACTUALLY THOUGHT AT ONE POINT OF PUTTING HIM UP ON THE -- NOT
19 ON THE WITNESS STAND BUT JUST HAVING HIM WALK OVER TO A NOTE
20 PAD THAT WAS UP IN THE COURTROOM AND WRITE HIS NAME.
21 HOWEVER, WE WERE PRETTY CONFIDENT THAT THAT WOULD SUBJECT HIM
22 TO CROSS-EXAMINATION, AND WE DIDN'T WANT TO DO THAT.

23 WHAT WE DID INSTEAD WAS - AND IT'S VERY DIFFICULT TO
24 READ THIS FROM THE RECORD - BUT WHAT WE DID INSTEAD WAS WE
25 TOLD MR. TERRY TO WRITE DURING MY CLOSING ARGUMENT. AND THE

2536

1 FIRST QUESTION I HAD IN MY CLOSING ARGUMENT -- I STOOD UP AT
2 COUNSEL TABLE SO THAT THE JURY WAS NOT ONLY LOOKING AT ME BUT
3 LOOKING AT MR. TERRY AS WELL, AND I MADE THE COMMENT THAT
4 WHAT WE KNOW FROM THE EVIDENCE IS THAT THE -- SOME VERSION OF
5 THIS IS THAT THE ASSAILANT WAS RIGHT-HANDED, AND I LOOKED
6 DOWN AT MR. TERRY WHO WAS WRITING WITH HIS LEFT HAND. THAT
7 WAS AS CLOSE AS I COULD COME TO GETTING THAT EVIDENCE INTO --
8 INTO EVIDENCE WITHOUT PUTTING HIM OR SOMEBODY ELSE THAT WOULD
9 PUT HIS CHARACTER INTO EVIDENCE.

10 Q. BECAUSE YOU NEVER DID PUT UP ANY TESTIMONY AT THE
11 GUILT PHASE---

12 A. THAT'S CORRECT.

13 Q. I'M GOING TO SHOW YOU ON PAGE 1473 -- AND THIS IS
14 NOT HIGHLIGHTED BUT...

15 A. OKAY.

16 Q. (MR. FLOYD SHOWS THE PAGE TO THE WITNESS.) NOW, TO
17 PARAPHRASE DR. CARTER, WOULD YOU AGREE WITH ME THAT THE
18 TESTIMONY THAT YOU JUST BROUGHT OUT WAS THAT SHE HAD NO
19 VAGINAL BRUISING, NO VAGINAL TEARING, NO VAGINAL CUTS?

20 A. RIGHT.

21 Q. AND SO HIS ONLY EVIDENCE ON THE POSSIBILITY OF THERE
22 BEING A SEXUAL ASSAULT WAS KIND OF WHAT HE SAYS IN THAT AREA
23 RIGHT THERE? WOULD YOU TELL THE COURT WHAT THAT IS?

24 A. WELL, WOULD YOU LIKE ME TO READ WHAT'S IN THIS THAT
25 YOU UNDERLINED?

1 Q. YES.

2 A. "THERE WAS ALSO A SMALL TRACE OF FLUID EXTERNALLY ON
3 THE PUBIC HAIRS THAT APPEARED VERY SIMILAR TO SEMEN. BOTH OF
4 THOSE FINDINGS ARE VERY CHARACTERISTIC OF SEXUAL ACTIVITY OR
5 SEXUAL ASSAULT AT THE TIME."

6 Q. OKAY. SO BASICALLY HE SAID IT WAS EITHER SEXUAL
7 ACTIVITY OR SEXUAL ASSAULT.

8 A. YES.

9 Q. IS THAT CORRECT?

10 A. YES.

11 Q. AND THERE MAY HAVE BEEN ONE OTHER TIME WHERE HE SAID
12 CONSISTENT -- IT WAS CONSISTENT WITH EITHER SEXUAL ACTIVITY
13 OR SEXUAL ASSAULT, BUT HE NEVER REALLY WAS ABLE TO COME OUT
14 AND SAY WITH A MEDICAL DEGREE OF CERTAINTY THERE WAS SEXUAL
15 ASSAULT, WAS HE?

16 A. I DON'T RECALL OTHER THAN WHAT THE RECORD REFLECTS.
17 I DID NOTE THERE THAT MS. FULLWOOD ACTUALLY DID THE CROSS ON
18 MR. CARTER---

19 Q. YEAH.

20 A. ---SO SHE MAY BE A BETTER WITNESS AS TO THAT THAN
21 ME.

22 Q. NOW, I BELIEVE MS. FULLWOOD DID THE DIRECTED
23 VERDICT.

24 A. EXCUSE ME? I'M SORRY?

25 Q. I BELIEVE MS. FULLWOOD DID THE DIRECTED VERDICT.

2538

1 A. I BELIEVE THAT'S CORRECT.

2 Q. WOULD YOU AGREE WITH ME THAT BASICALLY ALL IT WAS
3 WAS AN ARGUMENT THAT THE EVIDENCE FAILED TO ESTABLISHED...

4 A. I DON'T REMEMBER, TO BE HONEST WITH YOU.

5 Q. SO YOU DON'T RECALL ANY KIND OF ARGUMENT AS TO THE
6 SPECIFICS OF THE PARTICULAR CRIMES.

7 A. I DON'T RECALL.

8 Q. NOW, AFTER THE STATE RESTED, DID THE DEFENSE PUT UP
9 ANY EVIDENCE OR TESTIMONY?

10 A. I DON'T BELIEVE THAT WE DID.

11 Q. SO WHAT WE HAD AT THE ENDING OF THE GUILT PHASE WAS
12 BASICALLY THE ADMISSION IN CLOSING STATEMENT THAT HE HAD
13 CONFESSED, A CAUSE OF DEATH OF BLOWS TO THE HEAD, AND HIS
14 SEMEN PRESENT.

15 A. AND THE FINGERPRINT.

16 Q. AND A FINGERPRINT.

17 A. RIGHT, AND THE FINGERPRINT ON THE PHONE BOX.

18 Q. AND WE HAD NOTHING TO -- TO GIVE THE JURY ANY OTHER
19 ALTERNATIVE---

20 A. NO.

21 Q. ---AT THAT POINT.

22 A. I THINK THAT'S RIGHT.

23 Q. OKAY. NOW, DO YOU RECALL MAKING THE CLOSING
24 STATEMENT AT THE GUILT PHASE?

25 A. I HAVE -- I HAVE READ OVER SOME PARTS OF IT, AND I

1 REMEMBER SOME THINGS. I DON'T KNOW... DEPENDS.

2 Q. OKAY. WOULD YOU AGREE WITH ME THAT THERE WAS NO
3 ARGUMENT MADE ABOUT THE IMPACT OF CIRCUMSTANTIAL EVIDENCE ON
4 THE CASE?

5 A. FROM ME?

6 Q. (NODDED HEAD UP AND DOWN.)

7 A. I WOULDN'T HAVE ARGUED CIRCUMSTANTIAL EVIDENCE.
8 THAT DOESN'T SURPRISE ME THAT I DIDN'T DO THAT.

9 Q. OKAY. WOULD YOU AGREE WITH ME THAT JUDGE CLARY GAVE
10 A VERY GOOD CIRCUMSTANTIAL EVIDENCE CHARGE, IF YOU RECALL?

11 A. I DON'T RECALL.

12 Q. WOULD YOU AGREE WITH ME THERE WAS NO ARGUMENT MADE
13 ABOUT THE POSSIBILITY THAT THE SEX WAS CONSENSUAL?

14 A. I DON'T RECALL.

15 Q. NOW, DO YOU RECALL -- OF COURSE, THE JUDGE, JUDGE
16 CLARY, MADE THE JURY CHARGE AT THAT POINT. IS THAT CORRECT?

17 A. AT THE CONCLUSION OF THE EVIDENCE AND THE CLOSING
18 ARGUMENTS? I BELIEVE SO.

19 Q. NOW, I'M GOING TO SHOW YOU PAGES -- STARTING WITH
20 PAGE 1571, AND I'VE GOT SOME -- SOME HIGHLIGHTED AREAS.

21 A. OKAY.

22 Q. COULD YOU PUBLISH THE HIGHLIGHTED AREAS?

23 A. "MALICE OR IMPLIED OR INFERRED MALICE. IMPLIED:
24 MALICE MAY BE INFERRED WHERE -- INFERRED -- INFERRED BUT EVEN
25 IF FACTS PROVED ARE SUFFICIENT TO RAISE AN INFERENCE OF

2540

1 MALICE, THIS INFERENCE WOULD SIMPLY BE AN EVIDENTIARY FACT.
2 IF IT IS PROVED BEYOND A REASONABLE DOUBT THAT ONE
3 INTENTIONALLY KILLED ANOTHER WITH A DEADLY WEAPON, AN
4 IMPLICATION OF MALICE MAY ARISE. THE USE OF A DEADLY WEAPON
5 PERMITS YOU TO INFER MALICE, BUT IT DOES NOT REQUIRE YOU TO
6 INFER MALICE. INFERENCE: IMPLICATION OF MALICE MAY ARISE --
7 WEAPON SO AS TO ENDANGER THE LIFE OF ANOTHER WITHOUT" -
8 EXCUSE ME - "HANDLE A DEADLY WEAPON SO AS TO ENDANGER THE
9 LIFE OF ANOTHER WITHOUT JUST CAUSE OR EXCUSE MAY BE
10 SUFFICIENT TO RAISE THIS IMPLICATION. MALICE MAY BE IMPLIED
11 OR INFERRED. MALICE IS IMPLIED WHERE ONE INTENTIONALLY AND
12 DELIBERATELY DOES AN UNLAWFUL ACT. IF THE EVIDENCE SHOULD
13 SHOW UNDER WHAT CIRCUMSTANCES THE BLOW DELIVERED WHICH TOOK
14 THE LIFE OF..."

15 Q. OKAY.

16 A. WE'RE DONE.

17 Q. OKAY. SO ALL THROUGH THE CHARGE THE JUDGE USED THE
18 TERM THAT MALICE IS AN IMPLICATION.

19 A. RIGHT.

20 Q. OR MAY BE IMPLIED.

21 A. RIGHT.

22 Q. WOULD YOU AGREE WITH ME THAT THAT'S AN INCORRECT
23 STATEMENT OF THE LAW THAT---

24 A. NO. I DON'T RECALL EXACTLY WHAT THE LAW WOULD HAVE
25 BEEN AT THAT TIME, AND IF THAT WAS AN INCORRECT CHARGE---

2541

1 Q. THERE WAS NO---

2 A. I KNOW THAT'S GONE ON DIRECT APPEAL, BUT I DON'T
3 KNOW IF THAT WAS AN ISSUE IN...

4 Q. OKAY. THERE WAS NO OBJECTION MADE TO THE CHARGE,
5 WAS THERE?

6 A. I DON'T RECALL IF THERE WAS OR NOT.

7 Q. NOW, I ASK YOU TO LOOK AT THE HIGHLIGHTED AREA AT
8 THE BOTTOM OF PAGE 1574, TOP OF PAGE 1575.

9 A. OKAY. "IF THE EVIDENCES SHOW UNDER WHAT
10 CIRCUMSTANCES A BLOW DELIVERED WHICH TOOK THE LIFE OF
11 ANOTHER, THEN YOU, THE JURY, WOULD HAVE TO DETERMINE WHETHER
12 UNDER SUCH CIRCUMSTANCES THE ACT WAS MALICIOUS."

13 Q. OKAY.

14 A. IS THAT WHAT YOU WANTED ME TO READ?

15 Q. UH-HUH.

16 A. OKAY.

17 Q. WOULD YOU AGREE WITH ME THAT THE JUDGE THERE IS
18 MAKING A COMMENT ABOUT THE FACTS IN THIS CASE IN THAT THE
19 STATE'S THEORY WAS THAT A BLOW CAUSED HER DEATH?

20 A. OH, WITH THE TERM "A BLOW"?

21 Q. (NODDED HEAD UP AND DOWN.)

22 A. THAT DOESN'T STRIKE ME AS THE JUDGE MAKING A
23 COMMENT, BUT -- BUT I DON'T RECALL WHETHER OR NOT WE MADE A
24 COMMENT ONE WAY OR THE OTHER ABOUT THAT.

25 Q. OKAY. THANK YOU.

1 A. YES, SIR.

2 Q. I REFER YOU NOW TO PAGE 1576, THE HIGHLIGHTED
3 AREA---

4 A. SURE.

5 Q. ---OF THE JUDGE'S CHARGE.

6 A. "PROOF OF INTENT NECESSARILY RESTS ON INFERENCE FROM
7 CONDUCT."

8 Q. OKAY. DO YOU FEEL THAT'S A CORRECT STATEMENT OF THE
9 LAW?

10 A. I HAVE NO IDEA.

11 Q. NO OBJECTION IS MADE TO THAT.

12 THE COURT: REPEAT THE -- REPEAT THE STATEMENT.

13 THE WITNESS: "PROOF OF INTENT NECESSARILY RESTS ON
14 INFERENCE FROM CONDUCT."

15 BY MR. FLOYD:

16 Q. WOULD YOU AGREE THAT THAT MAY BE A CORRECT CHARGE IF
17 IT WAS -- IT MAY BE A PERMISSIVE INFERENCE CONDUCT RATHER
18 THAN RESTS UPON IT?

19 A. THE ISSUE BEING WHETHER OR NOT THE WORD REST AS
20 OPPOSED TO?

21 Q. WHETHER IT'S PERMISSIVE INFERENCE OR---

22 A. PERMISSIVE?

23 Q. OR A...

24 A. I DON'T HAVE ANY IDEA. I'M SORRY. I CAN'T HELP
25 YOU.

1 THE COURT: DO Y'ALL HAVE A COPY OF THE TRANSCRIPT
2 THAT'S FOR ME?

3 MR. SALTER: I APOLOGIZE, YOUR HONOR. IT SHOULD
4 HAVE BEEN HANDED UP EARLIER. I THOUGHT IT WAS.

5 MS. BROWN: WE DO HAVE AN EXTRA COPY.

6 MR. SALTER: WE HAVE THE COPY OF THE RECORD ON
7 APPEAL AS WELL AS ALL THE PLEADINGS PRIOR TO TODAY.

8 THE COURT: OKAY. THAT'LL -- THAT'LL HELP ME FOLLOW
9 ALONG ON THIS.

10 MS. BROWN: WE GOT SIDETRACKED THIS MORNING. WE
11 WERE ASKING THE CLERK IF IT WAS PART OF THE RETURN. I'M
12 SORRY.

13 THE COURT: THAT'S OKAY. THAT'S NO PROBLEM.

14 MR. SALTER: YOUR HONOR, MAY I APPROACH?

15 THE COURT: YES, SIR.

16 (MR. SALTER HANDS UP THE RECORD ON APPEAL TO THE
17 COURT.)

18 THE COURT: THERE'S SOMETHING ELSE FROM THE
19 SOLICITOR'S FILE THAT I JUST REALIZED I HAVE NOT COVERED
20 THAT'S SITTING ON MY DESK. SO WE'LL GET THEM BACK IN HERE
21 SHORTLY AND WE'LL DEAL WITH THAT.

22 BY MR. FLOYD:

23 Q. NOW, MR. STONE, AT THE CONCLUSION OF THE GUILT
24 PHASE, YOU THEN ENTERED INTO THE PENALTY PHASE.

25 A. YES, SIR.

1 Q. IS THAT CORRECT? NOW, DO YOU RECALL THAT THE STATE
2 PUT UP AN AWFUL LOT OF EVIDENCE JUST TO TRY TO MAKE GARY LOOK
3 BAD?

4 A. YES.

5 Q. DID YOU, PRIOR TO THE BEGINNING OF THE GUILT -- OF
6 THE PENALTY PHASE, MAKE ANY KIND OF MOTION IN LIMINE TO
7 EXCLUDE ANY INAPPROPRIATE CHARACTER EVIDENCE?

8 A. I DON'T RECALL IF -- IF WE MADE ANY MOTIONS PRIOR TO
9 SENTENCING OR NOT. I DON'T RECALL. IF IT'S IN THE RECORD,
10 IT WAS, BUT I DON'T -- I DON'T RECALL.

11 Q. NOW, AT THAT POINT IN THE TRIAL WOULD YOU AGREE WITH
12 ME THAT THE DEFENSE HAD NOT PUT UP ANY EVIDENCE WHATSOEVER?

13 A. YES, SIR.

14 Q. SO WOULD YOU AGREE WITH ME THAT GARY HAD NOT PUT HIS
15 CHARACTER INTO EVIDENCE AT THAT POINT?

16 A. YES, SIR.

17 Q. DID YOU CONSIDER MAKING A MOTION TO EXCLUDE ANY
18 CHARACTER EVIDENCE SINCE IT WOULD NOT BE PERMISSIBLE UNDER
19 RULES 404 AND 405?

20 A. I DON'T BELIEVE THAT'S THE LAW. I THINK IN A DEATH
21 PENALTY CASE THE SENTENCING IS GOING TO THE DEFENDANT'S
22 CHARACTER AS WELL AS THE CHARACTERISTICS OF THE CRIME. I
23 THINK IT'S GOT TO BE ADMISSIBLE REGARDLESS OF WHAT WENT ON IN
24 THE GUILT PHASE. SO I DIDN'T MAKE THAT MOTION, AND I DON'T
25 REMEMBER IF MS. FULLWOOD MADE THAT MOTION, AND IF THAT CASE

2545

1 WERE TRIED TODAY, I WOULDN'T MAKE THAT MOTION.

2 Q. ARE YOU FAMILIAR WITH THE RECENT SUPREME COURT CASE
3 OF STATE V. BENNETT?

4 A. NO.

5 Q. NOW, THE FIRST -- THE FIRST WITNESS IN THE PENALTY
6 PHASE WAS A LIEUTENANT BROWN WHO TALKED ABOUT AN
7 INVESTIGATION THAT HE CONDUCTED. AND WOULD YOU AGREE WITH ME
8 - AND YOU MAY NOT REMEMBER - THAT EVERYTHING HE SAID WAS
9 HEARSAY?

10 A. WHAT DID HE TESTIFY TO EXACTLY? I...

11 Q. ABOUT SOME THEFTS. HOLD ON A MINUTE.

12 A. I DON'T RECALL EXACTLY WHAT HE TESTIFIED TO; I'M
13 SORRY. IF IT WAS---

14 Q. THEFTS OF EQUIPMENT FROM A CONSTRUCTION SITE?

15 A. I'M SORRY. I CAN'T RECALL THAT. I APOLOGIZE.

16 Q. OKAY. BUT NO OBJECTION WAS MADE TO ANY HEARSAY
17 NATURE OF THE EVIDENCE, WAS IT?

18 A. NOT UNLESS IT'S IN THE RECORD. I DON'T KNOW.

19 **THE COURT:** LET ME MAKE A SUGGESTION JUST -- JUST
20 MAYBE TO SORT OF STREAMLINE SOME OF THIS. BUT A LOT -- A LOT
21 OF THE STUFF LIKE WAS AN OBJECTION MADE TO A CERTAIN PIECE OF
22 EVIDENCE AND WHETHER IT SHOULD HAVE BEEN MADE WILL NOT DEPEND
23 -- THE ARGUMENT FOR THAT WILL NOT DEPEND ON WHAT DUFFIE OR
24 SOME OTHER WITNESSES SAY, AND SO YOU MIGHT CAN SKIP OVER SOME
25 OF THAT. WHETHER OR NOT HE REMEMBERS, FOR EXAMPLE, THAT

2546

1 THERE WAS AN OBJECTION MADE IS REALLY NOT ALL THAT HELPFUL
2 BECAUSE THE RECORD DOES REFLECT WHETHER OR NOT THERE WAS AN
3 OBJECTION MADE. NOW, IF YOU NEED AN EXPLANATION AS TO WHY HE
4 DIDN'T MAKE AN OBJECTION, THEN HE CAN TESTIFY TO THAT, BUT I
5 DON'T THINK WE'RE IN ANY BIG HURRY.

6 MR. FLOYD: OKAY.

7 THE COURT: IT -- IT'S NOT SUPPOSED TO BE MUCH --
8 IT'S NOT REALLY SUPPOSED TO BE AN EXERCISE INTO HOW MUCH THE
9 LAWYERS CAN REMEMBER BECAUSE THE RECORD REFLECTS WHAT
10 HAPPENED AND WHAT DIDN'T HAPPEN BUT... SO THAT -- WITH
11 THAT -- WITH THAT KIND OF UNDERSTANDING, I DON'T WANT -- I
12 GUESS I SAY THAT BECAUSE I DON'T WANT YOU TO FEEL LIKE I'M
13 NOT GOING TO CONSIDER A CERTAIN ARGUMENT YOU MADE BECAUSE YOU
14 DIDN'T -- YOU DIDN'T BRING OUT IN TESTIMONY ABOUT IT DURING
15 THE TRIAL. I MEAN---

16 MR. FLOYD: OKAY.

17 THE COURT: ---SOMETHING LIKE THE MALICE CHARGE, FOR
18 EXAMPLE, WE DON'T EVEN HAVE TO HAVE ANY TESTIMONY ABOUT THAT.
19 I MEAN, IT'S -- IT'S EITHER RIGHT OR WRONG UNDER THE LAW. IF
20 HE DIDN'T -- IF IT'S WRONG AND HE DIDN'T OBJECT TO IT, THEN
21 THAT'S INEFFECTIVE. THEN THE QUESTION BECOMES WHETHER OR NOT
22 THERE WAS A REASONABLE PROBABILITY THAT IT COULD HAVE MADE A
23 DIFFERENCE SO...

24 MR. FLOYD: MAYBE I CAN TRY SOMETHING HERE THAT WILL
25 REALLY GET US THROUGH IT.

1 THE COURT: OKAY.

2 BY MR. FLOYD:

3 Q. MR. STONE, WERE THERE ANY OBJECTIONS THAT WERE NOT
4 MADE IN THE PENALTY PHASE THAT WERE NOT MADE BECAUSE OF SOME
5 TRIAL TACTIC OR REASON?

6 A. I DON'T MEAN TO BE EVASIVE, BUT I'M NOT SURE I KNOW
7 HOW TO ANSWER THAT QUESTION. I DON'T RECALL. THE FIRST
8 ANALYSIS WOULD HAVE TO BE: WAS THERE EVIDENCE THAT WAS
9 ADMITTED BY THE STATE THAT WE SHOULD HAVE OBJECTED TO OR WE
10 CHOSE NOT TO BECAUSE THERE WAS A STRATEGY INVOLVED? AND I
11 CAN'T -- I DON'T KNOW HOW SPECIFIC... YOU MIGHT HAVE TO BE A
12 LITTLE BIT MORE SPECIFIC WITH THAT FOR ME TO ANSWER THE
13 QUESTION PROPERLY.

14 Q. OKAY. DO YOU RECALL THE TESTIMONY OF MITCH
15 WILKERSON CONCERNING THE PROSTITUTE THAT WAS STABBED IN THE
16 NECK?

17 A. I DO ONLY BECAUSE I REVIEWED THE TRANSCRIPT A FEW
18 MOMENTS -- NOT A FEW MOMENTS AGO. A COUPLE OF HOURS AGO.

19 Q. WOULD YOU AGREE WITH ME THAT THE PROSTITUTE WAS NOT
20 THERE TO TESTIFY?

21 A. THAT'S CORRECT.

22 Q. WOULD YOU AGREE WITH ME THAT HER STATEMENT WOULD NOT
23 ORDINARILY HAVE BEEN ADMISSIBLE IN THE PROCEEDING?

24 A. I THINK THAT'S RIGHT.

25 Q. AND WOULD YOU AGREE WITH ME THAT THEY WERE ABLE TO

2548

1 GET HER STATEMENT IN THE PROCEEDING BECAUSE THE DOOR WAS
2 OPENED THROUGH THE CROSS-EXAMINATION?

3 A. I KNOW THAT THEY PUT IN A GOOD BIT OF EVIDENCE AS TO
4 THE INDICTMENT OR WHAT THE CHARGE WAS AND THEY PUT IN THE
5 EVIDENCE THAT HE HAD PLED GUILTY. I KNOW THAT PART OF --
6 THAT THE ACTUAL STATEMENT DID NOT COME IN UNTIL AFTER I
7 QUESTIONED THE OFFICER AS TO VARIOUS PARTS OF THE STATEMENT.
8 SO, YES, THE ANSWER TO THAT QUESTION I GUESS IS YES, BUT A
9 GOOD BIT OF THE STUFF HAD COME IN BEFORE THAT.

10 Q. WAS THERE ANY TACTICAL REASON THAT YOU DID NOT
11 OBJECT TO ANY OF THE TESTIMONY COMING FROM THE DEPARTMENT OF
12 CORRECTIONS PERSONNEL OR PROBATION?

13 A. I DON'T RECALL.

14 Q. DID YOU EVER CONSIDER MAKING AN OBJECTION THAT A LOT
15 OF THIS TESTIMONY WAS -- THAT THE PREJUDICIAL NATURE FAR
16 OUTWEIGHED THE PROBATIVE VALUE OF IT BECAUSE OF THE...

17 A. I DON'T RECALL IF WE MADE THAT -- IF WE MADE THAT
18 OBJECTION, AND I DON'T RECALL IF WE -- IF WE CONSIDERED THAT.

19 Q. OKAY. NOW, DURING THE PENALTY PHASE WOULD YOU AGREE
20 WITH ME THAT AT THAT POINT IN TIME THE STATE DID INTRODUCE
21 MR. TERRY'S STATEMENT?

22 A. YES.

23 Q. NOW, AT THE PENALTY PHASE FOR THE JUDGE'S CHARGE,
24 YOU, OF COURSE, SUBMITTED ITEMS FOR MITIGATION, STATUTORY
25 MITIGATION, DID YOU NOT?

2549

1 A. YES.

2 Q. BUT WOULD YOU AGREE WITH ME THERE WAS NO REQUEST FOR
3 THE STATUTORY MITIGATION OF PROVOCATION, NUMBER EIGHT?

4 A. I DON'T BELIEVE THERE WAS.

5 Q. OKAY. BUT BY THEN YOU DID HAVE THE STATEMENT IN,
6 DID YOU NOT?

7 A. RIGHT. YES.

8 Q. DO YOU RECALL IN YOUR CLOSING AT THE PENALTY PHASE
9 TELLING THE JURY THAT GARY TERRY IS A RAPIST, A MURDERER, AND
10 AN INVADER OF HOMES?

11 A. NO, SIR, I DON'T RECALL THAT.

12 Q. WOULD THERE HAVE BEEN ANY TACTICAL REASON FOR SAYING
13 THOSE TYPES OF THINGS?

14 A. I DON'T RECALL SAYING THAT.

15 Q. OKAY.

16 A. IN FACT, I THINK MR. HUMPHRIES SAID THAT. SOUNDS
17 LIKE SOMETHING HE WOULD HAVE SAID.

18 Q. I REFER YOU TO PAGE 2099, THE HIGHLIGHTED PART.

19 A. OKAY. YEAH, I DID SAY THAT. I'M STILL PRETTY SURE
20 MR. HUMPHRIES SAID IT, BUT I SAID IT, TOO, BECAUSE AT THIS
21 POINT THEY HAD ALREADY FOUND ALL THOSE TO BE TRUE.

22 Q. OF COURSE, BY THIS POINT WE ALSO HAD THE STATEMENT
23 IN---

24 A. RIGHT.

25 Q. ---DID WE NOT? NO FURTHER QUESTIONS, YOUR HONOR.

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CROSS-EXAMINATION

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BY MR. SALTER:

Q. GOOD AFTERNOON.

A. HEY.

Q. I'LL TRY TO BE AS BRIEF AS POSSIBLE. I WANT TO
FIRST GO BACK AND START WITH WHAT WAS TOUCHED ON AT THE VERY
BEGINNING. YOU DON'T RECALL, I BELIEVE, WHEN YOU WERE
APPOINTED?

A. I DON'T.

Q. IF I---

A. I REMEMBER GETTING THE PHONE CALL FROM THE JUDGE,
BUT I DON'T RECALL WHEN THAT WAS.

Q. I SHOW YOU A LETTER DATED APRIL 1, 1996, FROM THE
HONORABLE SIDNEY FLOYD TO THE CLERK OF COURT HERE---

A. OKAY.

Q. ---AS WELL AS A TWO-PAGE ORDER AND ASK YOU IF THAT
REFRESHES YOUR RECOLLECTION.

A. YES. THIS HAS IT DATED -- IT WAS FILED APRIL THE
2ND OF 1996, AND HE SIGNED IT APRIL THE 1ST.

Q. DOES THE ORDER NOT ALSO REFLECT THAT IT WAS FILED ON
THE 2ND?

A. YES.

Q. ALL RIGHT.

A. YES.

Q. SO YOU WERE APPOINTED APRIL -- I WOULD MOVE TO

2551

1 INTRODUCE THIS, YOUR HONOR, I BELIEVE WITHOUT OBJECTION AS
2 RESPONDENT'S EXHIBIT 1.

3 MR. FLOYD: NO OBJECTION.

4 THE COURT: IT'S ADMITTED.

5 (DEFENDANT'S EXHIBIT 1 WAS RECEIVED IN EVIDENCE.)

6 BY MR. SALTER:

7 Q. SO YOU WERE APPOINTED APRIL 1ST OF 1996.

8 A. IT WOULD APPEAR THAT -- THAT THAT BE THE CASE.

9 Q. NOW, YOU DISCUSSED SOME OF YOUR WORK HISTORY, BUT
10 I'D LIKE TO KIND OF FOCUS IN ON HOW MUCH FELONY TRIAL
11 EXPERIENCE YOU HAD HAD BY THE TIME OF YOUR APPOINTMENT WITHIN
12 THE SUBSEQUENT TRIAL. I BELIEVE YOU SAID YOU WENT TO THE
13 FIFTH CIRCUIT SOLICITOR'S OFFICE IN JANUARY OF 1989?

14 A. THAT'S RIGHT.

15 Q. WHAT WERE YOUR RESPONSIBILITIES AT THAT POINT IN
16 TIME?

17 A. AT THE TIME THAT I BEGAN AT THE SOLICITOR'S OFFICE I
18 WAS AN ASSISTANT SOLICITOR TRYING JUST ABOUT ANY TYPE OF CASE
19 THAT CAME ALONG. THE -- WE DID NOT HAVE A SPECIFIC TRIAL
20 TEAM. WE DIDN'T HAVE A SPECIALIZATION IN THE SOLICITOR'S
21 OFFICE, SO YOU TRIED SORT OF A VARIETY OF CASES WHEN I FIRST
22 GOT THERE, AND THAT LASTED ABOUT A YEAR, YEAR AND A HALF,
23 BEFORE I BECAME ONE OF TWO DRUG PROSECUTORS IN THE OFFICE.

24 Q. ALL RIGHT. DURING THAT FIRST YEAR YOU WERE THERE,
25 DO YOU RECKON -- DO YOU HAVE ANY IDEA HOW MANY GENERAL

2552

1 SESSION CASES---

2 A. YES.

3 Q. ---YOU TRIED?

4 A. YES.

5 Q. ABOUT HOW MANY?

6 A. EIGHTEEN.

7 Q. ABOUT 18? AND THEN WHEN YOU THEREAFTER CHANGED FROM
8 BASICALLY DOING DRUG PROSECUTIONS, DO YOU KNOW ROUGHLY WHAT
9 PERCENTAGE OF THE DOCKET WOULD HAVE BEEN INVOLVED IN THAT?

10 A. THE DRUG DOCKET AT THE TIME -- GREG HEMBREE, WHO IS
11 THE SOLICITOR IN THE FIFTEENTH CIRCUIT, WAS THE LEAD OF THAT
12 TEAM, AND WE HANDLED TOGETHER PROBABLY 35 PERCENT OF THE
13 WHOLE DOCKET. IT WAS THAT -- THE DRUGS MADE UP THAT MANY
14 CASES OUT OF OUR -- OUT OF OUR OFFICE'S DOCKET.

15 Q. ALL RIGHT, SIR. AND WHEN YOU WENT INTO PRIVATE
16 PRACTICE, YOU SAID YOU HAD SOME CIVIL CASES AS WELL AS
17 CRIMINAL?

18 A. RIGHT.

19 Q. WHAT KIND OF CIVIL CASES WERE YOU DOING?

20 A. FORTY-TWO U.S.C. 1983 CASES IN FEDERAL COURT, STATE
21 TORT CLAIMS ACT CASES, AND STATE COURT.

22 Q. OKAY. IS IT FAIR TO SAY THAT YOU WERE DOING SOME
23 FAIRLY COMPLICATED CIVIL WORK?

24 A. I FOUND IT COMPLICATED, YES.

25 Q. YOU HAD -- AND YOU ALSO DID, I BELIEVE, SOME

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1 CRIMINAL WORK AS WELL.

2 A. I DID. I DID.

3 Q. NOW, BEFORE YOUR INVOLVEMENT IN THIS CASE, HAD YOU
4 EVER TRIED OR BEEN INVOLVED IN THE TRIAL OF A MURDER CASE?

5 A. I WAS INVOLVED IN A COUPLE OF THE CASE -- A COUPLE
6 OF MURDER CASES IN THE SOLICITOR'S OFFICE BEFORE I LEFT. IN
7 FACT, TOMMY DAVIS WAS THE INVESTIGATOR THAT WE ENDED UP
8 HIRING AS A PRIVATE INVESTIGATOR, HAD BEEN WITH THE F.B.I.,
9 AND WAS -- I HAD WORKED WITH ON A MURDER CASE. WHEN EXACTLY
10 THAT WAS, I CAN'T RECALL, BUT -- BUT -- BUT I HAD HAD SOME
11 EXPERIENCE WITH HIM. I HAD HELPED WITH -- WITH SOME OF THE
12 CASES HANDLED BY -- BY THE SOLICITOR, BUT HAVING ACTUALLY
13 TRIED A MURDER CASE UP TO THAT POINT, I CAN'T RECALL IF I DID
14 OR NOT. I DON'T BELIEVE I DID.

15 Q. ALL RIGHT. BUT YOU'D HAD, WHAT, SAY SEVEN YEARS OR
16 SO FELONY TRIAL EXPERIENCE BY THE TIME OF YOUR -- OF YOUR
17 INVOLVEMENT IN THIS CASE?

18 A. YES, AT LEAST. YES. THAT'S RIGHT.

19 Q. YOU WERE -- YOU WERE A FAIRLY WELL-SEASONED LAWYER
20 BY THE TIME YOU GOT APPOINTED IN THIS CASE.

21 A. IF YOU SAY SO, I'LL BE GLAD TO SAY THAT.

22 Q. ALL RIGHT.

23 A. I DON'T KNOW THAT I WANT TO PAT MYSELF ON THE BACK
24 THAT MUCH, BUT I APPRECIATE IT.

25 Q. DID YOU FIND THAT YOUR FORMER WORK WITH THE FIFTH

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1 CIRCUIT SOLICITOR'S OFFICE HELPED YOU IN ANY WAY WHEN YOU DID
2 CRIMINAL DEFENSE WORK?

3 A. YES.

4 Q. HOW SO?

5 A. I KNEW HOW IT WORKED. THE THING ABOUT A CRIMINAL
6 COURTROOM IS I'M SURE THE SAME AS A -- AS A LOT OF PEOPLE
7 FIND. YOU REALLY ENJOY CRIMINAL LAW, AND IF YOU'RE A
8 PROSECUTOR, I THINK YOU REALLY ENJOY CRIMINAL LAW, AND GOING
9 TO THE DEFENSE SIDE IS NOT AS DIFFICULT AS IT SOUNDS. THE --
10 IF YOU ENJOY DOING CRIMINAL LAW, YOU'RE GOING TO ENJOY IT
11 FROM BOTH SIDES.

12 THE TRIAL -- BEING IN A COURTROOM AND HANDLING
13 YOURSELF IN A COURTROOM I THINK IS A PARTICULARLY DIFFICULT
14 THING TO MASTER. IT'S VERY DIFFICULT TO BE IN A POSITION TO
15 GET YOU THE EXPERIENCE TO DO THAT, AND I THINK A SOLICITOR'S
16 OFFICE AND A PUBLIC DEFENDER'S OFFICE ARE ABOUT THE ONLY WAY
17 YOU CAN GET ANY REAL QUICK TRIAL EXPERIENCE THAT AMOUNTS TO
18 ANYTHING. I THINK THAT MY TIME IN THE SOLICITOR'S OFFICE
19 PREPARED ME VERY WELL TO HANDLE DEFENSE WORK, AND I ENJOYED
20 DOING IT AND IT WAS EVERYTHING FROM IN FRONT OF THE JURY TO
21 DEALING WITH THE COURT.

22 Q. OKAY. HOW DID YOU -- I THINK YOU TOUCHED A LITTLE
23 BIT ON THIS ON DIRECT. HOW DID YOU AND MS. FULLWOOD DIVVY UP
24 YOUR RESPONSIBILITIES IN THIS CASE?

25 A. WE WENT BACK AND FORTH ON WHETHER OR NOT WE WOULD

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1 SPLIT UP THE GUILT PHASE AND THE PENALTY PHASE, AND WE ENDED
2 UP CHOOSING NOT TO DO THAT. INSTEAD, SHE HAD A LOT OF
3 EXPERIENCE WITH D.N.A. SHE DID -- SHE DID THE CROSS-
4 EXAMINATION ON THE D.N.A. SHE -- OBVIOUSLY THE CROSS-
5 EXAMINATION ON THE PATHOLOGIST. I HANDLED A LOT OF THE LAW
6 ENFORCEMENT TESTIMONY. THE FINGERPRINTS -- I HAD SOME
7 EXPERIENCE WITH THAT DEALING WITH -- WORKING WITH THE
8 SOLICITOR'S OFFICE AND PARTICULARLY THE POINTS OF
9 IDENTIFICATION, INFORMATION THAT I HAD FROM WORKING AS A
10 SOLICITOR AND HOW MANY POINTS AT THAT TIME WAS CONSIDERED A
11 MATCH AND THINGS LIKE THAT.

12 WE ALSO HIRED DON GIRNDT WHO WAS FORMERLY WITH, I
13 BELIEVE, S.L.E.D. AND -- AS A PRIVATE INVESTIGATOR TO HELP US
14 WITH THE CRIME SCENE, AND I WORKED PROBABLY MORE SO WITH HIM
15 THAN -- THAN BETH DID. WHEN IT CAME TO THE PENALTY PHASE, WE
16 WERE VERY SPECIFIC. THE ITEMS THAT I HANDLED IN THE PENALTY
17 PHASE WERE THE -- WAS THE SCIENTIFIC APPROACH TO IT. HER
18 APPROACH WAS THE SOCIAL BACKGROUND OF THE DEFENDANT. SHE PUT
19 UP THE WITNESSES THAT WOULD ESTABLISH THE SOCIAL ASPECT OF
20 GARY TERRY'S BACKGROUND AND THINGS LIKE THAT, AND I PUT UP A
21 PSYCHIATRIST, A PSYCHOLOGIST, AND A NEUROPSYCH TO PUT IN
22 SCIENTIFIC EVIDENCE AS TO HIS BRAIN AND VARIOUS ISSUES WE HAD
23 WITH THAT.

24 Q. ALL RIGHT, SIR. NOW, YOU TESTIFIED EARLIER THAT YOU
25 DO NOT RECALL HOW MANY TIMES YOU MET WITH MR. TERRY BEFORE?

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1 A. I DON'T. I DON'T.

2 Q. WOULD IT BE FAIR TO SAY YOU MET WITH HIM FAIRLY
3 OFTEN?

4 A. I MET WITH HIM A NUMBER OF TIMES, AND I ALSO MAKE
5 THE COMMENT THAT I SENT PEOPLE TO SEE HIM AS WELL. I DID NOT
6 FIND MEETING WITH MR. TERRY WAS PARTICULARLY FRUITFUL. I
7 WAS -- I MET WITH HIM A NUMBER OF TIMES. HE HAD A NUMBER OF
8 PHYSICAL AILMENTS THAT HE COMPLAINED OF WHEN I MET WITH HIM,
9 A LOT OF HEADACHES, A LOT OF PROBLEMS IN THE DEPARTMENT OF
10 CORRECTIONS THAT HE WANTED ME TO HELP WITH, AND IT -- I DID
11 NOT FEEL AS THOUGH I WAS GETTING ENOUGH REALLY GOOD
12 INFORMATION FROM HIM THAT I COULD FOLLOW UP ON. I MET WITH
13 HIM A NUMBER OF TIMES, BUT TO TELL YOU HOW MANY TIMES I DID,
14 I CAN'T RECALL.

15 Q. ALL RIGHT. DID YOU UTILIZE ANY OF YOUR OTHER -- ANY
16 OTHER MEMBERS OF YOUR DEFENSE TEAM TO TRY TO HELP YOU---

17 A. YEAH.

18 Q. ---GET INFORMATION FROM HIM?

19 A. I SENT DON -- DONNA SCHWARTZ-WATTS, THE PSYCHIATRIST
20 THAT WE HAD THAT WE HAD HIRED, SHE WENT AND TALKED TO HIM. I
21 BELIEVE THAT OUR -- OUR EXPERT IN MITIGATION WENT AND SPOKE
22 TO HIM A NUMBER OF TIMES, BUT I CAN'T RECALL. I WASN'T IN
23 CHARGE OF THAT PART OF THE CASE. TOMMY DAVIS I THINK I SENT
24 TO MEET WITH HIM TO GET SOME INFORMATION ON VARIOUS THINGS,
25 BUT TO BE ABLE TO TELL YOU EXACTLY HOW MANY TIMES, I CAN'T.

1 Q. ALL RIGHT. NOW, DID YOU DISCUSS YOUR STRATEGIC
2 MATTERS WITH MR. TERRY?

3 A. FROM -- YES. AND WHAT WE ALSO DID WAS EVEN
4 CONTINUING THROUGH THE TRIAL -- AND I THINK THAT'S GOING BACK
5 TO THE HANDWRITING. I THINK WE DISCUSSED THAT AND AS SILLY
6 AS IT SEEMS THAT WE MAY HAVE ACTUALLY HAD HIM SIT THERE AND
7 WRITE WHEN I'M DOING A CLOSING ARGU -- CLOSING ARGUMENT, BUT
8 THAT WAS -- THIS WAS STRATEGY ON OUR PART. I THINK THAT HE
9 HAD A -- GETTING -- GETTING INFORMATION FROM HIM WAS SOMEWHAT
10 LIMITED AND WAS NOT -- I DIDN'T -- I DIDN'T GET A LOT OF
11 HELPFUL INFORMATION THAT I COULD FIND ANY BACK-UP FOR.

12 Q. DID IT APPEAR TO YOU THAT HE WAS MORE CONCERNED
13 ABOUT MATTERS THAT WEREN'T AS IMPORTANT AS HIS TRIAL AS
14 OPPOSED TO---

15 A. WELL, HE WAS -- HE WAS CONCERNED WITH HIS HEADACHES,
16 AND HE TALKED ABOUT HIS HEADACHES A LOT, AND EVERY TIME I
17 WENT AND MET WITH HIM, WHETHER THAT WAS IN THE PRISON OR EVEN
18 AT TRIAL, HE -- HE CONTINUOUSLY COMPLAINED ABOUT HEADACHES.
19 OF COURSE, WE HAD HIRED JUST ABOUT EVERY PSYCHOLOGIST AND
20 PSYCHIATRIST THAT WE COULD GET OUR HANDS ON TO HELP US WITH
21 THAT, AND THAT'S SORT OF WHERE WE WERE GOING WITH THE DEFENSE
22 FROM THE SENTENCING PHASE.

23 Q. DO YOU RECALL WHAT, IF ANYTHING, MR. TERRY MAY HAVE
24 TOLD YOU ABOUT THE -- HIS INVOLVEMENT IN THE CRIME FOR WHICH
25 HE WAS -- THE CRIMES FOR WHICH HE WAS CHARGED?

1 A. OF COURSE, WE HAD HIS STATEMENT. I THINK AT ONE
2 TIME -- THE VERY FIRST TIME I MET WITH HIM THOUGH THE
3 STATEMENT, AS I RECALL, WAS INCONSISTENT WITH HIS ACTUAL
4 WRITTEN STATEMENT. THE -- WHEN I MET WITH HIM ON HUGER
5 STREET IN COLUMBIA AT THE SPECIAL HOUSING UNIT FOR THE
6 DETENTION CENTER, HE TOLD ME HE COULD NOT IMAGINE HOW THE
7 SEMEN GOT THERE, THAT HE WAS THINKING THAT HIS GIRLFRIEND OR
8 WIFE OR SOMEONE HAD -- HAD TAKEN IT IN A CONDOM AND PLANTED
9 IT THERE. THAT WAS -- THAT WAS A PROBLEM FOR ME BECAUSE
10 OTHER THAN WHAT I FOUND TO BE A PARTICULARLY UNUSUAL DEFENSE
11 ANGLE, IT WAS ALSO RIGHT AFTER "PRESUMED INNOCENT" CAME OUT
12 AND THAT SOUNDED AN AWFUL LOT LIKE WHAT THAT BOOK AND THAT
13 MOVIE WAS ABOUT AND, AGAIN, IT WAS INCONSISTENT WITH HIS
14 WRITTEN STATEMENT AS WELL.

15 Q. OKAY. WOULD IT BE FAIR TO SAY THAT YOU AND YOUR
16 CO-COUNSEL UTILIZED YOUR INVESTIGATOR AND YOUR MITIGATION EX
17 -- OR YOUR MITIGATION EXPERT AND ANYONE ELSE YOU HAD ON THE
18 DEFENSE TEAM TO TRY TO RUN DOWN A POSSIBLE ALIBI OR ANY OTHER
19 DEFENSE ON BEHALF OF YOUR CLIENT?

20 A. WE DID. AND I SENT -- SENT TOMMY DAVIS TO A NUMBER
21 OF DIFFERENT -- DIFFERENT PLACES. I CAN'T RECALL EXACTLY WHO
22 HE TALKED TO, BUT I HAD HIM -- I KNOW HE WAS OUT AT THE LAKE
23 ONE TIME MEETING WITH MR. BOOZER AND SOME OF HIS FAMILY
24 MEMBERS, SPEAKING TO VARIOUS PEOPLE THAT HAD APPEARED IN THE
25 INCIDENT REPORT, AND BASICALLY AS THEY WOULD COME IN, WE'D

1 SEND HIM BACK OUT AND HAVE HIM INTERVIEW THESE PEOPLE AND
2 TALK TO THEM.

3 Q. ALL RIGHT. SO HE INTERVIEWED PEOPLE WHO SHOWED UP
4 ON THE INCIDENT REPORT.

5 A. RIGHT.

6 Q. NEIGHBORS -- NEIGHBORS OF THE VICTIM?

7 A. RIGHT.

8 Q. AND YOU HAD HIM TALK TO PEOPLE WHO MAY HAVE HAD
9 DEALINGS WITH YOUR CLIENT IN THE DAYS LEADING UP TO THE DATE
10 THAT HER BODY WAS DISCOVERED?

11 A. RIGHT.

12 Q. ALL RIGHT. AND YOU RECALL A MR. BOOZER.

13 A. I DO.

14 Q. DO YOU RECALL WHETHER OR NOT Y'ALL GLEANED ANYTHING
15 HELPFUL FROM MR. BOOZER OR...

16 A. I DON'T RECALL US GETTING -- IT SEEMED LIKE MR.
17 BOOZER -- AND HONESTLY I REMEMBER THAT NAME BECAUSE I JUST
18 REMEMBER MR. DAVIS GOING OUT AND SPEAKING TO HIM. I THINK
19 WHAT WE WERE TRYING TO DO WAS ESTABLISH AN ALIBI THAT MR.
20 TERRY WAS SOMEWHERE ON THE LAKE IN A BOAT AT THE TIME THE
21 MURDER TOOK PLACE, AND WE WEREN'T ABLE TO TIE IT DOWN. THE
22 -- WHETHER IN SOME CASES THAT WAS MEMORY OR IN SOME CASES
23 THAT JUST WASN'T THE RESPONSE WE WERE GETTING.

24 Q. AND DO YOU RECALL WHETHER SOMEONE ON THE DEFENSE
25 TEAM SPOKE TO A PARAPLEGIC LADY BY THE NAME OF MS. DEBERRY?

1 A. I DO. I RECALL HIM -- I RECALL TOMMY SPEAK -- TOMMY
2 DAVIS SPEAKING TO HER. SHE WAS THERE. SHE WAS, I THINK, IN
3 THE LEXINGTON LAKE AREA AS WELL.

4 Q. ALL RIGHT. IS IT FAIR TO SAY THAT IF THEY -- IF
5 THESE WITNESSES HAD PROVIDED ANYTHING USEFUL, Y'ALL WOULD
6 HAVE -- WOULD HAVE USED THEM?

7 A. I DON'T RECALL ANY OF THE WITNESSES GIVING US
8 ANYTHING. I REMEMBER GETTING INFORMATION THAT -- THAT WAS
9 DAMAGING FROM VARIOUS PEOPLE, BUT I DON'T RECALL ANYBODY
10 SENDING -- GETTING ANY INFORMATION FROM ANYONE THAT HELPED US
11 IN A DEFENSE IN ANY -- IN ANY LEGITIMATE WAY.

12 Q. ALL RIGHT. YOU MENTIONED DONALD GIRNDT.

13 A. YES.

14 Q. YOU OBVIOUSLY HAD HIM AVAILABLE TO LOOK AT ANY OF
15 THE BLOOD SPATTER EVIDENCE.

16 A. YES.

17 Q. YOU HAD HIM THERE FOR THE CRIME SCENE EVIDENCE, TOO?

18 A. YES.

19 Q. RIGHT?

20 A. YES.

21 Q. AND ALSO I BELIEVE FINGERPRINTS.

22 A. THAT'S RIGHT.

23 Q. DO YOU RECALL WHETHER OR NOT HE DID ANY FINGERPRINT
24 TESTING ON HIS OWN?

25 A. YEAH, HE DID -- WE ACTUALLY HAD A COPY OF THE FILMS

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1 THAT THE -- THE LIFTS, AND HE LOOKED OVER THAT. HE WAS IN
2 CHARGE OF THE CRIME SCENE FOR US, THE BEST I CAN RECALL, AND,
3 IN FACT, I THINK WE EVEN TOOK HIM OUT TO THE CRIME SCENE
4 ALBEIT AFTER THE -- AFTER THE FACT. BUT HE WAS IN CHARGE,
5 FROM OUR STANDPOINT, OF CRIME SCENE -- AS A CRIME SCENE
6 EXPERT, ANALYZING BLOOD SPATTER AND FINGERPRINTS AND THINGS
7 LIKE THAT.

8 Q. AND DO YOU RECALL WHETHER OR NOT HE WAS ABLE TO
9 DEVELOP A LATENT PRINT THAT THE STATE HAD MISSED?

10 A. WELL, HE -- THERE WAS -- THERE WERE TWO PRINTS, AS I
11 RECALL, ON THE PHONE BOX. THE PHONE BOX I THOUGHT WAS
12 PARTICULARLY DAMAGING TO US BECAUSE I THINK FROM A JUROR
13 STANDPOINT, CUTTING SOMEBODY OFF FROM THE OUTSIDE WORLD IS --
14 THAT'S TOUGH TO EXPLAIN. IT'S TOUGH TO GET AROUND MALICE.
15 IT'S TOUGH TO GET AROUND INTENT, AND IT'S VERY DIFFICULT JUST
16 FROM AN EMOTIONAL STANDPOINT. SO THE PHONE BOX WAS
17 IMPORTANT. WE HAD A FINGERPRINT THAT WAS NOT MATCHED BY THE
18 STATE, BUT IT WAS -- WHETHER IT WAS -- I CAN'T RECALL IF IT
19 WAS -- IT WASN'T A SMUDGE. I CAN'T RECALL IF THERE JUST
20 WEREN'T ENOUGH POINTS TO MAKE A COMPARISON.

21 I HAD MR. -- WE HAD MR. GIRNDT LOOK AT IT. HE
22 STUDIED IT AND, IN FACT, AT ONE POINT I THOUGHT HE WAS GOING
23 TO BE ABLE TO TESTIFY THAT THAT WAS NOT THE DEFENDANT'S LEFT
24 HAND OR WHATEVER IT WAS. THE PROBLEM IS AT SOME POINT HE
25 CAME BACK AND SAID IT COULD, HOWEVER, BE HIS RIGHT HAND. SO

1 IT DIDN'T -- DIDN'T END UP HELPING US AT ALL, BUT IT WAS
2 CLOSE THERE FOR A LITTLE BIT, BUT HE -- BUT HE---

3 Q. FROM THE STANDPOINT OF THE STATE---

4 A. YEAH. I MEAN, IT WAS -- BASICALLY THEY DIDN'T MAKE
5 THE -- THE STATE DIDN'T MAKE THE MATCH, BUT MR. GIRNDT --
6 THERE WAS A REAL GOOD ARGUMENT TO BE MADE THAT HE WOULD HAVE
7 MADE IT FOR THEM.

8 Q. I BELIEVE Y'ALL HAD YOUR OWN D.N.A. EXPERT.

9 A. WE DID.

10 Q. OKAY.

11 A. I SAY THAT. I THINK -- I'M PRETTY SURE WE DID.
12 AGAIN, MS. FULLWOOD HANDLED THAT SO -- BUT I...

13 Q. ALL RIGHT.

14 A. I'M PRETTY SURE WE DID.

15 Q. AND YOU'VE TOUCHED ON THIS. YOU VISITED THE CRIME
16 SCENE ITSELF.

17 A. YES.

18 Q. AND YOU HAD MR. GIRNDT WITH YOU.

19 A. YES.

20 Q. AND YOUR CO-COUNSEL WAS THERE ALSO.

21 A. YES.

22 Q. ALL RIGHT. AND Y'ALL FILED RULE 5 AND BRADY
23 MOTIONS?

24 A. YES.

25 Q. AND Y'ALL HAD THOSE RESPONSES BEFORE THE---

1 A. WE DID.

2 Q. ---BEFORE THE TRIAL BEGAN?

3 A. WE DID.

4 Q. OKAY. DID ANY OF YOUR EXPERTS EVER SUGGEST TO YOU
5 THAT, HEY, THERE ARE SEVERAL ITEMS OF EVIDENCE THAT THE STATE
6 HAS NOT -- HAD TESTED AND WE THINK YOU NEED TO HAVE SOMEONE
7 TEST THIS, WHETHER IT BE THEM OR SOME OTHER EXPERT?

8 A. WELL, PART OF THAT -- I THINK WE -- I THINK WE KNEW
9 THAT THERE WERE SOME ITEMS THAT HAD NOT BEEN TESTED THAT WERE
10 NOT -- THAT WERE NOT VERIFIED BY S.L.E.D. SPECIFICALLY, I
11 BELIEVE -- AND I'VE REVIEWED SOME OF THE TRANSCRIPT OR SOME
12 OF THE -- SOME OF THE -- SOME OF THE ITEMS THAT IT SEEMS THAT
13 THERE WERE PUBIC HAIRS ON THE DEFENDANT THAT HAD BEEN -- THAT
14 HAD NOT BEEN MATCHED OR ON THE VICTIM THAT HAD NOT BEEN
15 MATCHED. WE DECIDED THAT IT WAS MORE EFFECTIVE TO CROSS ON
16 THAT OR TO MAKE A POINT OF THAT IN A CLOSING ARGUMENT THAN IT
17 WAS TO ACTUALLY GET IT TESTED OURSELVES, ESPECIALLY WITH THE
18 D.N.A. MATCH AND WITH EVERYTHING ELSE POINTING THAT WE FELT
19 LIKE WE HAD A DECENT ARGUMENT TO BE MADE THAT THEY SIMPLY
20 LEFT SOME STUFF OUT AND THEY DIDN'T TEST WHAT THEY SHOULD
21 HAVE TESTED. IT WAS MORE OF PUNCHING HOLES IN THEIR CASE AS
22 OPPOSED TO MAKING THEIR CASE FOR THEM, BUT I DON'T RECALL ANY
23 OF OUR EXPERTS SUGGESTING THAT WE GO AND TEST THE STUFF.

24 Q. OKAY. AND PART OF THAT WAS BECAUSE EVERY TIME YOU
25 HAD TESTED SOMETHING IT SEEMED TO IMPLICATE YOUR CLIENT?

1 A. WELL, IT WASN'T HELPING. I MEAN, THE WITNESSES WE
2 WERE RUNNING DOWN WERE NOT HELPING US, AND THE FINGERPRINT
3 THAT WE STUDIED DIDN'T HELP US EITHER.

4 Q. ALL RIGHT, SIR. DO YOU RECALL WHETHER OR NOT Y'ALL
5 EVER ENTERED INTO ANY PLEA NEGOTIATIONS ON BEHALF OF YOUR
6 CLIENT?

7 A. THERE WERE NO PLEA NEGOTIATIONS. I AM SURE I SPOKE
8 TO THE SOLICITOR'S OFFICE ABOUT THEM, BUT I CAN'T RECALL.
9 THERE WERE NO -- THERE WAS NO OFFER GIVEN BY THE -- BY THE
10 SOLICITOR'S OFFICE FOR ANYTHING OTHER THAN THE DEATH PENALTY.

11 Q. ALL RIGHT. NOW, GOING INTO THE TRIAL, YOU AND YOUR
12 CO-COUNSEL, MS. FULLWOOD, Y'ALL DIDN'T JUST DECIDE TO GIVE UP
13 ON THE GUILT PHASE, DID YOU?

14 A. NO. IN FACT, WHAT -- NO, AND THAT'S THE HARD PART
15 ABOUT IT. THE HARD PART ABOUT TRYING A CASE LIKE THIS IS --
16 IS THAT YOU GO TO THE JURY ON THE -- ON THE GUILT PHASE AND
17 YOU SAY, "HE DIDN'T DO IT. HE DIDN'T DO IT. HE DIDN'T DO
18 IT." AND THEN THE JURY COMES BACK AND SAYS, "YES, HE DID
19 IT," AND THEN YOU HAVE TO GO BACK AND TRY TO SAY, "OKAY.
20 WELL, HE DID IT, BUT DON'T KILL HIM." YOU LOSE CREDIBILITY,
21 AND IT'S VERY DIFFICULT TO DO, BUT THERE WERE -- THERE WAS
22 ENOUGH THERE THAT WHAT -- WE FELT LIKE WE COULD AT LEAST GIVE
23 SOME RESIDUAL DOUBT. IF WE COULD GET THE JURY THINKING IT'S
24 NOT A SLAM-DUNK, THERE'S SOME STUFF OUT THERE THAT THEY
25 DIDN'T DO, THAT THEY DIDN'T DO THEIR HOMEWORK IN SOME VARIOUS

1 AREAS AND THERE WERE SOME PROBLEMS, THAT IT JUST WASN'T A --
2 IT WASN'T A CLEAN CASE, THEN MAYBE THE JURY WOULD HAVE THAT
3 IN THE BACK OF THEIR MIND DURING SENTENCING. SO THAT WAS --
4 THAT WAS THE APPROACH. REGARDLESS OF THE POTENTIAL LOSS OF
5 CREDIBILITY FOR THE -- FOR THE LAWYERS, WE CHOSE TO DO IT
6 THAT WAY BECAUSE WE FELT LIKE THE BEST ANGLE WE MIGHT HAVE,
7 OTHER THAN THE ORGANIC BRAIN DAMAGE, WAS THAT THE JURY WOULD
8 HAVE SOME TYPE OF RESIDUAL DOUBT.

9 Q. ALL RIGHT. NOW, BETWEEN THE TIME OF THE JACKSON V.
10 DENNO HEARING WHICH WAS PRETRIAL AND THE TIME OF YOUR OPENING
11 COMMENTS---

12 A. RIGHT.

13 Q. ---DID EITHER MR. HUMPHRIES OR MR. CHASE OR ANYONE
14 ON THE PROSECUTION TEAM INDICATE AFFIRMATIVELY THAT THEY
15 PLANNED TO INTRODUCE WHAT LATER BECAME STATE'S EXHIBIT 68,
16 THE MARCH 24, 1995, STATEMENT?

17 A. WELL, WE DID A JACKSON/DENNO HEARING. THE PURPOSE
18 BEHIND THE JACKSON/DENNO HEARING IS FOR THE STATE TO
19 INTRODUCE THE STATEMENT. WHEN WE DID THE JACKSON/DENNO
20 HEARING, YOU KNOW, I THINK EVERYONE IN THE COURTROOM,
21 INCLUDING THE JUDGE, ASSUMED THAT THE PURPOSE BEHIND DOING
22 THE HEARING WAS TO PUT THE STATEMENT IN. IT WAS GOOD
23 STRATEGY ON THE STATE'S PART BECAUSE I DON'T KNOW IF THEY
24 DECIDED AT THE LAST MINUTE NOT TO PUT IT IN OR IF THEY WERE
25 PLANNING ALL ALONG TO PUT IT IN IN THE PENALTY PHASE. BUT

1 THAT WAS -- THAT WAS SOMETHING I SLIPPED ON. I ASSUMED THEY
2 WERE GOING TO PUT IT IN, AND I TALKED ABOUT IT IN MY OPENING
3 ARGUMENT AND THEY DIDN'T PUT IT IN.

4 Q. DO YOU THINK THAT IN LIGHT OF THE EVIDENCE THAT WAS
5 PRESENTED AGAINST YOUR CLIENT THAT IT WAS PREJUDICIAL?

6 A. MY STATEMENT?

7 Q. YES.

8 A. I THINK IT PROBABLY WAS PREJUDICIAL. THE QUESTION I
9 WOULD HAVE IS: HOW PREJUDICIAL WAS IT? WAS IT SOMETHING
10 THAT WOULD HAVE MADE A DIFFERENCE ONE WAY OR THE OTHER? I
11 DON'T KNOW. OBVIOUSLY THE STATE FELT LIKE THEIR CASE WAS
12 STRONG ENOUGH EVEN WITHOUT IT NOT EVEN TO PUT IT IN, SO I
13 DON'T KNOW HOW PREJUDICIAL MY -- MY OPENING ARGUMENT WOULD
14 HAVE BEEN.

15 Q. AS I UNDERSTAND YOUR REASON FOR MAKING THE COMMENTS
16 WAS YOU WERE FACED WITH THE SITUATION WHERE THE STATE HAD A
17 -- NOT ONLY THE STATE'S EXHIBIT 68, THE STATEMENT, BUT ALSO A
18 VIDEOTAPE OF THE -- OF THE INTERVIEW THAT LED TO THE
19 STATEMENT; CORRECT?

20 A. YES.

21 Q. AS WELL AS -- AND YOU ALSO HAD THE D.N.A.

22 A. YES.

23 Q. AND YOU ALSO HAD THE FINGERPRINT.

24 A. YES.

25 Q. THAT'S A FAIRLY TOUGH ROW TO HOE IF YOU'RE A DEFENSE

1 ATTORNEY, ISN'T IT?

2 A. YEAH. WE ALSO HAD -- WE DID HAVE THE UNIQUE
3 SITUATION THAT MR. TERRY HAD BEEN INVOLVED EARLIER IN THE
4 DISCUSSION WITH THE FELLOW INMATE THAT HE WAS GOING TO
5 CONFESS FOR A CRIME THAT HE DIDN'T COMMIT SO THAT THE OTHER
6 DEFENDANT WOULD BREAK HIM OUT OF PRISON, AND THAT -- THAT IN
7 ITSELF WAS SUCH A LUDICROUS IDEA THAT I THINK IT REALLY
8 EXPLAINS HOW SOMEBODY COULD CONFESS TO SOMETHING THEY DIDN'T
9 DO.

10 Q. ALL RIGHT. NOW, Y'ALL GAVE THOUGHT TO WHETHER OR
11 NOT MR. TERRY SHOULD TESTIFY; CORRECT?

12 A. YES.

13 Q. AND AS I UNDERSTAND IT, Y'ALL MADE THE DECISION THAT
14 HE SHOULD NOT TESTIFY?

15 A. I THINK WE LEFT THAT STILL UP TO HIM, BUT I DIDN'T
16 THINK IT WAS A GOOD IDEA, NO.

17 Q. ALL RIGHT. AND WHY IS THAT?

18 A. I DIDN'T THINK HE WOULD BE VERY CREDIBLE.

19 Q. ALL RIGHT. IS THAT IN PART BASED ON YOUR OWN
20 DEALINGS WITH HIM?

21 A. IT WAS BASED IN LARGE PART ON MY OWN DEALINGS WITH
22 HIM, YES.

23 Q. ALL RIGHT, SIR.

24 A. AND HERE'S ANOTHER PROBLEM WE HAD, TOO: AT
25 SENTENCING I WAS GOING TO PUT IN -- AND I CANNOT RECALL ALL

1 THREE OF THE DOCTORS' NAMES. DR. SCHWARTZ-WATTS, DR.
2 DEYSACH, AND DR. -- SOMEONE ELSE. ONE HAD PERFORMED A SPEC
3 SCAN WHICH AT THAT TIME WAS SOMETHING I HAD NOT SEEN BEFORE
4 BUT BASICALLY SHOOTING RADIOACTIVE FLUIDS INTO THE -- INTO
5 THE BLOODSTREAM TO MIRROR THE ACTIVITY OF THE BRAIN.

6 THE SPEC SCAN WAS GOING TO SHOW THAT IN PARTS OF HIS
7 BRAIN THAT IT WAS EXCEPTIONALLY DARK AND THEN ESPECIALLY IN
8 THE FRONTAL LOBE. THESE DARK AREAS, AT LEAST ACCORDING TO
9 THE DOCTOR, WAS WHERE HE MADE HIS DECISIONS AND THAT THIS WAS
10 A PROBLEM FOR HIM AND THAT BECAUSE OF THAT HE HAD A
11 LEGITIMATE ORGANIC MENTAL DISORDER. I THOUGHT THAT WAS OUR
12 BEST ANGLE TO SAVE HIS LIFE.

13 HAD HE TESTIFIED, I DON'T KNOW THAT HIS STATEMENT
14 WOULD HAVE BEEN CREDIBLE, BUT HE WOULD NOT HAVE COME ACROSS
15 AS SOMEONE WHO WAS BRAIN DAMAGED, I DON'T BELIEVE. OTHER
16 THAN THE HEADACHES AND VARIOUS THINGS LIKE THAT, I DON'T KNOW
17 THAT THAT SHOWS VERY WELL. AND SO YOU'RE GOING AGAIN TO THE
18 JURY AND THEN YOU'RE GOING TO ASK THEM: PLEASE CONSIDER HIM
19 MENTALLY CHALLENGED WHEN, IN FACT, YOU HEARD HIM AND HE
20 TESTIFIED AND HE SOUNDED QUITE CLEAR. AND THAT -- THAT WAS
21 ANOTHER PROBLEM THAT WE HAD FROM THAT STANDPOINT, BUT I STILL
22 THINK AND I CAN'T RECALL EXACTLY WHAT THE PROCESS WAS, BUT
23 THE DECISION TO TESTIFY -- I WOULD HAVE RECOMMENDED THAT HE
24 DID NOT, BUT I THINK WE STILL LEFT THAT UP TO HIM WHETHER OR
25 NOT HE WOULD DO THAT OR NOT.

1 Q. NOW, I BELIEVE MR. TERRY HAD ALSO GIVEN A JANUARY, I
2 BELIEVE, 17, 1995, STATEMENT TO THE POLICE IN WHICH HE DENIED
3 ANY INVOLVEMENT WHATSOEVER IN THE CASE? DO YOU RECALL THAT
4 ONE?

5 A. I DON'T RECALL THAT. THAT MAY BE THE CASE, BUT I
6 DON'T -- I DON'T RECALL.

7 Q. THE STATE OBVIOUSLY DID NOT INTRODUCE THAT IN THE
8 GUILT PHASE EITHER, DID THEY?

9 A. NOT TO MY -- NOT TO MY KNOWLEDGE. I DON'T REMEMBER
10 THAT.

11 Q. YOU WERE ASKED QUESTIONS ABOUT BATSON VERSUS
12 KENTUCKY. WERE YOU AWARE AT THE TIME OF YOUR REPRESENTATION
13 THAT YOU COULD MAKE A BATSON MOTION BASED UPON STRIKES ON
14 GENDER?

15 A. YES. WE HAD -- AND THAT PROBABLY IS SOMETHING THAT
16 CAME FROM THE SOLICITOR'S OFFICE, BUT WE HAD -- I HAD MADE A
17 NUMBER OF BATSON -- ACTUALLY, INTERESTINGLY ENOUGH, I HAD
18 MADE A NUMBER OF BATSON MOTIONS MYSELF AS A PROSECUTOR WHICH
19 AT THAT TIME WAS RELATIVELY UNHEARD OF BEFORE -- I DON'T
20 REMEMBER THE EXACT CASE. IT WAS A GEORGIA CASE THAT ALLOWED
21 CIVIL -- BATSON IN CIVIL JURIES, BUT I RECALL SPECIFICALLY
22 MAKING THOSE TYPE OF MOTIONS AS THE STATE WHICH A LOT OF THE
23 TRIAL JUDGES WOULD SIMPLY DISCOUNT AND SAY, "NO, YOU CAN'T DO
24 THAT; YOU'RE THE STATE."

25 BATSON WAS A -- WAS ONE OF THOSE ISSUES THAT IF

1 YOU'RE GOING TO TRY A LOT OF CASES YOU HAD TO KNOW A LOT
2 ABOUT AND YOU HAD TO BE AWARE OF IT AND IT WAS NOT -- WE KNEW
3 IT FROM EVERY ANGLE POSSIBLE. BUT I SPECIFICALLY REMEMBER
4 LOOKING AT THE JURY AND LIKING WHAT I SAW. I WAS WRONG, BUT
5 THAT'S -- BUT I RECALL LOOKING AT THE JURY AND THINKING THAT
6 WE HAD THE BEST CHANCE WE COULD OUT OF OUR -- OUT OF OUR
7 SELECTION.

8 Q. AND IN LIGHT OF THE FACT THAT YOU FELT COMFORTABLE
9 WITH THE JURY, DID YOU SEE ANY PURPOSE IN MAKING A BATSON
10 MOTION?

11 A. NO. I MEAN AND THE -- AS FAR AS STRIKING WOMEN ARE
12 CONCERNED, NO, I DON'T -- I DON'T -- I DID NOT SEE THAT, AND
13 I JUST -- I REMEMBER BEING COMFORTABLE WITH THE JURY THAT WE
14 HAD SELECTED.

15 Q. OKAY. NOW, AS PART OF YOUR ATTACK ON THE STATE'S
16 EVIDENCE, I BELIEVE IN YOUR CLOSING ARGUMENT YOU FOCUSED ON
17 THE IDEA THAT THE STATE ONLY SHOWED WHAT THEY WANTED THE
18 JURORS TO SEE.

19 A. RIGHT.

20 Q. CORRECT?

21 A. RIGHT.

22 Q. AND THAT NOW THAT DOVETAILED INTO YOUR DECISION TO
23 USE CROSS-EXAMINATION AS OPPOSED TO DOING YOUR OWN
24 INDEPENDENT TESTING AND---

25 A. YES.

1 Q. ---ANALYSIS? OKAY. AND I BELIEVE YOU COVERED YOUR
2 -- YOUR EFFORTS TO PRESENT TO THE JURY INFORMATION THAT YOUR
3 CLIENT WAS LEFT-HANDED EVEN THOUGH I BELIEVE DR. CARTER
4 OPINED THAT THE PERSON USED THEIR RIGHT HAND?

5 A. THAT'S CORRECT.

6 Q. ALL RIGHT. AND YOU WERE ASKED ABOUT A JUROR NAMED
7 GEORGIA MILLER, JUROR NUMBER 163?

8 A. OKAY.

9 Q. AND I BELIEVE -- THE TESTIMONY I WOULD LIKE TO ASK
10 YOU ABOUT BEGINS ON PAGE 373, LINE 18 THROUGH PAGE 374, LINE
11 7. IF I MIGHT SHOW THAT TO YOU.

12 A. WHAT PAGE?

13 Q. 373, LINE 18 THROUGH PAGE 374, LINE 7.

14 A. OKAY. I SEE IT. WOULD YOU LIKE ME TO READ THAT
15 INTO THE RECORD OR IS THAT...

16 Q. NO. I JUST WANT TO ASK YOU A COUPLE OF QUESTIONS
17 ABOUT IT.

18 A. OKAY.

19 Q. YOU WERE ASKED ABOUT HER RESPONSE TO A QUESTION
20 RELATING TO WHETHER OR NOT SHE COULD IMPOSE THE DEATH
21 PENALTY; RIGHT?

22 A. RIGHT.

23 Q. AND SHE -- DOESN'T SHE INITIALLY EXPRESS SOME
24 CONFUSION AS TO THE NATURE OF YOUR QUESTION?

25 A. THERE IS -- THERE IS A GOOD BIT OF CONFUSION

1 THROUGHOUT.

2 Q. ALL RIGHT, SIR.

3 A. "COULD YOU SAY IF HE IS SOMEBODY APPROPRIATE FOR THE
4 DEATH PENALTY?" "I DON'T KNOW. I MEAN, I WOULD JUST HAVE TO
5 WAIT AND SEE."

6 Q. THOSE WERE---

7 A. AND ALSO, OF COURSE, SHE MAKES THE COMMENT, "I DON'T
8 WANT TO GIVE HIM DEATH," AND THEN FOLLOWS THAT WITH, "BUT
9 THAT'S WHAT WOULD HAPPEN." I DON'T KNOW WHAT SHE MEANT BY
10 THAT.

11 Q. ALL RIGHT, SIR. IF YOU GO ON DOWN TO PAGE -- PAGE
12 374?

13 A. YEP.

14 Q. LINE 17 THROUGH PAGE -- 374, LINE 23?

15 A. RIGHT.

16 Q. SHE WAS ASKED A SIMILAR QUESTION AND GAVE---

17 A. WELL, I WENT BACK IN AND ASKED HER IF SHE HEARD --
18 IF SHE FOUND SOMEBODY GUILTY OF MURDER AND GUILTY OF RAPE OR
19 BURGLARY BUT THERE ARE SOME OTHER THINGS THAT COME IN TO
20 MITIGATE IT, COULD YOU IN THAT CASE LISTEN TO THAT AND
21 POTENTIALLY GIVE SOMEONE LIFE? AND HER RESPONSE IS, "I'D
22 HAVE TO LISTEN TO IT, YES." "BUT IF YOU LISTEN TO IT, COULD
23 YOU DO EITHER ONE?" AND SHE RESPONDED, "YES."

24 Q. OKAY. SO SHE COULD BE FAIR AND IMPARTIAL. SHE WAS
25 JUST CONFUSED ON HER PART INITIALLY AS TO WHAT WAS BEING

1 ASKED OF HER?

2 A. YEAH, AND I DON'T GET THE IMPRESSION FROM THE
3 TRANSCRIPT -- IT WAS VERY DIFFICULT TO READ THE TRANSCRIPT
4 AND REMEMBER EXACTLY WHAT THE -- WHAT THE JUROR WAS LIKE.
5 BUT I DON'T GET THE IMPRESSION FROM THIS IN HER RESPONSES
6 THAT SHE WOULD BE A LEADER ONE WAY OR THE OTHER IN THE JURY
7 BOX AND I -- SO I DON'T KNOW THAT THAT WOULD HAVE CONCERNED
8 ME A GREAT DEAL ANYWAY.

9 Q. WHEN YOU SAY A LEADER IN THE JURY BOX, YOU MEAN IN
10 THE VERY ACT OF DELIBERATING---

11 A. THAT'S RIGHT. I MEAN, YOU KNOW, YOU'D LIKE LEADERS
12 IF THEY'RE GOING TO BE ON YOUR SIDE. YOU DON'T WANT LEADERS
13 IF THEY'RE NOT GOING TO BE ON YOUR SIDE, AND I DON'T GET THE
14 IMPRESSION -- AND THEN THOSE THAT COME IN BETWEEN. YOU JUST
15 HOPE TO GET YOUR LEADERS IN THERE. BUT I DON'T FIND ANYTHING
16 IN HERE THAT WOULD PARTICULARLY WORRY ME ABOUT HER.

17 MR. SALTER: ALL RIGHT, SIR. BEG THE COURT'S
18 INDULGENCE FOR A SECOND.

19 THE COURT: YES, SIR.

20 BY MR. SALTER:

21 Q. YOU WERE ASKED ABOUT -- SOME QUESTIONS ABOUT THE
22 MALICE CHARGE.

23 A. YES.

24 Q. ANY DOUBT IN YOUR MIND THAT THERE WAS EVIDENCE OF
25 MALICE IN THIS CASE?

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1 A. NO.

2 Q. THAT EVIDENCE WOULD HAVE INCLUDED THE EVIDENCE YOU
3 TALKED ABOUT: THE FINGERPRINTS ON THE TELEPHONE BOX WHERE
4 THE TELEPHONE LINES HAD BEEN YANKED OUT.

5 A. THAT WAS TO ME THE MOST DAMAGING THING ABOUT THE
6 WHOLE CASE, THE TELEPHONE LINES. I KNOW THE MURDER AND THE
7 RAPE, I MEAN, ARE OBVIOUSLY BRUTAL CRIMES, BUT I THINK THE
8 THING THAT GETS TO A JUROR MORE THAN ANYTHING ELSE IN A CASE
9 LIKE THIS IS THAT THE PHONE LINES WERE CUT OR PULLED.

10 Q. AND I BELIEVE YOU INDICATED ON DIRECT EXAMINATION
11 THAT YOU WOULD NOT HAVE OBJECTED TO EVIDENCE -- WHETHER YOU
12 OBJECTED OR NOT, YOU WOULD NOT HAVE RAISED AN OBJECTION TODAY
13 EVEN TO EVIDENCE CONCERNING THE DEFENDANT'S BAD CHARACTER IN
14 THE PENALTY PHASE.

15 A. NO. NOW, I'M GOING TO GO LOOK UP STATE VERSUS
16 BENNETT. I WANT TO MAKE SURE THAT SOMETHING HASN'T CHANGED
17 IN THE -- IN THE RECENT OPINIONS, BUT I WOULD NOT -- MY
18 UNDERSTANDING -- AND I KNOW CERTAINLY AT THAT TIME THE
19 CHARACTERISTIC OF THE CRIME AND OF THE DEFENDANT WERE BOTH
20 ADMISSIBLE AND WERE BOTH PROPER IN THE SENTENCING PHASE.

21 Q. NOW, YOU WERE ASKED ABOUT YOUR CROSS-EXAMINATION OF
22 MITCH WILKERSON.

23 A. YES.

24 Q. AND HE'S WITH THE POLICE DEPARTMENT IN COLUMBIA---

25 A. I BELIEVE HE SAID HE WAS IN COLUMBIA, WASN'T HE?

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1 RICHLAND COUNTY OR COLUMBIA?

2 Q. ALL RIGHT, SIR. NOW, DO YOU -- DO YOU RECALL WHAT
3 YOU ASKED HIM? DO YOU RECALL YOUR CROSS-EXAMINATION OF HIM?

4 A. IS THIS THE -- IS THIS ABOUT THE PROSTITUTE?

5 Q. YES, SIR.

6 A. YES. HE HAD PUT EVIDENCE IN -- EXCUSE ME. HE HAD
7 PUT EVIDENCE IN CONCERNING THE CRIME ITSELF AND THAT HE --
8 AND I'D HAVE TO LOOK AT THE TRANSCRIPT TO BE EXACTLY SURE,
9 BUT I THINK THE EVIDENCE CONCERNED MR. TERRY STABBING THIS
10 WOMAN. HE GOT IN WHAT I THOUGHT WAS PRETTY DAMAGING EVIDENCE
11 ALREADY. MY QUESTION TO HIM WAS THAT -- WAS WHETHER OR NOT
12 MR. TERRY AT THE TIME OR RIGHT AFTER THE STABBING, I BELIEVE,
13 WAS CONFUSED OR I REMEMBER HE COULDN'T FIND THE DOOR AS HE
14 WAS LEAVING, AND HE TURNED AROUND AFTER HE STABBED THE WOMAN
15 AS IF NOTHING HAD HAPPENED. I RECALL GOING INTO THAT WITH --
16 WITH THE OFFICER, YES.

17 Q. OKAY. AND YOUR PURPOSE WAS TO -- FOR WHAT?

18 A. WELL, WE'RE IN THE SENTENCING PHASE, AND AT THIS
19 POINT THE PURPOSE BEHIND ANY OF THIS EVIDENCE IS TO ESTABLISH
20 THAT -- THAT THERE WAS SOME MITIGATION ON THE PART OF GARY
21 TERRY. NOW, AN ASSAULT AND BATTERY ALTHOUGH THAT'S -- I
22 THINK HE PLED GUILTY TO A HIGH AND AGGRAVATED NATURE, BUT
23 STABBING SOMEONE IN THE NECK IS GOING TO COME ACROSS PRETTY
24 BADLY TO THE JURY. THE ISSUE THOUGH IS WHETHER OR NOT THERE
25 WAS SOME MITIGATION TO BE GLEANED FROM THAT, AND MY THOUGHT

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1 WAS THAT THE FACT THAT HE WAS CONFUSED THAT THE WAY HE DID IT
2 SHOWED SOME MENTAL PROBLEM WITH HIM. I THOUGHT THAT WORKED
3 VERY WELL WITH THE FACT THAT WE WERE GOING TO PUT UP THE
4 PSYCHIATRIST, THE PSYCHOLOGIST, AND THE NEUROPSYCHOLOGIST.

5 Q. AND THIS HELPFUL INFORMATION CAME FROM THE
6 PROSTITUTE'S STATEMENT TO THE POLICE OFFICER?

7 A. YES.

8 Q. OKAY. YOU WERE ASKED ABOUT YOUR CLOSING ARGUMENT IN
9 WHICH YOU REFERRED TO YOUR CLIENT AS A RAPIST AND A MURDERER.

10 A. YES.

11 Q. BY THAT TIME HE'D ALREADY BEEN CONVICTED, HAD HE
12 NOT, I MEAN, OF MURDER?

13 A. YES.

14 Q. CRIMINAL SEXUAL CONDUCT IN THE FIRST DEGREE?

15 A. YES.

16 Q. AND---

17 A. AND THE THING ABOUT THE HOME INVADER, I THINK THAT
18 WAS ONE OF THE VERY FIRST TIMES I HAD EVER ACTUALLY HEARD
19 SOMEBODY USE THAT TERM; IT USED TO NOT BE. AT THIS TIME IT
20 WAS BURGLARY. THERE WAS NO SUCH THING AS HOME INVASION
21 EXCEPT ON THE TELEVISION. AND I RECALL THE DEPUTY SOLICITOR
22 USING IT IN HIS STATEMENT, SO IT SEEMS THAT MAYBE THAT WAS
23 A -- THAT WAS A MIMIC OF THE STATE'S CASE TO SUM THAT UP AND
24 TO MOVE ON TO WHAT THE WHOLE SENTENCING PHASE WAS ABOUT WHICH
25 WAS: WHAT'S DIFFERENT? I MEAN, FORGET -- FORGET THE CASE

1 ITSELF THAT'S BEFORE YOU. WHAT'S DIFFERENT THAT WOULD MAKE
2 YOU DECIDE, WHETHER IT BE AGGRAVATION AND MITIGATION? AND
3 TRYING TO TURN THE JURY TO THE MITIGATION ASPECT OF IT.

4 Q. AND THAT'S BECAUSE THE STATE TYPICALLY FOCUSES --
5 WANTS TO FOCUS AGAIN ON THE FACTS OF THE CASE WHEN WE GET TO
6 THE PENALTY PHASES.

7 A. IT WOULD HAVE BEEN IN THIS CASE, YES.

8 Q. IN ADDITION TO ANY BACKGROUND EVIDENCE---

9 A. YES.

10 Q. ---CONCERNING IT.

11 A. YES.

12 Q. OKAY. NOW, I BELIEVE YOU WERE ASKED ON DIRECT
13 EXAMINATION ABOUT WHETHER OR NOT STATE'S EXHIBIT 68, THE
14 MARCH 24, 1995, STATEMENT BY YOUR CLIENT WOULD HAVE SUPPORTED
15 A MANSLAUGHTER CHARGE?

16 A. YES.

17 Q. DO YOU FEEL THAT IT WOULD HAVE SUPPORTED SUCH AN
18 INSTRUCTION OR...

19 A. I DON'T RECALL. IT LOOKS LIKE THERE'S CERTAINLY
20 EVIDENCE THERE THAT YOU COULD MAKE THAT ARGUMENT. THE --
21 MAYBE UNDER A HEAT OF PASSION TYPE ARGUMENT IT SEEMS THAT --
22 YOU STILL HAD HIM BEATING HER WITH SOME OBJECT THAT HE SAID
23 -- I BELIEVE HE SAID THAT HE MIGHT HAVE BROUGHT IN WITH HIM
24 WHICH, OF COURSE, DOESN'T MAKE MUCH SENSE IF IT'S CONSENSUAL
25 SEX WHY YOU WOULD BRING AN OBJECT WITH YOU. BUT THERE WAS A

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1 BROKEN WINDOW AND I THINK IN HIS STATEMENT HE MADE SOME
2 STATEMENT ABOUT HE COULD HAVE BROKEN THAT WINDOW. YOU KNOW,
3 I'LL BE HONEST WITH YOU. I CAN'T RECALL THAT ONE WAY OR THE
4 OTHER. I CANNOT RECALL IF THAT WAS -- IF THAT WAS SOMETHING
5 THAT WOULD HAVE GIVEN US A VOLUNTARY CHARGE OR NOT.

6 Q. ALL RIGHT. IS IT FAIR TO SAY THAT THE MANNER IN
7 WHICH THE VICTIM'S BODY WAS POSITIONED WHEN SHE WAS FOUND BY
8 HER DAUGHTER THAT THAT -- THAT THAT WAS INCONSISTENT WITH A
9 MANSLAUGHTER?

10 A. MIGHT HAVE BEEN. I CAN'T -- I'LL BE HONEST WITH
11 YOU; I CAN'T RECALL.

12 Q. YOU DON'T REMEMBER?

13 A. I DON'T REMEMBER.

14 Q. Y'ALL DID CROSS-EXAMINE EACH OF THE STATE'S FORENSIC
15 EXPERTS; CORRECT?

16 A. I BELIEVE WE DID.

17 Q. ALL RIGHT. AND Y'ALL DID SO FAIRLY VIGOROUSLY?

18 A. I HOPE SO.

19 MR. SALTER: ALL RIGHT. NOTHING FURTHER.

20 REDIRECT EXAMINATION

21 BY MR. FLOYD:

22 Q. MR. STONE, ARE YOU SURE THAT THERE'S TESTIMONY THAT
23 MR. TERRY BROUGHT SOME WEAPON INTO THE HOME?

24 A. NO. I DON'T THINK -- I DON'T THINK THERE IS
25 TESTIMONY OF THAT. I THOUGHT -- I THINK THAT WAS PART OF HIS

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1 STATEMENT.

2 Q. YOU THINK IT'S---

3 A. IF YOU HAVE THE STATEMENT WITH YOU, I'LL LOOK AT IT
4 AND TELL YOU WHAT I'M TALKING ABOUT. I DON'T RECALL IF
5 IT'S...

6 Q. (MR. FLOYD HANDS THE STATEMENT TO THE WITNESS.)

7 A. THANK YOU. NO. I'M SORRY. I GOT THAT WRONG. HE
8 SAID, "I THEN LOST MY TEMPER. I SWUNG BACK AT HER AGAIN. I
9 THEN GOT SOMETHING INTO MY HAND. IT WAS JUST THERE IN THE
10 HALL. SHE COULD HAVE BROUGHT IT WITH HER, AND THEN I COULD
11 HAVE BUSTED A PANE OF GLASS ON THE DOOR OR BUSTED THE DOOR
12 OPEN. I DON'T RECALL. I DON'T REMEMBER PULLING THE PHONE
13 LINES, AND I DON'T REMEMBER WHAT I DID WITH THE OBJECT THAT I
14 USED TO HIT MS. JACKSON."

15 Q. OKAY.

16 A. THAT'S -- THAT'S BASICALLY IT. IT WAS -- APPARENTLY
17 THE STATEMENT WAS WHETHER OR NOT SHE HAD BROUGHT IT IN
18 INSTEAD OF HIM. SO THAT'S -- THAT WAS MY MISTAKE.

19 Q. OKAY. NOW, THE TESTIMONY ABOUT THE PROSTITUTE WAS
20 DAMAGING ABOUT THE STABBING, WASN'T IT?

21 A. YES.

22 Q. BUT ISN'T IT TRUE THAT THAT -- THAT TESTIMONY COULD
23 NOT HAVE BEEN BROUGHT BEFORE THE JURY HAD A TIMELY MOTION
24 BEEN MADE THAT IT WAS HEARSAY?

25 A. MAYBE SO. I KNOW -- I KNOW THE INDICTMENT WOULD

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1 HAVE BEEN ABLE TO COME IN. I HAVE SEEN THAT TYPE OF EVIDENCE
2 COME IN FROM THE POLICE OFFICERS BASICALLY MAKING AN
3 OBSERVATION OF THE INVESTIGATION ITSELF BUT -- BUT THAT'S A
4 GOOD QUESTION. I DON'T KNOW.

5 Q. THAT IS HEARSAY.

6 A. IT SEEMS -- IT SEEMS THAT WAY, YES.

7 Q. IN FACT---

8 THE COURT: WHERE IS THAT IN THE RECORD?

9 MR. SALTER: IT'S ON PAGE 1618, YOUR HONOR.

10 BY MR. FLOYD:

11 Q. IN FACT, THE ONLY THING THAT USUALLY COMES IN IS A
12 CERTIFIED COPY OF THE JUDGMENT OR CONVICTION.

13 A. UNLESS YOU HAVE THE ACTUAL WITNESSES, YES, ALTHOUGH
14 I HAVE ACTUALLY SEEN IT COME -- A GOOD BIT OF THE INFORMATION
15 COME IN FROM THE POLICE OFFICER WHO INVESTIGATED THE CASE.

16 Q. AND THAT'S BECAUSE SOME PEOPLE DON'T MAKE
17 OBJECTIONS.

18 A. WELL, I DON'T KNOW IF IT'S THE LACK OF OBJECTION OR
19 WHETHER OR NOT THE -- THE GUILTY PLEA WITH THE LANGUAGE IN
20 THE INDICTMENT COVERS JUST ABOUT THE SAME INFORMATION. THAT
21 DEPENDS.

22 Q. NOW, WOULD YOU AGREE WITH ME THAT -- THAT MR. TERRY
23 WOULD BE ENTITLED TO THE INDEPENDENT UNBIASED JUDGMENT OF ALL
24 12 JURORS?

25 A. SURE.

1 Q. OKAY. AND WERE YOU AWARE WHEN MS. -- WHEN MS.
2 MILLER WAS SEATED ON THE JURY THAT THE DEFENSE HAD ONLY USED
3 ONE STRIKE AT THAT TIME?

4 A. THAT -- I DON'T KNOW. IF THAT'S WHAT THE RECORD
5 REFLECTS, THAT'S RIGHT. I DON'T KNOW.

6 Q. NOW, YOU TESTIFIED -- WAS ONE OF YOUR THEORIES
7 RESIDUAL DOUBT?

8 A. YES.

9 Q. THAT'S WHAT YOU WANTED TO ARGUE?

10 A. YES.

11 Q. IF THAT WAS A THEORY, WHY WOULD YOU TELL THE JURY HE
12 WAS A RAPIST, MURDERER, AND HOME INVADER?

13 A. BECAUSE THEY WERE DONE. THEY HAD ALREADY MADE THE
14 DECISION, AND FOR ME TO GO IN AT THIS POINT -- CERTAINLY I
15 DON'T BELIEVE THAT AT THAT TIME AND I DON'T BELIEVE NOW I
16 COULD AS A DEFENSE ATTORNEY ARGUE RESIDUAL DOUBT. BUT I
17 THINK IT'S SOMETHING THAT'S RECOGNIZED THAT IS A REAL -- A
18 REAL ISSUE WITH JURORS. BUT AT THE SENTENCING PHASE, YOU
19 KNOW, YOU'RE STILL TRYING TO BUILD SOME TYPE OF CREDIBILITY,
20 AND FOR ME TO GO IN AND SAY, "OKAY. I KNOW THAT YOU'VE COME
21 BACK WITH A VERDICT THAT SAYS HE'S GUILTY OF ALL OF THESE
22 THINGS, BUT I DON'T BELIEVE IT, SO LET'S MOVE ON," ISN'T
23 GOING TO BUY ME A WHOLE LOT OF CREDIBILITY. I'M TRYING TO
24 GET AT THIS POINT THE JURY TO THINK IN THE TERMS OF: WE'VE
25 ALREADY DECIDED THIS, BUT WHAT'S MITIGATION? I MEAN, WHAT --

1 WHAT DO WE HAVE OUT THERE THAT MAKES THIS DIFFERENT?

2 Q. DID YOU REVIEW THE SUPREME COURT OPINION ON THE
3 APPEAL?

4 A. I DO. I REMEMBER -- I REMEMBER REVIEWING IT FOR
5 THE -- BECAUSE I THOUGHT THE JACKSON/DENNO CONFESSION AND MY
6 OPENING ARGUMENT ISSUE WAS -- WAS OBVIOUSLY VERY INTERESTING,
7 AND I RECALL READING THAT OPINION ON THAT, YES.

8 Q. AND YOU---

9 A. AND I BELIEVE WE ACTUALLY HAD A DISSENT FROM AT THAT
10 POINT THE CHIEF JUSTICE ON THAT ISSUE.

11 Q. AND, IN FACT, NOW YOU'RE A -- YOU'RE A PROSECUTOR
12 NOW, A SOLICITOR. IS THAT CORRECT?

13 A. RIGHT.

14 Q. WOULD YOU AGREE WITH ME THAT CHIEF JUSTICE FINNEY
15 BASICALLY SAID IT WAS INAPPROPRIATE FOR THE SOLICITOR'S
16 OFFICE TO SANDBAG---

17 A. I THINK SANDBAGGING IS THE EXACT TERM HE USED, YES.

18 Q. AND WOULD YOU AGREE WITH ME THAT THAT'S
19 INAPPROPRIATE CONDUCT TO SANDBAG BY A PROSECUTOR?

20 A. WELL, I THINK WHAT THE SUPREME COURT DID WAS THEY --
21 THEY BASICALLY SAID THAT, YOU KNOW -- AND WHILE I APPRECIATE
22 WHAT JUSTICE FINNEY SAID AND I THINK I -- AND I CERTAINLY
23 APPRECIATED IT FROM THE STANDPOINT OF BEING A DEFENSE
24 ATTORNEY AND FELT LIKE I'D BEEN DUPED ON THAT ONE, THE
25 SUPREME COURT BASICALLY TURNED THAT INTO STRATEGY AND SO --

1 YOU KNOW, I DON'T KNOW. AT THIS POINT I'M NOT SO SURE THAT'S
2 IMPROPER CONDUCT OR NOT JUST REALLY GOOD STRATEGY ON THE PART
3 OF THE STATE.

4 Q. WELL, THAT BRINGS UP AN INTERESTING POINT.. IS IT --
5 IS IT THE GOAL OF THE PROSECUTION TO JUST OBTAIN A
6 CONVICTION?

7 A. NO.

8 Q. IN FACT, DOESN'T -- IF YOU KNOW, DOESN'T THE COMMENT
9 TO RULE 3.8 SAY THAT THE PROSECUTORS---

10 A. THAT WE'RE MINISTERS OF JUSTICE AND THAT OUR JOB IS
11 TO STRIKE FAIR BLOWS, IF ANY BLOWS AT ALL. YEAH, SOMETHING
12 LIKE THAT.

13 Q. THAT'S RIGHT. HE'S NOT SIMPLY AN ADVOCATE, IS HE?

14 A. YEAH. YOU GOT IT. YES, SIR.

15 MR. FLOYD: THANK YOU.

16 MR. SALTER: I DON'T BELIEVE I HAVE ANYTHING
17 FURTHER, YOUR HONOR.

18 THE COURT: ALL RIGHT. MR. STONE, YOU'RE FREE TO
19 GO.

20 THE WITNESS: THANK YOU, SIR.

21 THE COURT: THANK YOU FOR COMING. LET'S TAKE A
22 SHORT BREAK.

23 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

24 THE COURT: THANK YOU. HAVE A SEAT.

25 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

1 **THE COURT:** DO YOU NOT HAVE AN ORDER TO TRANSPORT
2 HIM HERE BY TOMORROW?

3 **S.C.D.C. OFFICER:** NO, SIR.

4 **THE COURT:** OKAY.

5 **S.C.D.C. OFFICER:** IT'S AN ORDER FOR TODAY ONLY.

6 **MR. SALTER:** THERE SHOULD BE ONE IN PLACE TO -- THEY
7 SHOULD HAVE HIM HERE TUESDAY AND WEDNESDAY AT LEAST.

8 **S.C.D.C. OFFICER:** SEE, IN A CASE WITH A DEATH ROW
9 WE USUALLY LEAVE THEM OVER -- OVERNIGHT.

10 **THE COURT:** YOU USUALLY LEAVE HIM?

11 **S.C.D.C. OFFICER:** YEAH, IF IT'S MORE THAN -- MORE
12 THAN ONE DAY.

13 **THE COURT:** SO YOU WOULD NORMALLY LEAVE HIM WITH
14 LEXINGTON COUNTY?

15 **S.C.D.C. OFFICER:** LEXINGTON OR RICHLAND.

16 **THE COURT:** OKAY. CAN YOU -- WE NEED TO WORK IT OUT
17 IN SOME WAY BECAUSE HE'S GOT TO BE HERE TOMORROW AND
18 WEDNESDAY AT LEAST. SO---

19 **S.C.D.C. OFFICER:** BUT, SEE, THIS WAS WHAT I WAS
20 ASKING THE LAWYERS SINCE EARLY THIS MORNING WHEN WE ARRIVED.

21 **THE COURT:** UH-HUH.

22 **S.C.D.C. OFFICER:** BECAUSE IT'S BEST FOR THE
23 INSTITUTION TO KNOW, ESPECIALLY WHEN WE GOT, YOU KNOW, SO
24 MANY OTHER... BUT THE IDEA OF THEM KNOWING THAT IT'S A DEATH
25 ROW, WE HAVE TO HAVE FOUR PEOPLE, AND IF THE COVERAGE IS NOT

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1 THERE -- OUR STAFF GO HOME AT 4:00.

2 THE COURT: ALL RIGHT. WELL, WHAT'S THE BEST WAY
3 FOR US TO ACCOMPLISH GETTING HIM HERE TOMORROW? IS THAT TO
4 LEAVE HIM -- TO ARRANGE TO HAVE HIM LEFT IN LEXINGTON OR TO
5 DO ANOTHER ORDER OR WHAT?

6 S.C.D.C. OFFICER: WELL, IF IT'S ONLY TOMORROW, THAT
7 WOULD BE -- WELL, I CAN'T SAY IT WOULD BE FINE, BUT I HAVE TO
8 NOTIFY -- THEY WOULD HAVE TO SEND THE ORDER BEFORE.

9 MR. SALTER: I WROTE CORRECTIONS AND ASKED TO HAVE
10 HIM TRANSPORTED, AND I GUESS THEY ASSUMED HE WOULD BE LEFT
11 HERE. I DON'T KNOW BECAUSE THE FIRST -- THE FIRST LETTER
12 YOUR HONOR CALLED ME---

13 THE COURT: RIGHT.

14 MR. SALTER: WE HAD A STATUS CONFERENCE, AND I THEN
15 FIRED OUT ONE CORRECTING THAT AND INDICATING IT WOULD TAKE AT
16 LEAST THREE DAYS.

17 S.C.D.C. OFFICER: AND THIS ORDER SAYS RETURN HIM
18 BACK TODAY. IT DOESN'T SAY AT LEAST THREE DAYS OR ONGOING.

19 THE COURT: WHO SIGNED THAT ORDER?

20 S.C.D.C. OFFICER: THIS CAME FROM -- IT COME FROM
21 THE LAWYER TO MS. TURBEVILLE WHO SENDS OUT THE ORDER.

22 THE COURT: OKAY. WELL, I DON'T -- WHAT DO YOU WANT
23 ME TO DO? HE'S GOT TO BE HERE TOMORROW. THERE'S NO --
24 THERE'S NO -- HE'S GOT TO BE HERE TOMORROW. SO Y'ALL CAN
25 EITHER WORK OUT LEAVING HIM HERE IN LEXINGTON OR Y'ALL CAN

1 BRING HIM BACK TOMORROW.

2 S.C.D.C. OFFICER: WELL, THAT'S UP TO THEM BECAUSE
3 THEY HAVE TO GET IN TOUCH WITH THE COUNTY TO LET THEM KNOW
4 THAT HE'S COMING THROUGH COURT.

5 THE COURT: IT'S NOT UP TO THEM. IT'S UP TO THE
6 DEPARTMENT OF CORRECTIONS, AND IT MAY NOT BE YOU---

7 S.C.D.C. OFFICER: WELL, WE'RE PREPARED -- WE'RE
8 PREPARED TO LEAVE HIM.

9 THE COURT: YEAH. WELL---

10 S.C.D.C. OFFICER: THAT'S WHAT THE PAPERWORK -- AND
11 IT SAY OVERNIGHT PACKAGE. IT HAS HIS MEDICAL RECORD AND
12 EVERYTHING THAT TRAVELS WITH US IN THE EVENT THEY SAID, "TURN
13 HIM OVER; WE ARE KEEPING HIM OVERNIGHT."

14 MS. BROWN: YOUR HONOR, MAY I SUGGEST WE CALL LYNN
15 TURBEVILLE AT S.C.D.C.? SHE WOULD BE ABLE TO AT LEAST ANSWER
16 OUR QUESTIONS AS TO WHAT SHE NEEDS TO HAVE THE PAPERWORK.

17 THE COURT: ALL RIGHT. HAVE WE GOT A PHONE IN HERE?

18 LEXINGTON COUNTY OFFICER: WE HAVE ONE RIGHT BACK
19 HERE.

20 THE COURT: OKAY. CAN YOU CALL HER? HAVE YOU GOT
21 HER NUMBER?

22 MS. BROWN: I BELIEVE I---

23 S.C.D.C. OFFICER: JUST LIKE I SAY, WE ONLY -- THE
24 INDIVIDUAL COUNTY JUST SIGN THIS WHERE WE'RE TURNING HIM
25 OVER.

1 **LEXINGTON COUNTY OFFICER:** SEE, THE ONLY PROBLEM WE
2 GOT ABOUT HIM BEING ON THERE -- WE ARE TO GIVE IT TO OUR
3 SUPERVISORS OVER THERE TO FIND OUT WILL HE BE ABLE TO TAKE
4 THAT RESPONSIBILITY OR NOT.

5 **THE COURT:** RIGHT. I UNDERSTAND. WE'LL CALL MS.
6 TURBEVILLE.

7 **S.C.D.C. OFFICER:** OKAY.

8 **MS. BROWN:** I CAN JUST USE MY PHONE AND STEP OUT IF
9 YOU DON'T MIND.

10 **THE COURT:** THAT WILL BE FINE. ALL RIGHT. CALL
11 YOUR NEXT WITNESS.

12 **MR. FLOYD:** YOUR HONOR, WE CALL FRAN HUMPHRIES.

13 FRANCIS A. HUMPHRIES, JR., AFTER BEING DULY
14 SWORN, TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION

16 BY MR. FLOYD:

17 Q. MR. HUMPHRIES, WOULD YOU STATE YOUR NAME FOR THE
18 RECORD?

19 A. IT'S FRANCIS ALLEN HUMPHRIES, JR.

20 Q. AND WHERE ARE YOU CURRENTLY EMPLOYED?

21 A. I'M THE CHIEF DEPUTY SOLICITOR IN THE FIFTEENTH
22 CIRCUIT.

23 Q. AND HOW LONG HAVE YOU BEEN DOING THAT?

24 A. SEVEN YEARS. ABOUT SEVEN YEARS.

25 Q. AND WERE YOU INVOLVED IN THE GARY TERRY CASE?

1 A. I WAS.

2 Q. AND WHAT WAS YOUR CAPACITY?

3 A. I WAS ORIGINALLY SECOND CHAIR, BUT AN ILLNESS WITH
4 THE SOLICITOR'S WIFE KEPT HIM AWAY OUT OF STATE AND I MOVED
5 TO FIRST CHAIR.

6 Q. OKAY. NOW, DURING THE INVESTIGATION OF THIS MATTER
7 DID ANYONE PRODUCE TO THE SOLICITOR'S OFFICE ANY PHOTOGRAPHS
8 OF GARY TERRY INSIDE URAI JACKSON'S HOUSE?

9 A. NOT TO MY KNOWLEDGE.

10 Q. DID ANYONE PRODUCE ANY PHOTOGRAPHS OF URAI JACKSON
11 SITTING ON GARY TERRY'S LAP?

12 A. NOT TO MY KNOWLEDGE.

13 Q. AND WOULD YOUR ANSWER BE THE SAME AS TO WHETHER OR
14 NOT YOU PRODUCED ANY SUCH PHOTOGRAPHS TO THE DEFENSE?

15 A. I DON'T RECALL ANY SUCH PHOTOGRAPHS. NOT HAVING
16 RECALLED THEM, I WOULDN'T HAVE PRODUCED THEM.

17 Q. WOULD YOU AGREE WITH ME HAD THEY BEEN DISCOVERED
18 THEY WOULD HAVE BEEN DISCOVERABLE TO THE DEFENSE?

19 A. I DIDN'T -- NOW, WE WERE AWARE - AND I DON'T KNOW
20 FROM WHAT SOURCE - THAT GARY TERRY HAD BEEN IN THE RESIDENCE
21 BEFORE, BUT I THINK THAT WAS IN CONNECTION WITH HER DAUGHTER,
22 I BELIEVE, OR SOME -- SOME CONNECTION THAT WAY, THAT HE WAS
23 FAMILIAR WITH THE HOUSE, BUT I DON'T RECALL ANY PHOTOGRAPHS
24 THAT WOULD HAVE DOCUMENTED THAT AND I CAN'T REMEMBER FROM
25 WHAT SOURCE I RECALL THAT.

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1 Q. NOW, BEFORE THE TRIAL YOU PRODUCED WITNESSES FOR A
2 JACKSON/DENNO HEARING IN CONNECTION WITH TWO STATEMENTS THAT
3 HE GAVE?

4 A. AT THE -- AT THE REQUEST OF THE DEFENSE WE DID GO
5 INTO A JACKSON VERSUS DENNO HEARING.

6 Q. DID THE DEFENDANT REQUEST THAT OR---

7 A. I BELIEVE THE DEFENSE REQUESTED THE DENNO HEARING.
8 IN ANY EVENT, WE INTENDED ON ELICITING THE STATEMENT IN THE
9 PENALTY PHASE, SO A DENNO HEARING WOULD HAVE HAD TO HAVE BEEN
10 HELD UNDER ANY CIRCUMSTANCES.

11 Q. WERE YOU SURPRISED AND -- OF COURSE, YOU KNOW WE
12 WERE DISCUSSING THE STATEMENT THAT WAS STATE'S EXHIBIT 68.

13 A. UH-HUH.

14 Q. SO YOU DID PLAN TO USE THIS STATEMENT DURING THE
15 TRIAL.

16 A. DURING THE PENALTY PHASE.

17 Q. YOU NEVER CONSIDERED USING IT IN THE GUILTY PHASE?

18 A. NO. WELL, LET ME SAY IT -- LET ME SAY IT THIS WAY:
19 WHEN -- JUST SO YOU UNDERSTAND A LITTLE BIT ABOUT THE WAY
20 CASES WERE PREPARED IN LEXINGTON COUNTY, TYPICALLY THE SECOND
21 CHAIR - AT THAT TIME WOULD BE EITHER ME OR DAYTON RIDDLE
22 ALONG WITH TOM CHASE WHO WORKED WITH US ON CAPITAL CASES -
23 WOULD PREPARE THE CASE UP TO A POINT AND THEN THE SOLICITOR
24 WOULD -- WOULD COME IN AT SOME LATER POINT AND WE'D TALK
25 ABOUT SPECIFIC TRIAL STRATEGIES, HOW TO PRESENT THE EVIDENCE,

1 THE ORDER OF WITNESSES, AND SO ON.

2 WE OBVIOUSLY WERE AWARE OF THE STATEMENT. THE
3 STATEMENT IS -- IT BASICALLY ATTEMPTS TO ESTABLISH A DEFENSE
4 AS TO ONE OR MORE OF THE CHARGES AND MITIGATE ONE CHARGE, THE
5 MURDER CHARGE, FROM MURDER TO POTENTIALLY A MANSLAUGHTER.
6 AND IN DISCUSSING ADMITTING THE STATEMENT, ALBEIT IT DOES
7 PLACE HIM THERE AND DOES -- DOES IMPLICATE HIM IN THE -- IN
8 THE DEATH OF MS. JACKSON, YOU KNOW, WE DECIDED STRATEGICALLY
9 THAT IT WAS NOT SOMETHING WE WANTED TO PUT UP IN THE CASE IN
10 CHIEF, AND IF THIS DEFENSE WAS TO BE BEFORE A JURY, WE WANTED
11 IT TO COME FROM THE DEFENDANT HIMSELF. SO THAT DECISION WAS
12 MADE FAIRLY EARLY ON.

13 Q. WELL, IF YOU WANTED IT TO COME FROM THE DEFENDANT,
14 WHY DID YOU FILE A MOTION IN LIMINE TO PREVENT THEM FROM
15 PUTTING THE STATEMENT IN?

16 A. OH, I DIDN'T WANT TO PUT -- DON'T MISUNDERSTAND ME.
17 I WANTED IT TO COME FROM THE DEFENDANT, HIM TESTIFYING, SO
18 I'D HAVE A RIGHT TO CROSS-EXAMINE.

19 Q. OKAY. DID THE FACT THAT -- WERE YOU SURPRISED WHEN
20 DEFENSE COUNSEL ADMITTED THERE WAS A CONFESSION IN THE
21 OPENING STATEMENT?

22 A. I RECALL SITTING AT COUNSEL TABLE WITH MR. CHASE,
23 AND WHEN I HEARD SOLICITOR STONE'S COMMENTS REGARDING A
24 CONFESSION AND A FALSE CONFESSION, I WAS SURPRISED. I DIDN'T
25 HAVE ANY PRIOR INDICATION FROM THE DEFENSE TEAM THAT THAT WAS

1 A TACTIC THEY WERE GOING TO TAKE IN THE CASE.

2 Q. DID THAT ERASE ANY DOUBT YOU MIGHT HAVE TO USE THE
3 STATEMENT?

4 A. I NEVER INTENDED TO USE THE STATEMENT; I THOUGHT I
5 SAID THAT.

6 Q. NEVER? NEVER?

7 A. AS A FINAL TRIAL STRATEGY WELL IN ADVANCE OF THE
8 TRIAL OF THE CASE, WE HAD DECIDED NOT TO USE THE STATEMENT IN
9 THE GUILT PHASE.

10 Q. DO YOU RECALL THE JURY SELECTION PROCESS?

11 A. NOT SPECIFICALLY. I RECALL THAT THERE WAS A JURY
12 SELECTION PROCESS.

13 Q. DO YOU RECALL THAT THERE WAS ONLY ONE POTENTIAL
14 BLACK JUROR?

15 A. I DON'T HAVE ANY SPECIFIC RECOLLECTION OF THAT.

16 Q. CAN YOU TELL US THEN -- DO YOU HAVE ANY RECOLLECTION
17 OF WHY YOU STRUCK THE ONLY POTENTIAL BLACK JUROR?

18 A. I CAN'T TELL YOU. IT WAS USUALLY MY PRACTICE - AND
19 I CAN'T TELL YOU IF I DID IT IN THIS CASE - BUT TYPICALLY AT
20 THE END OF THE JURY SELECTION PROCESS EVEN IN THE ABSENCE OF
21 ANY---

22 Q. MR. HUMPHRIES, I APOLOGIZE. THAT WAS NOT THE ONLY
23 POTENTIAL BLACK JUROR---

24 A. OKAY. THAT'S FINE.

25 Q. I APOLOGIZE FOR SAYING THAT.

1 A. CERTAINLY. WHAT I WAS -- WHAT I BEGAN TO SAY WAS IT
2 WAS A PRACTICE -- AND I'M NOT CERTAIN IF I DID IT IN THIS
3 CASE. BUT IT IS -- IT IS A PRACTICE OF MINE AND WHICH I
4 LEARNED OBVIOUSLY FROM THE SOLICITOR, SOLICITOR MYERS, EVEN
5 IF IN THE ABSENCE OF A BATSON MOTION WE WOULD PROFFER OUR
6 REASONS FOR OUR STRIKES EVEN IN THE ABSENCE OF A BATSON
7 MOTION AND I -- AND I MAY HAVE DONE THAT IN THIS CASE. I
8 USUALLY DO.

9 Q. CAN YOU TELL THE COURT WHY YOU ONLY STRUCK WOMEN
10 JURORS?

11 A. I CAN'T TELL YOU SPECIFICALLY WHY, NO. I CAN TELL
12 YOU THAT THERE WAS CERTAINLY NOT ANY, YOU KNOW, SYSTEMATIC
13 REASONING BEHIND IT. THIS WAS A HOME INVASION/BURGLARY/RAPE
14 OF A FEMALE, SO I -- YOU KNOW, I CERTAINLY WOULDN'T STRIKE
15 FEMALE JURORS AS A -- AS A PATTERN OR PRACTICE IN A CASE LIKE
16 THIS. THERE MUST HAVE BEEN SOMETHING ELSE ABOUT THOSE JURORS
17 THAT -- THAT I DIDN'T LIKE AS MUCH AS I LIKED OTHER JURORS.

18 Q. SO YOU DO NOT RECALL ANY SPECIFIC RATIONALE FOR
19 STRIKING GLENDA CLIFTON -- GLENDA CLIFTON.

20 A. I DON'T. WE'VE GOT -- YOU KNOW, THERE ARE NOTES IN
21 CONNECTION WITH THAT ON ALL OF THE JURORS, EVERY JUROR THAT
22 WE QUESTIONED, AND I SUPPOSE IF I WERE TO REVIEW ALL OF MY
23 NOTES IN REGARD TO THOSE JURORS I MIGHT BE ABLE TO ANSWER YOU
24 MORE SPECIFICALLY, BUT I CAN'T TELL YOU SITTING HERE TODAY
25 WHY I DECLINED TO PRESENT ANY ONE PARTICULAR JUROR.

1 Q. AND SO YOUR ANSWER WOULD BE THE SAME AS TO KAREN
2 MOORE?

3 A. YES.

4 Q. CHERYL KIRKPATRICK?

5 A. YES.

6 Q. MS. KISER?

7 A. YES.

8 Q. AND MS. LEAPHART WHO WAS THE BLACK FEMALE JUROR THAT
9 WAS STRUCK.

10 A. YES.

11 Q. SO YOU CAN'T THINK OF ANY REASON FOR STRIKING THOSE
12 JURORS.

13 A. NO. I MEAN, THAT'S NOT A FAIR STATEMENT. IT'S NOT
14 THAT I CAN'T THINK OF ANY REASON. I'M CERTAIN I HAD REASONS
15 FOR STRIKING THEM AT THE TIME, BUT IT'S BEEN SOME NINE YEARS
16 SINCE I TRIED THAT CASE AND I CAN'T RECALL SPECIFICALLY WHY I
17 CHOSE TO STRIKE THOSE JURORS AT THIS TIME. AGAIN, IF I HAD
18 MY NOTES IN FRONT OF ME, I MIGHT BE ABLE TO ANSWER YOUR
19 QUESTIONS BETTER.

20 Q. OF COURSE, THOSE NOTES ARE BEING WITHHELD FROM THE
21 DEFENSE, ARE THEY NOT?

22 A. I BELIEVE THAT THAT'S SOME OF THE INFORMATION THAT
23 THE COURT TERMED AS WORK PRODUCT, YES.

24 THE COURT: WELL, THEY'RE NOT BEING WITHHELD FROM
25 HIM FOR HIS -- IF HE WANTS TO REVIEW THEM OR IF YOU WANT HIM

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1 TO REVIEW THEM.

2 MR. FLOYD: WE WOULD ASK THAT THEY BE REVIEWED SO
3 THAT WE CAN CROSS-EXAMINE HIM ON THE POINTS, YOUR HONOR.

4 THE COURT: ALL RIGHT. IF WE TOOK A SHORT BREAK,
5 WOULD YOU BE ABLE TO GO OVER THERE AND ASK FOR THOSE NOTES
6 AND REVIEW THEM?

7 THE WITNESS: IF I COULD FIND OUT WHERE THEY ARE.
8 I'M SO LOST IN THIS COURTHOUSE; I CAN'T TELL WHERE THE
9 SOLICITOR'S OFFICE IS. THE BEST I CAN TELL: IT'S ON ALL
10 FOUR FLOORS.

11 THE COURT: ALL RIGHT.

12 THE WITNESS: I THINK MR. FRIER IS GOING TO BE ABLE
13 TO HELP US THERE.

14 THE COURT: DO YOU WANT TO DO THAT NOW OR DO YOU
15 WANT -- DO YOU WANT TO FINISH YOUR DIRECT?

16 MR. FLOYD: I CAN GO AHEAD AND FINISH BECAUSE WE DO
17 HAVE THE OTHER WITNESS COMING AT 4, THE DOCTOR.

18 THE COURT: OKAY. I THINK HE'S GONE TO FIND THE
19 NOTES, AND WHEN HE GETS BACK, WE'LL GIVE YOU A CHANCE TO
20 REVIEW THEM.

21 THE WITNESS: THANK YOU.

22 BY MR. FLOYD:

23 Q. DID YOU AT SOME POINT IN TIME IN YOUR TRIAL
24 PREPARATION DECIDE THAT YOU WERE GOING TO USE THE STATEMENT
25 OF MR. TERRY?

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1 A. WE KNEW WE WERE GOING TO USE IT IN THE PENALTY
2 PHASE.

3 Q. OKAY. BUT YOU NEVER CONSIDERED USING IT IN THE
4 GUILT PHASE?

5 A. AS A FINAL TRIAL STRATEGY WELL IN ADVANCE OF THE
6 TRIAL OF THE CASE, WE - AND I USE THE COLLECTIVE WE -
7 SOLICITOR MYERS, MYSELF, AND TOM CHASE AFTER DISCUSSION
8 DETERMINED THAT WE WOULD NOT USE THE STATEMENT. IT WAS -- I
9 MEAN, IT WAS EXCULPATORY TO A LARGE EXTENT AS TO THE CRIMINAL
10 SEXUAL CONDUCT, PERHAPS EVEN THE HOME INVASION, AND IT
11 MITIGATED THE MURDER FROM VOLUN -- FROM MURDER TO VOLUNTARY.
12 THAT'S BASICALLY PUTTING THE DEFENDANT'S DEFENSE IN WITHOUT
13 HIM HAVING TO TAKE THE STAND. I'M NOT IN THE PRACTICE OF
14 DOING THAT. I DON'T DO THAT NOW. AND I DIDN'T INTEND TO DO
15 IT IN THAT CASE.

16 Q. WAS YOUR COMMENT ON YOUR ARGUMENT TO THE COURT ON
17 PAGE 1374 THAT THE STATE IS JUST CHARGED WITH PRESENTING
18 EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT? IS THAT YOUR
19 STRATEGY?

20 A. I'M SORRY?

21 Q. THAT THE STATE IS ONLY CHARGED WITH PRESENTING
22 EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT? WAS THAT YOUR
23 THEORY OR YOUR OUTLOOK ON THE CASE?

24 A. IF YOU'RE ASKING ME IF IT'S MY THEORY THAT I HAVE TO
25 PUT IN EVERY BIT OF EVIDENCE AS A PROSECUTOR THAT COULD

1 LOGICALLY BEAR ON THE CASE, THAT'S NOT MY THEORY, NO.

2 Q. WELL, IS IT YOUR THEORY THAT THE SOLICITOR IS JUST
3 SUPPOSED TO GET A CONVICTION WHICHEVER -- USING WHATEVER
4 EVIDENCE HE CAN?

5 A. NO, SIR. THIS IS -- THIS IS EVIDENCE THAT THE
6 DEFENDANT HAD IN HIS POSSESSION AND HAD EVERY RIGHT TO
7 PRESENT. I DIDN'T -- YOU KNOW, MY NOT PRESENTING HIS
8 STATEMENT DIDN'T -- DIDN'T IMPEDE HIM FROM ASSERTING A
9 DEFENSE. THAT WAS HIS -- HIS ELECTION.

10 MR. FLOYD: YOUR HONOR, THAT'S ALL WE HAVE OF HIM
11 RIGHT NOW EXCEPT FOR THE QUESTIONS ABOUT THE JURY SELECTION.

12 THE COURT: DO YOU MIND IF THE STATE GOES AHEAD AND
13 CROSS-EXAMINES HIM WHILE WE WAIT?

14 MR. FLOYD: NO PROBLEM, YOUR HONOR.

15 MR. SALTER: WITH THE EXCEPTION OF QUESTIONS DURING
16 THE -- CONCERNING THE JURY SELECTION OBVIOUSLY, YOUR HONOR.

17 THE COURT: YES, SIR.

18 CROSS-EXAMINATION

19 BY MR. SALTER:

20 Q. REAL QUICKLY. I MISSED -- HOW LONG HAD YOU BEEN IN
21 THE ELEVENTH CIRCUIT SOLICITOR'S OFFICE AT THE TIME OF THIS
22 CASE?

23 A. I BEGAN THERE IN '92 OR 3. THREE MAYBE. I DON'T
24 RECALL EXACTLY WHEN, BUT IT WAS '92 OR 3.

25 Q. SO FOUR OR FIVE YEARS.

1 A. UH-HUH.

2 Q. AND YOU WERE ORIGINALLY SECOND CHAIR?

3 A. YES, WHICH IS -- I MEAN, THAT'S BASICALLY THE WAY
4 ALL OF THE CAPITAL CASES AT THE TIME WORKED WITH THE
5 SOLICITOR'S OFFICE IN THE ELEVENTH CIRCUIT. SOLICITOR MYERS
6 WAS ALWAYS FIRST CHAIR, AND EITHER DAYTON RIDDLE OR MYSELF AT
7 THAT TIME ACTED AS SECOND CHAIR.

8 Q. AND THEN LATER MR. CHASE.

9 A. CORRECT.

10 Q. OKAY. AND IT'S FAIR TO SAY THAT NO MATTER WHAT
11 EFFORTS YOU MADE, IN TERMS OF GATHERING INFORMATION AND
12 WORKING THE CASE UP, THAT ULTIMATELY ANY DECISIONS WOULD HAVE
13 TO BE MADE WITH HIS APPROVAL AS WELL.

14 A. NO QUESTION.

15 Q. AND Y'ALL MADE THE DECISION IN THIS INSTANCE TO NOT
16 INTRODUCE THE MAY 24, 1995, STATEMENT IN THE GUILT PHASE;
17 CORRECT?

18 A. CORRECT.

19 Q. DID YOU SEE A REAL NEED FOR IT?

20 A. NO. I THOUGHT IT -- ACTUALLY, IT WAS CONTRA TO --
21 TO MOST OF WHAT WE WERE TRYING TO ESTABLISH IN THE CASE. IT
22 WAS BLATANTLY SELF-SERVING.

23 Q. ALL RIGHT. AND YOU TOUCHED ON THIS: MR. TERRY HAD
24 THE OPPORTUNITY TO TESTIFY, DIDN'T HE?

25 A. NO QUESTION.

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1 Q. AND AT---

2 A. AND THAT WAS A POINT THAT JUDGE CLARY MADE VERY
3 CLEAR, THAT -- THAT THE COURT WAS NOT PROHIBITING THE
4 DEFENDANT FROM ASSERTING THAT DEFENSE. HE WOULD JUST HAVE TO
5 DO IT BASED ON HIS OWN TESTIMONY AND NOT THROUGH A SELF-
6 SERVING STATEMENT.

7 Q. ALL RIGHT. DID YOU -- DID EITHER YOU OR MR. CHASE,
8 EXCUSE ME, MAKE ANY AFFIRMATIVE REPRESENTATION THAT YOU
9 INTENDED TO REPRESENT -- TO INTRODUCE THIS IN THE GUILT
10 PHASE?

11 A. NO.

12 Q. NO?

13 A. NO.

14 Q. SO WHATEVER CONCLUSIONS MR. STONE DREW, HE DREW FROM
15 -- ON HIS OWN.

16 A. YES. AND IT APPEARED TO US THAT HE HAD DECIDED --
17 YOU KNOW, THAT'S A -- WHEN HE CAME OUT WITH HIS OPENING
18 STATEMENT TALKING ABOUT A CONFESSION AND A FALSE CONFESSION,
19 OBVIOUSLY IT APPEARED TO US THAT THAT HAD BEEN A TRIAL TACTIC
20 HE HAD DECIDED ON SOMETIME BEFORE THEN WHICH HE STILL, QUITE
21 FRANKLY, EVEN AFTER TELLING -- SAYING THAT IN OPENING
22 ARGUMENT COULD HAVE ASSERTED IF MR. TERRY HAD TAKEN THE
23 STAND.

24 Q. ALL RIGHT. AND IS IT FAIR TO SAY THAT, UNLESS YOU
25 ABSOLUTELY HAVE TO, YOU LIKE TO HAVE YOUR TRIAL STRATEGY IN

1 HAND BEFORE -- BEFORE YOU WALK INTO THE COURTROOM?

2 A. NO QUESTION, PARTICULARLY IN CAPITAL CASES. WELL,
3 IN ANY -- IN ANY CASE. I MEAN, THAT'S JUST THE WAY I TRY
4 CASES. I DON'T -- I DON'T WALK IN---

5 Q. RIGHT.

6 A. ---AND FIGURE OUT WHAT I'M GOING TO DO ONCE I GET
7 THERE.

8 Q. WELL, YOU REPEATEDLY INDICATED THAT Y'ALL MADE THE
9 DECISION IN THIS INSTANCE BEFORE -- BEFORE THE TRIAL.

10 A. NO QUESTION. THERE WAS A GREAT DEAL OF DISCUSSION
11 ABOUT IT. I CAN TELL YOU AS A -- AS A YOUNGER PROSECUTOR,
12 WHEN YOU'VE GOT A STATEMENT WHICH IN CERTAIN RESPECTS
13 IMPLICATES THE DEFENDANT, IT REALLY IS SORT OF A FRIGHTENING
14 THING NOT TO PUT IT IN EVEN IF IT HAS THINGS THAT EXCULPATE
15 THE DEFENDANT. AND, QUITE FRANKLY, AT THAT POINT THAT WAS
16 SOMETHING THAT SOLICITOR MYERS SORT OF GOT ME OVER THE HUMP
17 ON. I CAN TELL YOU AS A PRACTICAL MATTER IF I CAN ESTABLISH
18 A CRIMINAL CASE AND MEET THE ELEMENTS OF THE OFFENSE WITHOUT
19 PUTTING IN A SELF-SERVING STATEMENT OF THE DEFENDANT, THAT'S
20 WHAT I'VE DONE SINCE THAT DAY.

21 Q. ALL RIGHT. THAT'S FAIR. NOW, YOU WERE ASKED ABOUT
22 SOME PHOTOGRAPHS. DO YOU RECALL EVER SEEING ANY PHOTOGRAPHS
23 OF MR. TERRY WITH THE VICTIM?

24 A. NO. I DON'T RECALL.

25 Q. OKAY.

2600

1 A. HUH-UH.

2 Q. HAD Y'ALL BEEN PROVIDED WITH SUCH PHOTOGRAPHS, WOULD
3 YOU HAVE DISCLOSED THEM?

4 A. I FEEL SURE WE WOULD HAVE. WE GIVE THEM EVERY
5 PHOTOGRAPH. I MEAN, IF THERE'S A PHOTOGRAPH IN OUR FILE --
6 AND THE ONLY EXCEPTION -- WELL, THERE'S NOT REALLY AN
7 EXCEPTION TO THAT. THERE ARE -- THERE ARE ALWAYS A SERIES OF
8 PHOTOGRAPHS IN CONNECTION WITH A PENALTY PHASE, THE VICTIM
9 IMPACT PORTION OF THE CASE, THAT WE DON'T PROVIDE UNTIL VERY
10 CLOSE TO THE TIME WE PRESENT THE VICTIM IMPACT TESTIMONY, BUT
11 WE GIVE THEM AT THAT TIME AN OPPORTUNITY TO REVIEW THOSE
12 PHOTOGRAPHS, AND THEY TYPICALLY COME TO US VERY LATE IN THE
13 PROCESS AFTER WE'VE ACTUALLY STARTED THE CASE.

14 Q. THAT WOULD BE SIMILAR TO THE PHOTOGRAPHS THAT A
15 DEFENDANT WOULD WANT TO INTRODUCE IN MITIGATION.

16 A. CERTAINLY. YOU KNOW, FAMILY AND FRIENDS WITH THE
17 VICTIM.

18 Q. ALL RIGHT.

19 A. THE VICTIM IN LIFE.

20 MR. SALTER: ALL RIGHT, SIR. I DON'T BELIEVE I HAVE
21 ANYTHING FURTHER AT THIS POINT.

22 THE COURT: ALL RIGHT. IS THERE A CONFERENCE ROOM
23 NEARBY? WHERE DO Y'ALL WANT TO GO? HE'S GOT THE STUFF, SO
24 Y'ALL JUST GO WHEREVER YOU WANT TO DO -- WANT TO GO AND
25 REVIEW THAT.

2801

1 **THE WITNESS:** JUDGE, IF I COULD HAVE A LIST OF THOSE
2 JURORS THAT HE WANTS ME TO BE ABLE TO RESPOND TO, I CAN JUST
3 PULL THEM OUT.

4 **THE COURT:** ALL RIGHT.

5 **THE WITNESS:** AND LET ME SAY -- WELL, LET ME JUST
6 LOOK AND SEE WHAT WE'VE GOT. I DON'T KNOW THAT WE'VE SAVED
7 ALL OF THE JUROR NOTES. IT MAY BE THAT I JUST SAVED THE
8 JUROR NOTES FROM THE ONES THAT WERE ACTUALLY SEATED, AND I
9 SAY I. OBVIOUSLY I HAVEN'T BEEN HERE -- I HAVEN'T WORKED
10 HERE IN THE OFFICE IN SOME TIME.

11 **THE COURT:** DO YOU MIND JUST BRINGING IT UP HERE AND
12 LET HIM LOOK THROUGH IT WHILE THE -- HE CAN ASK WHO THE
13 JURORS ARE?

14 (MR. HUBBARD HANDS A BOX OF DOCUMENTS TO THE
15 WITNESS.)

16 **THE COURT:** THANK YOU, RICK. I TELL YOU WHAT.
17 WHILE HE'S DOING THAT, THERE'S ONE MORE...

18 **THE WITNESS:** ALL RIGHT. IF YOU'LL JUST TELL ME THE
19 JUROR NUMBERS OR EITHER WHEN THEY WERE DRAWN OR WHEN THEY
20 WERE QUALIFIED, I'LL LOOK THROUGH AND SEE WHAT I'VE GOT.

21 **MS. KIMBROUGH:** I CAN GIVE YOU THOSE PAGE NUMBERS.

22 **THE WITNESS:** THE PAGE NUMBERS?

23 **MS. KIMBROUGH:** IF YOU WANT TO REVIEW THE
24 TRANSCRIPT.

25 **THE WITNESS:** LET ME JUST -- THIS IS GOING TO BE --

2302

1 ACTUALLY WHAT I'VE WRITTEN ON THE JUROR INFORMATION SHEETS IS
2 PROBABLY GOING TO BE MUCH MORE...

3 THE COURT: WHAT'S THE NAME OF THE JURORS?

4 MS. KIMBROUGH: OKAY. GLENDA CLIFTON, KAREN MOORE.

5 THE WITNESS: HANG ON JUST A SECOND BECAUSE THEY'RE
6 NOT -- THEY'VE ALREADY -- DO YOU KNOW AT WHAT POINT THEY WERE
7 QUALIFIED? I'VE GOT THEM IN ORDER. THAT'S FINE. LET ME --
8 LET ME JUST LOOK.

9 MS. KIMBROUGH: GLENDA CLIFTON WAS QUALIFIED FIRST.

10 THE WITNESS: I DON'T HAVE THAT ONE FOR SOME REASON
11 UNLESS IT'S IN THE BACK. HANG ON A SECOND.

12 MS. KIMBROUGH: I CAN GIVE YOU HER NUMBER IF YOU
13 WOULD LIKE.

14 THE WITNESS: I CAN TELL YOU THAT FOR WHATEVER
15 REASON I START AT SECOND QUALIFIED, AND I DON'T KNOW WHERE
16 THE FIRST ONE IS.

17 MS. KIMBROUGH: OKAY. THE SECOND ONE WAS CHARLES
18 MOORE.

19 THE WITNESS: YEP. I'VE GOT THAT ONE.

20 MS. KIMBROUGH: OKAY.

21 THE WITNESS: IS THAT AN ISSUE?

22 MS. KIMBROUGH: NO.

23 THE WITNESS: OKAY.

24 MS. KIMBROUGH: THE FIRST PERSON SEATED WAS NORWOOD
25 BROWN. THAT'S THE THIRD PERSON QUALIFIED.

2603

1 THE WITNESS: GOT THAT ONE.

2 MS. KIMBROUGH: THE FOURTH IS GEORGIA MILLER.

3 THE WITNESS: GOT THAT ONE.

4 MS. KIMBROUGH: THE FIFTH IS K.T. REEVES.

5 THE WITNESS: I DON'T HAVE THAT ONE.

6 MS. KIMBROUGH: OKAY. SHE WAS SEATED.

7 THE WITNESS: OKAY.

8 MS. KIMBROUGH: THE NEXT STATE STRIKE WOULD BE KAREN
9 MOORE, AND SHE WAS NUMBER 11, THE 11TH PERSON QUALIFIED,
10 JUROR NUMBER 170.

11 THE WITNESS: I DON'T HAVE THAT ONE.

12 MR. SALTER: YOUR HONOR, IF I MIGHT INTERRUPT. I
13 THINK PART OF THE PROBLEM MAY BE THAT IT WAS MY UNDERSTANDING
14 THAT MR. CHASE, WHO WAS CO-COUNSEL, REVIEWED THE FILE LAST
15 WEEK WITH RESPECT TO LOOKING FOR INFORMATION CONCERNING
16 JURORS AND WHY JURORS WERE STRUCK. IT MAY BE THAT HE PULLED
17 THAT INFORMATION. I DO NOT KNOW AND THAT IT'S THERE
18 ELSEWHERE IN THE...

19 THE WITNESS: I DON'T KNOW IF THERE'S ANY RHYME OR
20 REASON TO WHY I'VE GOT -- AND WHEN I SAY I'VE GOT, THESE ARE
21 THE ONES THAT OBVIOUSLY THE OFFICE STILL HAD WHEN I GOT HERE
22 THIS MORNING. I'VE GOT THE SECOND QUALIFIED, THIRD, FOURTH,
23 SIXTH, SEVENTH, NINTH, 13TH, 14TH, 15TH, 17TH, 18TH, 19TH,
24 20TH, 21ST, 22ND, 23RD, 24, 25, 26, 27, 30, 31, 33 -- WELL,
25 32 AND 33. SO I DON'T KNOW -- I DON'T KNOW WHAT GROUP OF

2604

1 JURORS THAT IS.

2 MR. FLOYD: MAYBE THIS WILL BE SIMPLER.

3 THE WITNESS: I'LL TRY.

4 REDIRECT EXAMINATION

5 BY MR. FLOYD:

6 Q. YOU NOTICE THAT THESE ARE THE ONES YOU STRUCK: ONE,
7 TWO, THREE, FOUR, FIVE.

8 A. OKAY.

9 Q. AND DO YOU HAVE ANY INFORMATION ON EITHER ONE OF
10 THESE -- EITHER ONE OF THOSE?

11 A. ALL RIGHT. HANG ON A SECOND. ALL RIGHT. I DON'T
12 HAVE CLIFTON. LET'S SEE. NO, NOT A ONE. TYPICALLY I WOULD
13 HAVE -- I WOULD HAVE KEPT THE ONES THAT WE SEATED AND THE
14 ONES THAT WE STRUCK---

15 Q. OKAY.

16 A. ---FOR JUST -- JUST FOR THIS PURPOSE, BUT I DON'T
17 KNOW WHERE THOSE MIGHT BE.

18 MR. HUBBARD: I'LL HAND THIS UP TO YOU. I DON'T
19 KNOW IF THIS WILL HELP OR NOT.

20 THE WITNESS: HERE WE GO. HANG ON.

21 BY MR. FLOYD:

22 Q. DO YOU NEED IT BACK?

23 A. HANG ON JUST A SECOND. THIS MIGHT -- THIS MIGHT
24 HELP. YEAH. HERE WE GO. I THINK -- I THINK -- I THINK
25 WE'RE IN THE MONEY NOW. ALL RIGHT. GLENDA CLIFTON. THAT

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1 WAS ONE; RIGHT?

2 Q. YEAH.

3 A. KAREN MOORE, KIRKPATRICK, KISER, AND LEAPHART. YEP,
4 GOT ALL THOSE.

5 Q. OKAY.

6 A. THEY WERE IN THE INFORMATION WITH THE ONES THAT
7 WE -- I TOLD YOU I KEPT THEM. I JUST DIDN'T KNOW WHERE THEY
8 WERE. ALL RIGHT. AS TO GLENDA CLIFTON, SHE WAS -- HER
9 ORIGINAL JUROR NUMBER WAS 50. SHE WAS THE FIRST DRAWN, FIRST
10 QUALIFIED. I NOTED THAT THERE WAS A QUESTION ABOUT WHETHER
11 OR NOT HER SON HAD BEEN IN P.T.I. WHAT I DO IS I'LL
12 INDICATE -- AND I DO THIS IN EVERY CASE WITH EVERY JUROR. I
13 PUT A CATEGORY: EITHER CATEGORY ONE, TWO, OR THREE. BUT IN
14 HER CASE I HAD A CATEGORY THREE WITH A QUESTION MARK BESIDE
15 IT.

16 AS TO THE ISSUE OF THE DEATH PENALTY, SHE HESITATED,
17 AND SHE SAID, "I THINK I COULD. THAT'S A HARD THING." WHEN
18 MS. FULLWOOD TALKED WITH HER, SHE SAID, "I FEEL LIKE I COULD.
19 DEPENDS ON THE FACTS AND CIRCUMSTANCES." SHE HAD NOT
20 DISCUSSED THE DEATH PENALTY IN THE PAST. SHE -- I'VE GOT
21 SOME NOTES HERE ABOUT PSYCHIATRISTS, MENTALITY, D.N.A.
22 TESTING. I DON'T KNOW IF MS.---

23 THE COURT: LET ME -- LET ME POSE THIS QUESTION.
24 BECAUSE THE ACTUAL THOUGHT PROCESS OF THE LAWYER IN MAKING
25 THE DECISION TO EXERCISE A PEREMPTORY STRIKE AS TO THIS JUROR

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1 HAS BECOME AN ISSUE IN THIS CASE, THE -- IT SEEMS TO ME THAT
2 THE WORK PRODUCT PROTECTION FOR THESE PARTICULAR DOCUMENTS
3 WOULD -- WOULD NO LONGER RESTRICT THEIR DISCLOSURE TO THE
4 APPLICANT BECAUSE THE VERY -- THE VERY ISSUE IN THE CASE AS
5 TO THESE JURORS IS EXACTLY WHY YOU'RE ASKING ME NOT TO
6 REQUIRE THOSE DOCUMENTS TO BE PRODUCED, AND THAT'S WHY HE
7 DECIDED NOT TO STRIKE THAT JUROR. SO IS THERE ANY OPPOSITION
8 TO GOING AHEAD AND PRODUCING TO THE APPLICANT THE INFORMATION
9 THAT I HAD PREVIOUSLY ORDERED NOT TO BE PRODUCED AS TO THE
10 JURORS WHOSE STRIKES THEY CHALLENGED? FROM THE SOLICITOR'S
11 OFFICE?

12 MR. HUBBARD: ME, YOUR HONOR? YOUR HONOR, I'LL GO
13 WITH THE COURT'S DISCRETION. I UNDERSTAND WHAT YOUR HONOR IS
14 SAYING. I GUESS MY ONLY CONCERN IS STILL FEELING FREE ENOUGH
15 TO MAKE THOSE NOTES IN THAT -- TO RECORD MY THOUGHT PROCESSES
16 AS A PROSECUTOR WHILE I'M SITTING IN ONE OF THESE CASES.

17 THE COURT: YEAH, BUT I -- AND I CERTAINLY
18 UNDERSTAND THAT, BUT WHEN IT BECOMES -- THIS IS PERHAPS
19 UNIQUE BECAUSE IF THE DEFENDANT AT THE TRIAL HAD MADE A
20 BATSON CHALLENGE, THEN IT WOULD HAVE BEEN NECESSARY FOR THE
21 LAWYER AT THAT TIME TO DISCLOSE TO JUDGE CLARY THE REASONS
22 WHY THEY MADE THE CHOICE TO STRIKE THOSE JURORS SO THAT JUDGE
23 CLARY COULD DETERMINE WHETHER OR NOT THOSE WERE RACE OR
24 GENDER-NEUTRAL REASONS.

25 MR. HUBBARD: RIGHT.

1 **THE COURT:** AND SO AT THAT TIME THE WORK PRODUCT AS
2 TO THAT THOUGHT PROCESS WOULD HAVE BEEN ELIMINATED, AND HERE
3 WE ARE NOW. THE WORK PRODUCT THAT THE -- THE RIGHT THAT THE
4 LAWYER HAS TO PROTECT THAT PARTICULAR THOUGHT PROCESS IS NOT
5 PRESENT ANY LONGER BECAUSE HE'S SUBJECT TO INQUIRY AND
6 EXAMINATION AND CROSS-EXAMINATION AS TO WHY HE DID WHAT HE
7 DID, AND SO I DON'T SEE, WITH THAT BEING TRUE, WHY THE
8 PROTECTION SHOULD -- SHOULD REMAIN IN PLACE ANY LONGER AS TO
9 THOSE JURORS. NOW, I DON'T THINK THAT PUTS -- I DON'T THINK
10 THAT PUTS YOUR LAWYERS OR ANY LAWYERS IN A COMPROMISING
11 POSITION BECAUSE OF THE FACT THAT THAT THOUGHT PROCESS IS
12 ALWAYS SUBJECT TO REVIEW BY THE COURT IF THERE'S A BATSON
13 CHALLENGE MADE. SO I'M GOING TO GO AHEAD AND ORDER THAT
14 THOSE PARTICULAR DOCUMENTS BE PRODUCED.

15 **THE WITNESS:** I WAS JUST LOOKING TO SEEING IF I'D
16 WRITTEN ANYTHING UGLY IN HERE.

17 **THE COURT:** ALL RIGHT.

18 **THE WITNESS:** ON THESE PARTICULAR FIVE I DID NOT.

19 **THE COURT:** AND WHY DON'T WE -- WE'LL JUST -- WE'LL
20 TAKE A SHORT BREAK TO ALLOW THOSE DOCUMENTS TO BE HANDED OVER
21 AND FOR YOU TO REVIEW THEM BEFORE YOU CONTINUE WITH YOUR
22 EXAMINATION OF MR. HUMPHRIES.

23 **MR. FLOYD:** OKAY. THANK YOU, YOUR HONOR.

24 **THE COURT:** AND WHAT DID YOU FIND OUT OR WHAT -- OR
25 HOW DID YOU SOLVE THE PROBLEM, HOPEFULLY IS THE QUESTION?

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1 **MS. BROWN:** WHAT I FOUND OUT FIRST, YOUR HONOR: WE
2 HAVE TEMPORARY HOUSING SET UP AT LEXINGTON COUNTY. SERGEANT
3 ANDERSON HAS ARRANGED THAT. WE DO NOT HAVE AN ORDER FOR
4 TRANSPORTATION FOR TOMORROW MORNING. WE'RE WORKING ON THAT
5 RIGHT NOW. IT MAY BE THAT LEXINGTON COUNTY WOULD REQUIRE AN
6 ORDER FROM YOU TO BE TAKEN OVER THERE TONIGHT TO MAKE SURE
7 TRANSPORTATION IS AVAILABLE.

8 **THE COURT:** WELL, YOU'VE SPOKEN WITH SOMEBODY AT THE
9 LEXINGTON COUNTY DETENTION CENTER WHO HAS THE AUTHORITY TO
10 DECIDE TO HOLD HIM AND THEY SAY THAT THEY CAN?

11 **MS. BROWN:** A SERGEANT ANDERSON HAS MADE
12 ARRANGEMENTS FROM S.C.D.C. FOR TEMPORARY HOUSING. THAT'S
13 WHAT THEY'VE TERMED IT - TEMPORARY HOUSING - AND TO TAKE TO
14 BOOKING, BUT WE DON'T HAVE AN ORDER FOR TRANSPORTATION
15 TOMORROW MORNING AND THAT'S A PROBLEM---

16 **THE COURT:** HOW DOES -- DOES THAT SOUND RIGHT?

17 **LEXINGTON COUNTY OFFICER:** GO AHEAD. SHE'S BACK
18 THERE SO... SHE WAS CHECKING ON IT THIS MORNING, BUT WE HAVE
19 TO GO THROUGH ALL KIND OF CHANNELS TO BE ABLE TO ACCEPT WHAT
20 YOU HAVE.

21 **THE COURT:** OKAY.

22 **LEXINGTON COUNTY OFFICER:** I CAN DOUBLE-CHECK TO BE
23 SURE.

24 **THE COURT:** HOW ABOUT CHECK AND SEE WHAT ELSE, IF
25 ANYTHING, I NEED TO DO.

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1 LEXINGTON COUNTY OFFICER: OKAY.

2 THE COURT: AND THAT'S TO TAKE HIM, STARTING NOW,
3 AND HOLD HIM UNTIL THE TRIAL IS OVER.

4 MR. HUBBARD: YOUR HONOR, THEY'RE MAKING A CALL
5 RIGHT NOW. I THINK THAT'S SOMETHING THEY CAN WORK OUT PRETTY
6 QUICK. THE LIEUTENANT JUST STEPPED OUT TO MAKE A CALL.

7 THE COURT: OKAY. WELL, THEN THAT SOUNDS LIKE
8 Y'ALL -- Y'ALL CHECK WITH THE DETENTION FOLKS BACK THERE AND
9 MAKE SURE, BUT IT SOUNDS LIKE Y'ALL CAN GO. AND I'M SORRY
10 FOR Y'ALL BEING KEPT HERE ALL DAY UNNECESSARILY.

11 S.C.D.C. OFFICER: THAT'S OKAY.

12 THE WITNESS: DO Y'ALL NEED HELP? MAY I STEP OFF
13 THE STAND?

14 THE COURT: SURE. YES, SIR.

15 (PAUSE IN PROCEEDINGS WHILE THE ATTORNEYS AND THE
16 WITNESS LOOK OVER DOCUMENTS.)

17 MR. FRIER: MAY I APPROACH?

18 THE COURT: YES, SIR.

19 (A BENCH CONFERENCE TAKES PLACE BETWEEN THE COURT
20 AND SCOTTIE FRIER.)

21 THE COURT: I JUST NEED TO DO AN ORDER; RIGHT?

22 S.C.D.C. OFFICER: YES, SIR.

23 THE COURT: ALL RIGHT. I'M GOING TO DO IT RIGHT
24 NOW. Y'ALL CAN PROCEED. I THINK I CAN LISTEN AND DO THIS
25 SMALL TASK WHILE -- AT THE SAME TIME. WHAT IS HIS I.D.

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1 NUMBER? DO Y'ALL HAVE THAT HANDY?

2 MR. TERRY: 5054. 5054.

3 THE COURT: ALL RIGHT. WHAT'S THE CASE NUMBER HERE?

4 MR. SALTER: YOUR HONOR, THE CASE NUMBER IS 2000 --
5 2000-CP-32-3470.

6 THE COURT: 3470?

7 MR. SALTER: YES, SIR, YOUR HONOR.

8 THE COURT: OKAY. IF Y'ALL ARE READY TO PROCEED,
9 YOU CAN, BUT IF YOU'RE STILL---

10 MR. FLOYD: OH, THANK YOU, YOUR HONOR.

11 THE COURT: ---DIGESTING THAT INFORMATION, YOU CAN
12 CONTINUE.

13 MR. FLOYD: YOUR HONOR, IN CONNECTION WITH THIS
14 POINT, IT'S DIFFICULT TO DO AN IN-DEPTH ANALYSIS UNLESS WE
15 WOULD ALSO BE PRODUCED THE NOTES ON THE 12 WHO WERE SELECTED
16 BECAUSE THEY'RE JUST HANDWRITTEN NOTES BY MR. HUMPHRIES ON
17 HIS REACTIONS AS TO WHETHER THESE PEOPLE WERE UNUSUAL OR
18 DEATH-PENALTY RELUCTANT AND THE WAY THEY DRESSED AND SOME
19 THINGS LIKE THAT. FOR EXAMPLE, THERE WAS A WHITE MALE, MR.
20 JUMPER, AND HIS COMMENTS IN HIS QUESTIONING WAS THAT IT WOULD
21 BE VERY HARD FOR HIM TO GIVE THE DEATH PENALTY AND HE DIDN'T
22 WANT TO SERVE BECAUSE IT WOULD BE A WORK HARDSHIP FOR HIM,
23 YET HE WAS SELECTED.

24 THE COURT: WELL, I DON'T -- I DON'T THINK THE SAME
25 ANALYSIS APPLIES TO THOSE JURORS WHO -- WHO WERE SELECTED AS

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1 FAR AS THE -- AS FAR AS THE WORK PRODUCT IS CONCERNED BECAUSE
2 IF -- IF WE HAD -- IF THERE HAD BEEN A BATSON CHALLENGE, THEN
3 IT WOULD HAVE BEEN -- IT WOULD HAVE GONE IN THREE STEPS. THE
4 STATE WOULD HAVE HAD TO IDENTIFY RACE AND GENDER-NEUTRAL
5 REASONS, AND THAT'S WHEN THIS INFORMATION THAT WE NOW -- WHAT
6 WE LATER SAID WAS WORK PRODUCT WOULD HAVE HAD TO HAVE BEEN
7 REVEALED. THEN, SECONDLY, THE JUDGE WOULD DETERMINE WHETHER
8 OR NOT THE -- THEY WERE RACE-NEUTRAL, AND IF THEY WERE -- IF
9 THEY WERE -- IF THEY WERE RACE-NEUTRAL, THEN IT WOULD BE UP
10 TO THE DEFENDANT TO PRODUCE EVIDENCE TO PROVE THAT THE
11 REASONS GIVEN WERE PRETEXTUAL. AND THAT WOULD BE BASED --
12 THE SECOND PART, THE COMPARISON PART OF THAT -- NOW, THAT --
13 YOU COULD DO THAT IN A VARIETY OF WAYS, AND ONE OF THE WAYS
14 THAT THE DEFENDANT COULD HAVE DONE THAT WAS TO -- WAS BY
15 COMPARING THOSE -- THAT INFORMATION KNOWN ABOUT THOSE WHO
16 WERE STRUCK TO THAT INFORMATION THAT WAS KNOWN ABOUT THOSE
17 WHO WEREN'T STRUCK. AND IN MAKING THAT COMPARISON, THE
18 DEFENDANT WOULD NOT HAVE HAD ACCESS TO ANYTHING THAT MR.
19 HUMPHRIES KNEW THAT HE WAS NOT REQUIRED TO DISCLOSE, AND SO
20 IF IT HAD BEEN DONE AT TRIAL, IT WOULD NOT HAVE INVOLVED
21 INFORMATION THAT HE -- THAT THE SOLICITOR'S OFFICE CONTINUES
22 TO CLAIM IS PROTECTED FROM DISCLOSURE BY WORK PRODUCT. IT
23 WOULD HAVE INVOLVED ONLY THOSE THINGS THAT HAD BEEN MADE
24 PUBLIC OR HAD BEEN KNOWN BY THE DEFENSE THROUGH THEIR OWN
25 JURY INVESTIGATION. SO I DON'T THINK THE ANALYSIS IS THE

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1 SAME, AND I'M NOT INCLINED TO REQUIRE THEM TO PRODUCE
2 ANYTHING MORE.

3 MR. FLOYD: ALL RIGHT. THANK YOU, YOUR HONOR.

4 REDIRECT EXAMINATION (RESUMED)

5 BY MR. FLOYD:

6 Q. MR. HUMPHRIES?

7 A. YES, SIR.

8 Q. CAN YOU TELL US WHY YOU STRUCK GLENDA CLIFTON?

9 A. I CONSIDERED HER A MARGINAL JUROR IN TERMS OF
10 QUALIFICATION. AS I SAID BEFORE, I INDICATED SHE WAS A
11 CATEGORY THREE BUT PUT A QUESTION MARK BESIDE IT. WHEN
12 QUESTIONED ABOUT WHETHER OR NOT SHE COULD SIGN THE VERDICT
13 FORM FOR DEATH, I INDICATED THAT SHE COULD SIGN marginally.
14 THERE WAS -- THERE'S SOME NOTATIONS AS TO PSYCHIATRISTS,
15 MENTALITY, D.N.A. TESTING, ALL OF WHICH WOULD HAVE BEEN AT
16 ISSUE IN THE CASE THAT I FELT LIKE SHE MIGHT HAVE BEEN MORE
17 INFLUENCED BY, AND SHE WAS HESITANT IN TALKING ABOUT WHETHER
18 OR NOT SHE COULD IMPOSE THE DEATH PENALTY AND SAID, "I THINK
19 I COULD. THAT'S A HARD THING." AND HER SON MAY HAVE BEEN IN
20 P.T.I., AND THAT WAS THE INITIAL INDICATION. BASED ON THAT,
21 COMPARED TO THE REST OF THE POOL AND THE OTHER ALTERNATIVES,
22 WE STRUCK HER.

23 Q. NOW, DID YOU SAY SOMETHING ABOUT HER ATTITUDE TOWARD
24 D.N.A. OR PSYCHIATRY OR SOMETHING LIKE THAT?

25 A. THE ONLY -- WHAT I'VE GOT HERE -- AND, YOU KNOW, I'M

2613

1 GOING BACK NINE YEARS, BUT WHAT I HAVE WRITTEN HERE
2 UNDERNEATH WHERE SHE WOULD HAVE BEEN EXAMINED BY MS.
3 FULLWOOD, I HAVE IN QUOTES "PSYCHIATRISTS" WITH A QUESTION
4 MARK, "MENTALITY" WITH A QUESTION MARK, AND "D.N.A. TESTING"
5 WITH A QUESTION MARK. I DON'T KNOW IF THAT WAS A NOTE AFTER
6 HEARING THE DISCUSSION WITH MS. FULLWOOD OR THE EXAMINATION
7 OF MS. FULLWOOD THAT I THOUGHT SHE MIGHT BE OVERLY IMPRESSED
8 WITH OR OVERLY TAKEN BY TESTIMONY BY OR REGARDING
9 PSYCHIATRISTS, MENTALITY, OR D.N.A. TESTING.

10 Q. WHAT HAP---

11 A. BUT, ANYWAY, THAT WAS---

12 Q. I'M SORRY. I DIDN'T WANT TO INTERRUPT.

13 A. NO, THAT'S FINE.

14 Q. DO YOU KNOW WHAT HAPPENED IS THAT MS. FULLWOOD MADE
15 A MOTION TO BE ALLOWED TO QUESTION CONCERNING HER ATTITUDE
16 TOWARDS PSYCHIATRY AND THE D.N.A. WHICH THE JUDGE DENIED?

17 A. IF SHE HAD, I WOULD HAVE OBJECTED TO IT, YEAH.

18 Q. YOU OBJECTED AND---

19 A. I'M CERTAIN I WOULD HAVE, YEAH.

20 Q. SO THERE WAS NO QUESTIONING TO OBTAIN HER ATTITUDE
21 ABOUT PSYCHIATRY, D.N.A.---

22 A. I'M JUST TELLING YOU THAT'S -- YOU KNOW, I'M DOING
23 THE BEST I CAN HERE WITH NINE-YEAR-OLD NOTES.

24 Q. HOW ABOUT KAREN MOORE?

25 A. KAREN MOORE? BASED ON MY NOTES, MS. FULLWOOD

2614

1 EXAMINED HER FIRST AND SHE SEEMED TO HAVE SOMEWHAT OF A
2 RAPPORT WITH MS. FULLWOOD. SHE APPARENTLY WAS SMILING AT MS.
3 FULLWOOD. OF COURSE, MANY PEOPLE DO, BUT I NOTED IT IN THIS
4 CASE. I ASKED HER ABOUT WHETHER OR NOT SHE COULD SIGN THE
5 VERDICT FOR DEATH, AND I HAVE IN QUOTES "SUBSTANTIALLY IMPAIR
6 ABILITY TO CONSIDER IMPOSING THE DEATH PENALTY," AND
7 OBVIOUSLY I HAD SOME CONCERN ABOUT WHETHER OR NOT ACTUALLY
8 SIGNING THE DOCUMENT WOULD SUBSTANTIALLY IMPAIR HER ABILITY
9 TO CONSIDER IMPOSING THE DEATH PENALTY. I HAVE A NOTE HERE
10 WITH -- IT INDICATES THE DEFENDANT, COLON, MENTALITY WHICH
11 SUGGESTS TO ME THAT -- THAT I MUST HAVE BELIEVED AT THE TIME
12 THAT SHE WOULD BE IMPRESSED WITH OR TAKEN BY TESTIMONY
13 REGARDING THE DEFENDANT'S MENTALITY, AND I HAVE A LINE DRAWN
14 DIRECTLY FROM THAT CIRCLE TO ANOTHER CIRCLE WHICH SAYS,
15 "STRIKE HER," AND IN A BLOCK BELOW I SAID, "NOT GIVING UP
16 MUCH INFORMATION." SO I MADE THE DECISION BASED ON THAT
17 EXAMINATION THAT WE SHOULD STRIKE HER BASED ON THOSE REASONS
18 AT THE TIME WE QUALIFIED HER WHICH WAS -- SHE WAS THE 14TH
19 DRAWN, 10TH QUALIFIED.

20 THE COURT: ALL RIGHT. LET ME -- LET ME INTERRUPT
21 Y'ALL JUST ONE SECOND. NOW, I JUST NEED TO DO AN ORDER THAT
22 SAYS FOR LEXINGTON COUNTY TO HOLD HIM UNTIL THE COMPLETION OF
23 THE TRIAL?

24 LEXINGTON COUNTY OFFICER: YES, SIR. THAT WILL BE
25 FINE.

2615

1 THE COURT: ALL RIGHT. ALL RIGHT. YOU CAN PROCEED.
2 BY MR. FLOYD:

3 Q. CHERYL KIRKPATRICK.

4 A. CHERYL KIRKPATRICK, WHEN ASKED ABOUT THE DEATH
5 PENALTY -- AND APPARENTLY THIS WAS WHEN THE COURT WAS TALKING
6 TO HER ABOUT THE CATEGORIES. SHE SAID, "I THINK SO. I'M NOT
7 SURE." THAT'S IN QUOTES. AS TO HER CATEGORY, I'VE GOT HER
8 AS A CATEGORY THREE WITH A QUESTION MARK. WHEN SOLICITOR
9 STONE EXAMINED HER, HE ASKED IF RAPE -- IF THERE'S A RAPE
10 INVOLVED, WOULD SHE AUTOMATICALLY GIVE THE DEATH PENALTY?
11 SHE SAID NO. SHE HESITATED REGARDING THE DEATH PENALTY.

12 I'VE GOT -- I BELIEVE, I'M NOT SURE, BUT THIS WOULD
13 INDICATE TO ME THAT SOLICITOR STONE MIGHT HAVE ASKED HER
14 COULD SHE CONSIDER THE DEATH PENALTY. I MAY HAVE EVEN
15 OBJECTED AT THAT POINT AND SAID THAT'S NOT THE STANDARD. SHE
16 CAN'T -- CAN'T JUST CONSIDER, BUT SHE MUST BE ABLE TO IMPOSE
17 UNDER THE RIGHT SET OF CIRCUMSTANCES. SHE SAID, "I AGREE
18 WITH THE DEATH PENALTY, BUT EMOTIONALLY I DON'T KNOW."

19 WHEN MR. CHASE EXAMINED HER AND ASKED ABOUT THE
20 DEATH PENALTY, SHE SAID, "I BELIEVE SO. I CAN'T SAY YES OR
21 NO." SHE INDICATED THAT SHE COULD SIGN. I WROTE IN A BOX AT
22 THE BOTTOM OF THE JUROR INFORMATION FORM THAT SHE WAS SOFT.
23 I CONSIDERED HER A SOFT JUROR OR SOFT ON THE DEATH PENALTY
24 WHICH IS WHY I STRUCK HER.

25 Q. AND HOW ABOUT MS. KISER?

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1 A. MS. KISER... THERE IS A REFERENCE HERE, AND I'M NOT
2 SURE EXACTLY WHAT IT MEANS. OH, YEAH, I DO, TOO. I'VE GOT A
3 BLOCK AT THE TOP THAT SAYS, "SEE S.R.H.'S FILE." THIS WAS A
4 LADY WHO WAS A DEFENDANT FOR ILL TREATMENT OF ANIMALS IN OUR
5 OFFICE AT THE TIME, HANDLED BY MR. HUBBARD. SHE HAD
6 PREVIOUSLY SERVED AS A JUROR. AS TO THE DEATH PENALTY, SHE
7 SAID SHE DIDN'T DISCUSS IT, SHE DIDN'T READ, SHE DIDN'T WATCH
8 T.V., AND IT WAS ACCORDING TO THE CIRCUMSTANCES, BUT I
9 BELIEVE PRIMARILY ON THE FACT THAT SHE WAS A -- EITHER A
10 DEFENDANT OR A PAST DEFENDANT -- AND I'M NOT SURE IF HER
11 CHARGES WERE PENDING AT THAT TIME OR NOT. THEY MIGHT VERY
12 WELL HAVE BEEN. IT LOOKS LIKE THEY WERE PENDING AT THE TIME.
13 SHE WAS DISMISSED AS I ELECTED TO STRIKE HER.

14 Q. AND MS. LEAPHART.

15 A. MS. LEAPHART? I NOTED THAT SHE HAD TO BE BROUGHT IN
16 BY THE SHERIFF. SHE WAS CONFUSED BY THE JUDGE'S
17 INSTRUCTIONS. SHE HAD HAD A PREVIOUS CONVICTION FOR SIMPLE
18 ASSAULT AND BATTERY. SHE WAS LATE FOR THE PANEL. MR. STONE,
19 SOLICITOR STONE, ASKED IF SHE COULD SIGN FOR THE DEATH
20 PENALTY, AND SHE SAID, "WELL, I'D JUST HAVE TO HEAR ALL THE
21 EVIDENCE FIRST." BUT I NOTED AT THAT TIME THAT SHE WAS A
22 QUESTION MARK. I INDICATED SO AT THE BOTTOM OF THE FORM THAT
23 SHE WAS A QUESTIONABLE JUROR IN MY MIND, AND I BELIEVE THAT'S
24 IT. AND LET ME SAY THIS JUST AS A -- JUST IN GENERAL. WHEN
25 I SAY I STRUCK HER BASED ON THESE REASONS, THESE ARE SOME OF

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1 THE REASONS THAT THESE JURORS WERE STRUCK. I WASN'T AUTOCRAT
2 IN THIS. I CONSULTED WITH MY CO-COUNSEL AND DON'T RECALL BUT
3 I MAY HAVE EVEN SPOKEN -- MAY HAVE EVEN HAD THE SOLICITOR ON
4 THE PHONE THAT NIGHT. SO WHEN I SAY I STRUCK, THESE WERE
5 REASONS WHY THEY WERE SUFFICIENT TO ME THAT THEY SHOULD BE
6 STRIKES. THERE MAY HAVE BEEN ADDITIONAL REASONS IN ADDITION
7 TO THE REASONS I HAVE GIVEN YOU, PROVIDED BY MR. CHASE, THAT
8 WE ELECTED TO STRIKE THESE JURORS AS OPPOSED TO OTHER JURORS.

9 Q. OKAY. BUT AS TO MR. JUMPER, A MALE, HE TESTIFIED
10 THAT IT WOULD BE HARD TO GIVE THE DEATH PENALTY AND IT WOULD
11 BE A FINANCIAL HARDSHIP FOR HIM TO SERVE, YET YOU ACCEPTED
12 HIM.

13 A. HANG ON A SECOND. I MEAN, YES -- APPARENTLY YES,
14 AND I DON'T -- I DON'T KNOW IF I'VE GOT HIS NOTES OR NOT. I
15 DON'T KNOW IF IT'S PROPER AT THIS POINT FOR ME TO GO INTO MY
16 NOTES ON THAT JUROR. I WOULD ASK THE COURT'S GUIDANCE ON
17 THAT.

18 THE COURT: I THINK THAT'S...

19 THE WITNESS: IT'S NOT SOMETHING I WOULD HAVE BEEN
20 ASKED TO RESPOND TO AT THE TIME OF THE DENNO.

21 MR. FLOYD: YOUR HONOR, WE WOULD SUGGEST THAT IN
22 ORDER TO ESTABLISH PRETEXT WE'D HAVE TO SHOW INCONSISTENCY IN
23 APPLICATION OF THE REASONING AMONG THE JURORS, THOSE SELECTED
24 AND THOSE REJECTED.

25 THE COURT: THERE'S NO -- THERE'S NO RESTRICTION

1 THAT I KNOW OF ON HIS REVIEWING HIS OWN NOTES ABOUT WHY HE
2 DID THAT, AND SO THAT'S THE EASY PART.

3 THE WITNESS: DO WE KNOW---

4 THE COURT: THE QUESTION WOULD BE WHETHER OR NOT
5 THAT MAKES THEM DISCOVERABLE.

6 THE WITNESS: RIGHT. THAT'S -- THAT WAS -- THAT WAS
7 MY NEXT QUESTION, AND I'M NOT SURE THAT -- LET ME SEE IF I'VE
8 GOT THAT. WHAT WAS HIS NAME?

9 MR. FLOYD: J. JUMPER.

10 THE WITNESS: JUMPER?

11 MR. FLOYD: YES.

12 MS. KIMBROUGH: JERRY JUMPER.

13 THE WITNESS: DO YOU KNOW WHEN HE WAS QUALIFIED, BY
14 ANY CHANCE, OR DRAWN?

15 MS. KIMBROUGH: HE WOULD HAVE BEEN VERY FAR DOWN ON
16 THE LIST. IT LOOKS LIKE HE WAS PROBABLY THE NINTH JUROR
17 SEATED.

18 THE WITNESS: LET'S SEE.

19 THE COURT: I THINK THAT THAT QUESTION IS ANSWERED
20 BY RULE 612 WHICH BASICALLY SAYS THAT IF A WRITING IS USED TO
21 REFRESH THE RECOLLECTION OF A WITNESS, THEN WITHIN THE
22 DISCRETION OF THE COURT IT BECOMES -- IT IS SUBJECT TO BEING
23 PRODUCED TO THE OPPOSING SIDE. AND I THINK THAT THE -- IF --
24 IF YOU -- YOU JUST ASKED HIM -- YOUR QUESTION WAS WHY DID HE
25 NOT STRIKE SO-AND-SO?

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1 **MR. FLOYD:** YES. IF HE WAS SAYING HE STRUCK THESE
2 BECAUSE THEY WERE HESITANT AND SO FORTH, THEN WHY DIDN'T HE
3 STRIKE THE WHITE MALE WHO SAID IT WOULD BE HARD FOR HIM TO
4 GIVE THE DEATH PENALTY?

5 **THE WITNESS:** BECAUSE I BELIEVED HE WAS A FOLLOWER.

6 **THE COURT:** I DON'T -- I DON'T REALLY THINK THAT
7 THAT -- I'M GOING TO STAND BY MY RULING THAT THAT DOES NOT
8 AUTOMATICALLY MAKE ALL OF HIS NOTES AND THOUGHTS ABOUT WHY --
9 ABOUT WHAT HE THOUGHT ABOUT A CERTAIN JUROR SUBJECT TO
10 DISCLOSURE. THE QUESTION WITH -- IT'S THE -- IT IS THE -- IT
11 IS THE PARTY OPPOSING THE STRIKES EVIDENTIARY BURDEN OF PROOF
12 TO BRING BEFORE THE COURT EVIDENCE SHOWING THAT THE RACE OR
13 GENDER-NEUTRAL REASONS WERE PRETEXTUAL.

14 IT IS -- IT IS THEN UP TO THE OTHER SIDE, THE STATE
15 IN THIS CASE, IF THEY CHOOSE TO, TO OFFER ANY EVIDENCE THAT
16 THEY MAY CHOOSE TO TO REBUT THE EVIDENCE THAT WOULD HAVE BEEN
17 OFFERED BY THE DEFENDANT. SO IT'S -- IT'S BASICALLY -- AT
18 THE TIME THAT THIS WOULD HAVE HAPPENED, IT WOULD BASICALLY
19 HAVE BEEN THE STATE'S DECISION AS TO WHETHER OR NOT THEY
20 COULD HAVE -- THEY WOULD HAVE REVEALED TO JUDGE CLARY WHAT
21 WAS IN THESE NOTES. SO, AGAIN, THE DECISION THERE AS TO
22 WHETHER OR NOT THEIR WORK PRODUCT WOULD HAVE BEEN DISCLOSED
23 IS IN THEIR HANDS AND I'M GOING TO -- I'M GOING TO LEAVE IT
24 THAT WAY. I'M NOT GOING TO REQUIRE THEM TO -- NOW, YOU CAN
25 ASK -- THAT'S NOT TO SAY YOU CAN'T ASK HIM WHY, BUT THAT

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1 DOESN'T -- THAT'S -- I JUST FIND THAT TO BE IN A DIFFERENT
2 CATEGORY FROM THE QUESTION OF WHY THEY DID AS OPPOSED TO WHY
3 THEY DIDN'T MAKE A STRIKE, SO -- BECAUSE IT'S THE MAKING OF
4 STRIKES THAT IS SUBJECT TO THE BATSON ANALYSIS. IT'S NOT --
5 THE DECISION NOT TO MAKE A STRIKE IS NOT SUBJECT TO A BATSON
6 ANALYSIS.

7 MR. FLOYD: WELL, I THINK THEORETICALLY, YOU KNOW,
8 THAT'S CORRECT, YOUR HONOR. HOWEVER, THE ONLY WAY YOU CAN
9 SOMETIMES JUDGE WHETHER OR NOT IT'S PRETEXTUAL OR NOT IS BY
10 COMPARING IT TO THE JURORS WHO WERE ACCEPTED.

11 THE COURT: ALL RIGHT. HERE IS YOUR ORDER. SEE IF
12 THAT TAKES CARE OF IT. THAT'S TRUE, BUT YOU HAVE TO DO
13 THAT -- YOU CAN'T JUST -- YOU CAN'T JUST INSERT YOURSELVES
14 INTO THE MINDS OF THE STATE'S LAWYERS IN ORDER TO MAKE THAT
15 COMPARISON. SO THAT'S MY RULING.

16 MR. FLOYD: OKAY.

17 BY MR. FLOYD:

18 Q. THERE'S NO QUESTION YOU STRUCK ALL WOMEN.

19 A. IF THAT'S WHAT THE RECORD SAYS. YEAH, THAT'S --
20 THAT'S TRUE.

21 Q. AND THERE'S NO -- NO QUESTION---

22 A. SEATED A LOT OF WOMEN, TOO.

23 Q. BUT YOU DID NOT STRIKE ANY MEN, DID YOU?

24 A. NOPE. WELL, LET ME -- WHAT ABOUT THE ALTERNATES?
25 NOPE.

2621

1 Q. HOW MANY STRIKES DID YOU USE ON THE ALTERNATES?

2 A. ONE.

3 Q. AND THAT WAS A FEMALE?

4 A. PAT BENTLEY.

5 Q. THANK YOU, MR. HUMPHRIES. NOW, GOING TO ANOTHER
6 POINT, IF YOU FELT THE STATEMENT OF MR. TERRY WAS SELF-
7 SERVING, WHY DID YOU PUT IT IN THE PENALTY PHASE?

8 A. I PUT IT IN BECAUSE I THINK IT SHOWED SOMETHING
9 ABOUT HIS CHARACTER, THAT HE WOULD HAVE COMMITTED THESE
10 OFFENSES AND WOULD FAIL TO TAKE RESPONSIBILITY FOR THEM AND
11 PLACE SOME BLAME ON A VICTIM. THAT'S WHY I PUT THEM IN, AND
12 I THOUGHT THAT SPOKE VOLUMES ABOUT HIS CHARACTER.

13 Q. OF COURSE, BY THEN YOU ALREADY HAD THE CONVICTION.

14 A. NO QUESTION ABOUT IT.

15 Q. AND DID YOU THINK THAT WAS WHAT YOUR ROLE SHOULD BE,
16 TO OBTAIN A CONVICTION?

17 A. TO SEEK JUSTICE. IN THIS CASE JUSTICE WAS A
18 CONVICTION; IT WAS RETURNED BY THE JURY.

19 Q. OF COURSE, WHAT YOU TOLD THE COURT WAS YOUR ROLE IS
20 TO OBTAIN A CONVICTION. IS THAT CORRECT?

21 A. I DON'T KNOW. SHOW ME WHAT YOU'RE TALKING ABOUT.

22 Q. PAGE 1374, THE HIGHLIGHTED PORTION. COULD YOU
23 PUBLISH THE HIGHLIGHTED PORTION?

24 A. YEAH, I'LL PUBLISH THE HIGHLIGHTED PORTION. I'LL
25 RESERVE THE RIGHT TO PUT IT IN CONTEXT. "THE STATE IS JUST

2622

1 CHARGED WITH PRESENTING EVIDENCE SUFFICIENT TO CONVICT THE
2 DEFENDANT. WE INTEND TO DO THAT." NOW, WHAT I'D LIKE TO SAY
3 IS, IN EXPLAINING MY ANSWER, "OUR POSITION IS THIS, YOUR
4 HONOR: WE DON'T HAVE TO PUT UP THE DEFENDANT'S OR THE
5 DEFENSE'S CASE. I UNDERSTAND THE PURPOSE FOR WHICH THEY WISH
6 TO ELICIT HIS STATEMENT. THE STATE'S JUST CHARGED WITH
7 PRESENTING EVIDENCE SUFFICIENT TO CONVICT THE DEFENDANT. WE
8 INTEND TO DO THAT. WE'RE GOING TO GIVE THIS JURY SUFFICIENT
9 EVIDENCE TO DO THAT OR SUBMIT THAT WE WILL. WE ARE NOT,
10 HOWEVER, REQUIRED UNDER ANY CIRCUMSTANCES TO PUT UP EVERY
11 STATEMENT OR ANY PARTICULAR STATEMENT OF..." WHATEVER ELSE IT
12 SAYS.

13 Q. THANK YOU.

14 A. YOU'RE WELCOME.

15 MR. FLOYD: NO FURTHER QUESTIONS.

16 MR. SALTER: JUST VERY BRIEFLY. AND, YOUR HONOR,
17 I'D LIKE FOR THE RECORD TO REFLECT THAT UP UNTIL THE TIME
18 YOUR HONOR ORDERED DISCLOSURE OF THAT PORTION OF THE
19 SOLICITOR'S FILE, I HAD NOT SEEN IT EITHER, THAT THE STATE
20 ATTORNEY GENERAL'S OFFICE HAD TAKEN THE POSITION BEFORE YOUR
21 HONOR PREVIOUSLY, AND CONTINUES TO DO SO, THAT ANY MATTERS
22 DISCLOSED TO US WOULD, IN FACT, BE DISCLOSED TO THE
23 APPLICANT'S ATTORNEYS.

24 THE COURT: ALL RIGHT, SIR.

25

2623

RE CROSS EXAMINATION

BY MR. SALTER:

Q. JUST VERY BRIEFLY, SIR. IS THERE ANY PARTICULAR REASON WHY THE STATE WOULD NOT WANT WOMEN -- AS A CATEGORY WOULD NOT WANT WOMEN ON A JURY?

A. ACTUALLY THAT WOULD BE CONTRA TO WHAT THE TRADITIONAL THINKING WOULD BE IN A CASE OF A HOME INVASION, BURGLARY WITH A RAPE OF A FEMALE VICTIM.

Q. ALL RIGHT. IS IT FAIR TO SAY THAT THE REASONS YOU ADVANCED WERE THE REASONS FOR STRIKING THOSE JURORS AS OPPOSED TO THEIR GENDER?

A. YES.

Q. AND I BELIEVE YOU INDICATED THAT, IN FACT, YOU DID SEAT A NUMBER OF WOMEN.

A. YES.

Q. THE RECORD SO REFLECTS, DOES IT NOT?

A. YES.

Q. ALL RIGHT. AGAIN, YOUR DECISION NOT TO INTRODUCE THE STATEMENT IN THE GUILT PHASE DID NOT PRECLUDE MR. TERRY FROM TESTIFYING, DID IT?

A. NO.

Q. AND HAD HE TESTIFIED, HE COULD HAVE GIVEN ANY VERSION HE WANTED TO, COULDN'T HE?

A. CERTAINLY COULD HAVE. HE'D JUST HAVE BEEN SUBJECT TO CROSS-EXAMINATION AT THAT POINT.

2624

1 Q. AND THAT'S WHAT -- THAT WAS YOUR WHOLE THINKING
2 BEHIND NOT INTRODUCING THE STATEMENT IN THE GUILT PHASE?

3 A. YES.

4 MR. SALTER: THANK YOU.

5 MR. FLOYD: NO FURTHER QUESTIONS, YOUR HONOR.

6 THE WITNESS: AND AM I RELEASED FROM MY SUBPOENA?

7 MR. FLOYD: AS FAR AS WE'RE CONCERNED.

8 THE WITNESS: OKAY. THAT'S -- WELL, YOU'RE THE --
9 YOU'RE THE ONE WHO ISSUED IT SO... THANK YOU, YOUR HONOR.
10 AS TO THESE RECORDS, DO THEY GO BACK TO THE STATE THEN?

11 THE COURT: THE ONES THAT WERE PRODUCED?

12 THE WITNESS: THESE ARE THE ONES THAT WERE PRODUCED.
13 THESE ARE THE ONES THAT WERE NOT.

14 THE COURT: THE ONES THAT WERE NOT PRODUCED GO BACK
15 TO THE STATE, TO THE SOLICITOR'S OFFICE.

16 THE WITNESS: AND THESE GO TO THE COURT?

17 THE COURT: WHY DON'T YOU GO AHEAD AND GIVE THOSE
18 BACK AND YOU -- CAN YOU COPY THOSE AND GIVE...

19 MR. HUBBARD: I CAN, YOUR HONOR. THE -- I'M NOT
20 SURE EXACTLY WHAT ALL IS WITH THAT BECAUSE THERE'S --
21 SOMETIMES IT'S NOT JUST A JURY FORM. IT MAY BE---

22 THE COURT: WHATEVER -- WHATEVER WAS SHOWN TO THE
23 APPLICANT, JUST GO AHEAD AND COPY IT AND GIVE IT TO HIM.

24 THE WITNESS: IT'S JUST THE FRONT PAGE IS WHAT THEY
25 READ. THAT'S WHAT WAS DISCLOSED TO THEM.

2625

1 **THE COURT:** THE FRONT PAGE OF EACH JUROR'S
2 INFORMATION?

3 **THE WITNESS:** WHERE MY NOTES ARE, IT'S JUST THE
4 FRONT PAGE. SO IF WE COULD COPY JUST THE FRONT PAGE, THEY
5 WOULD HAVE EVERYTHING THAT HAS BEEN DISCLOSED.

6 **THE COURT:** DOES THAT SUIT EVERYBODY?

7 **MS. KIMBROUGH:** YES, YOUR HONOR.

8 **MR. FLOYD:** THAT'S FINE WITH US, YOUR HONOR.

9 **THE COURT:** ALL RIGHT. SO THAT'S GOING TO BE ABOUT
10 SIX PAGES.

11 **THE WITNESS:** YEAH.

12 **THE COURT:** DO YOU NEED A SHORT BREAK BEFORE WE GO
13 ON?

14 **MR. FLOYD:** IT'S UP TO THE COURT.

15 **THE COURT:** HOW LONG IS THE NEXT WITNESS GOING TO
16 BE?

17 **MR. FLOYD:** IT WILL BE DR. CARTER. I DON'T INTEND
18 TO HAVE HIM ON NO MORE THAN MAYBE 10 OR 15 MINUTES. I DON'T
19 KNOW WHAT---

20 **THE COURT:** ALL RIGHT. LET'S JUST GO THEN.

21 DR. JOHN CARTER, AFTER BEING DULY SWORN,
22 TESTIFIED AS FOLLOWS:

23 **THE CLERK:** PLEASE HAVE A SEAT AND STATE YOUR FULL
24 NAME AND SPELL YOUR LAST NAME.

25 **THE WITNESS:** I'M DR. JOHN CARTER, C-A-R-T-E-R.

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DIRECT EXAMINATION1
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BY MR. FLOYD:

Q. AND, DR. CARTER, WHAT IS YOUR PROFESSION?

A. I'M A PHYSICIAN PATHOLOGIST. I'M DIRECTOR OF
CLINICAL LABORATORIES AT LEXINGTON MEDICAL CENTER.

Q. AND IN THAT POSITION ARE YOU OFTEN CALLED UPON TO DO
AUTOPSIES FOR THE SHERIFF'S DEPARTMENT?

A. OUR PATHOLOGIST GROUP THERE HAS DONE THE MAJORITY OF
THE AUTOPSIES FOR THE LEXINGTON COUNTY CORONER SINCE PROBABLY
1972.

Q. AND DID YOU DO THE AUTOPSY ON URAI JACKSON?

A. I DID.

Q. DID YOU BRING YOUR NOTES AND SO FORTH?

A. I DID.

Q. NOW, DR. CARTER, I'M NOT GOING TO GO THROUGH ALL THE
QUESTIONS THAT YOU WERE ASKED, BUT DID YOU CONCLUDE THAT
DEATH WAS THROUGH A BLOW TO THE HEAD?

A. DEATH WAS---

Q. OR SEVERAL BLOWS?

A. ---RIGHT, DUE TO MULTIPLE BLOWS TO THE RIGHT BACK OF
THE HEAD.

Q. AND WAS IT YOUR OPINION THAT THESE BLOWS WERE
ADMINISTERED BY A RIGHT-HANDED INDIVIDUAL?

A. I DON'T RECOLLECT THAT IN MY REPORT, AS YOU PUT ME
ON THE SPOT, THESE BLOWS WERE ADMINISTERED BY A RIGHT-HANDED

1 INDIVIDUAL. THE BLOWS, MORE LIKELY THAN NOT, WERE
2 ADMINISTERED POSTERIOR -- FROM A POSTERIOR -- FROM BEHIND THE
3 VICTIM. AND THE ASSAILANT -- IT WOULD BE MORE LIKELY THAN
4 NOT IF AN ASSAILANT IS BEHIND A VICTIM HITTING THE VICTIM
5 WITH A CLUB THAT IT WOULD BE MORE CONVENIENT, MORE LIKELY FOR
6 THE BLOWS TO BE STRUCK BY A RIGHT-HANDED INDIVIDUAL.

7 Q. OKAY. DID YOU TESTIFY TO THAT AT THE TRIAL?

8 A. I DON'T RECOLLECT.

9 Q. OKAY. NOW, DID YOU -- DID YOUR INVESTIGATION ALSO
10 -- LET ME -- LET ME REFRESH YOU ON THAT ONE. PAGE 1479, THE
11 FIRST HIGHLIGHTED PORTION AT THE TOP THERE, WHERE YOU WERE
12 ASKED, "AND THESE BLOWS WOULD HAVE BEEN MOST LIKELY
13 ADMINISTERED BY THE ASSAILANT WITH HIS OR HER RIGHT HAND?"
14 AND YOUR ANSWER WAS?

15 A. WAS YES.

16 Q. OKAY.

17 A. I HAVE NOT HAD A CHANCE TO REVIEW THIS TESTIMONY.

18 Q. OKAY. I UNDERSTAND. NOW, DID YOU ALSO EXAMINE THE
19 VAGINAL AREA OF THE VICTIM?

20 A. YES.

21 Q. AND WOULD YOU AGREE WITH ME THAT YOU FOUND NO
22 EVIDENCE OF BRUISES, SCRAPES, TEARS, OR CUTS IN THE VAGINAL
23 AREA?

24 A. NO. TO THE EXTERNAL GENITALIA, YES, THAT'S CORRECT.

25 Q. AND YOU ALSO FOUND NO EVIDENCE OF BRUISES, SCRAPES,

2628

1 TEARS, OR CUTS IN THE ANAL AREA. IS THAT CORRECT?

2 A. THAT'S CORRECT.

3 Q. DID YOU DISCOVER SOME SEMEN?

4 A. THERE WAS A MUCOID-LIKE FLUID IN THE VAGINAL VAULT
5 WHICH WAS EXAMINED FROM THE INTERNAL EXAMINATION WHEN THE
6 PELVIC ORGANS WERE REMOVED, AND THAT SEMEN-LIKE FLUID -- I
7 DIDN'T DIRECTLY EXAMINE IT, BUT THAT FLUID WAS TAKEN AND
8 GIVEN DIRECTLY TO A REPRESENTATIVE OF S.L.E.D. LABORATORIES.

9 Q. THAT WAS OBTAINED WITH A VAGINAL WASH. IS THAT
10 .CORRECT?

11 A. AS I RECOLLECT, IT WAS SWABBED AND WE MAY HAVE JUST
12 DIRECTLY REMOVED SOME FLUID WITH A SPECIMEN CONTAINER FROM
13 THE VAGINAL VAULT.

14 Q. NOW, DO YOU HAVE AN OPINION AS TO -- WHEN DID YOU DO
15 YOUR EXAMINATION?

16 A. THE EXAMINATION WAS DONE THE AFTERNOON -- THE SAME
17 AFTERNOON THAT THE BODY WAS DISCOVERED. I THINK THE BODY WAS
18 DISCOVERED SHORTLY AFTER NOON, AND THE -- I WENT TO THE SCENE
19 WHERE THE BODY WAS DISCOVERED, AND THE BODY WAS TRANSPORTED
20 FAIRLY QUICKLY BACK TO THE MORGUE. AND THE EXAMINATION, AS I
21 RECOLLECT, WAS DONE BETWEEN LIKE 4:30 AND 6:00 THAT
22 AFTERNOON.

23 Q. AND YOU WERE NOT ABLE TO COME UP WITH A PRECISE TIME
24 OF DEATH, WERE YOU?

25 A. THAT'S CORRECT.

(2629

1 Q. AND, IN FACT, WAS YOUR -- WAS YOUR ESTIMATION
2 SOMEWHERE UP TO 72 HOURS?

3 A. THAT'S CORRECT.

4 Q. AND YOU ONLY ARRIVED AT THAT BECAUSE THERE WAS SOME
5 EVIDENCE OF SOMEONE SEEING HER 72 HOURS EARLIER?

6 A. REPORTEDLY. AS I RECOLLECT, THERE WERE -- THERE WAS
7 MORE THAN ONE REPORT AT DIFFERENT TIMES FOR THE VICTIM LAST
8 SEEN ALIVE, BUT IT WAS -- IT WAS THE END OF MAY. THE WEATHER
9 WAS FAIRLY WARM, AND THERE WAS MODERATE -- MODERATELY
10 ADVANCED DECAY OR DECOMPOSITION OF THE BODY THAT INDICATED
11 THAT AT LEAST THAT POSTMORTEM INTERVAL WAS GREATER THAN 24
12 HOURS, AND I DON'T RECOLLECT NOW WHAT -- WHAT STOPPED MY
13 TIMING ESTIMATE AT 72 HOURS.

14 Q. OKAY. NOW, YOU DON'T KNOW, DO YOU, HOW LONG THE
15 SEMEN HAD BEEN PRESENT IN HER BODY?

16 A. I DO NOT, NO.

17 Q. IN FACT, SEMEN CAN LAST UP TO SEVEN DAYS, CAN'T IT?

18 A. OR EVIDENCE OF IT. IT WOULD BE DECAYING. THE
19 SPERMATOZOA WOULD BE COMING APART BY THAT TIME.

20 Q. AND AS YOU HAD TESTIFIED EARLIER, THERE WAS NO
21 EVIDENCE OF VAGINAL TEARING, BRUISING, OR---

22 A. TRAUMATIC INJURY, THAT'S CORRECT.

23 Q. NOW, YOU DON'T HAVE ANY PHYSICAL EVIDENCE, DO YOU,
24 TO SUGGEST THERE WAS ACTUALLY A SEXUAL ASSAULT AS OPPOSED TO
25 A CONSENSUAL SEX?

1 A. YOU KNOW, BEING CAREFUL WITH THAT, THERE WAS
2 EVIDENCE THAT THERE WAS A SEXUAL ACT.

3 Q. SEXUAL ACT.

4 A. AND THERE WAS EVIDENCE OF A MASSIVE ASSAULT WITH THE
5 VICTIM ATTEMPTING TO DEFEND HERSELF.

6 Q. OKAY. BUT YOU DON'T HAVE ANY EVIDENCE OR WAY OF
7 KNOWING THAT THOSE THINGS OCCURRED AT THE SAME TIME---

8 A. THAT'S CORRECT.

9 Q. ---DO YOU? OH, DID YOU ALSO FIND SOME MALE PUBIC
10 HAIRS?

11 A. YES.

12 Q. ABOUT FIVE OR SIX OF THEM, WASN'T THERE?

13 A. THAT'S CORRECT.

14 Q. AND, IN FACT, ONE OF THEM HAD A ROOT FOR -- THAT
15 COULD BE USED FOR D.N.A. TESTING.

16 A. THAT'S CORRECT.

17 Q. AND YOU TURNED THOSE OVER TO LAW ENFORCEMENT.

18 A. DIRECTLY -- DIRECTLY TO A S.L.E.D. AGENT.

19 Q. YOU ALSO FOUND SOME FINGERNAIL SCRAPINGS THAT
20 APPEARED TO BE BLOOD.

21 A. IT WAS THE DEPUTY CORONER THAT TOOK THE---

22 Q. OH, ALL RIGHT.

23 A. ---FINGERNAIL SCRAPINGS.

24 Q. OKAY. ALL RIGHT. SO THOSE WERE TURNED OVER TO
25 SOMEONE; IS THAT CORRECT?

2631

1 A. TO THE S.L.E.D. AGENT, RIGHT.

2 Q. NOW, DO YOU HAVE ANY -- DO YOU KNOW OR IS THERE ANY
3 WAY OF KNOWING HOW LONG SHE WOULD HAVE LIVED AFTER THE BLOWS
4 WERE STRUCK?

5 A. I THINK UNCONSCIOUSNESS AND DEATH WOULD HAVE BEEN
6 VERY SHORT, IF NOT INSTANTANEOUS. THOSE WERE MASSIVE
7 INJURIES.

8 Q. SO PRETTY MUCH INSTANTANEOUS?

9 A. THAT'S CORRECT.

10 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

11 CROSS-EXAMINATION

12 BY MR. SALTER:

13 Q. JUST VERY BRIEFLY. DOCTOR, I DON'T BELIEVE WE'VE
14 EVER MET. MY NAME IS ED SALTER. I'LL JUST GO THROUGH A FEW
15 THINGS WITH YOU. I BELIEVE YOU DISCUSSED ON DIRECT THAT IT
16 IS YOUR OPINION THAT THE DEATH RESULTED FROM THE -- A SERIES
17 OF BLUNT TRAUMA BLOWS TO THE BACK REAR PORTION OF THE HEAD?

18 A. THAT'S CORRECT.

19 Q. AND, IN FACT, SOME OF THE -- AND THIS IS FROM -
20 EXCUSE ME - BLUNT, HEAVY CLUB-LIKE OBJECTS?

21 A. YES.

22 Q. ALL RIGHT. AND IT RESULTED IN FRACTURING OF THE
23 SKULL?

24 A. THAT'S CORRECT.

25 Q. NOW, YOUR HYPOTHESIS THAT THIS WAS DONE WITH THE

2632

1 RIGHT HAND DOESN'T MEAN THAT THE PERSON HAD TO BE RIGHT-
2 HANDED, DID IT?

3 A. NO.

4 Q. OKAY. IT'S JUST THAT IT WOULD HAVE BEEN MORE EASILY
5 INFLICTED IF SOMEONE USED THEIR RIGHT HAND AS OPPOSED TO
6 THEIR LEFT HAND..

7 A. THAT'S CORRECT.

8 Q. AND SOMEONE WITH ENOUGH STRENGTH IN THEIR RIGHT HAND
9 COULD INFLICT THE BLOWS YOU FOUND.

10 A. YES.

11 Q. ALL RIGHT. EVEN IF THEY WERE, IN FACT, LEFT-HANDED.

12 A. THAT'S RIGHT.

13 Q. ALL RIGHT, SIR. NOW, IN YOUR REPORT -- DO YOU HAVE
14 A COPY OF YOUR REPORT BEFORE YOU?

15 A. I DO. I DO.

16 Q. I JUST WANT TO ASK YOU A COUPLE OF QUESTIONS, IF I
17 COULD. SPECIFICALLY ON PAGE 2, THE LAST PARAGRAPH, YOU
18 INDICATE THAT THE RANGE IN THE TIME OF DEATH IS BETWEEN 24
19 AND 72 HOURS, AND THEN ON PAGES 3 AND 4 YOU LIST FIVE REASONS
20 FOR THIS CONCLUSION.

21 A. YES.

22 Q. COULD YOU PLEASE TELL THE COURT WHAT THOSE FIVE
23 REASONS WERE?

24 A. OKAY. DEATH HAD OCCURRED AT SOME SIGNIFICANT TIME
25 INTERVAL PRIOR TO AUTOPSY, AS THE FOLLOWING CHANGES WERE

1 NOTED. IN ORDER OF PUTREFACTION: RELAXATION OF RIGOR
2 MORTIS. RIGOR MORTIS HAD FORMED AND HAD COMPLETELY RELAXED.
3 THERE WAS EARLY SKIN SLIPPAGE ON THE BACK AND THE SCALP.
4 THERE WAS EXTENSIVE DRYING, EARLY MUMMIFICATION OF THE LIPS
5 AND THE FINGERTIPS, AND THERE WERE SMALL WHITE INSECT LARVAE
6 PRESENT IN THE HEAD WOUND.

7 Q. ALL RIGHT. I UNDERSTAND YOU'RE NOT AN ENTOMOLOGIST,
8 SO I WON'T ASK YOU ANY QUESTION ABOUT THE INSECT LARVAE. BUT
9 ABOUT HOW LONG AFTER DEATH WOULD YOU EXPECT TO FIND THE ODOR
10 THAT YOU SMELLED?

11 A. IT DEPENDS ENTIRELY. YOU KNOW, IN CONTRAST TO WHAT
12 WE ALL SEE ON TELEVISION SHOWS, THERE'S A LOT OF VARIABILITY.
13 IT DEPENDS ENTIRELY ON THE AMBIENT TEMPERATURE. IT CAN --
14 I'VE BEEN SURPRISED, GROWING UP IN NEBRASKA AND SOUTH DAKOTA
15 WHERE IT'S KIND OF COLD TEMPERATURE, HOW FAST THOSE CHANGES
16 CAN OCCUR IN THE SUMMERTIME IN THE SOUTH. I'VE SEEN IT HAP
17 -- WELL, I'LL GO BACK TO WHAT I WAS GOING TO SAY. IT DEPENDS
18 ENTIRELY ON HOW HOT THE TEMPERATURE WAS. WAS THERE AIR
19 CONDITIONING RUNNING IN THE HOME OR WAS IT NON-AIR
20 CONDITIONED? WHAT WAS THE TEMPERATURE OUTSIDE THAT DAY, THE
21 PREVIOUS DAY? I'VE SEEN THAT HAPPEN WITHIN 24 TO 36 HOURS,
22 AND IN COLDER TEMPERATURES I'VE SEEN IT TAKE FOUR TO SEVEN
23 DAYS.

24 Q. ALL RIGHT, SIR. HOW ABOUT THE RELAXATION OF RIGOR
25 MORTIS?

2634

1 A. SAME VARIABILITY.

2 Q. OKAY.

3 A. BUT THAT'S WHY I CAN'T -- IT WOULD BE HARD FOR ME TO
4 IMAGINE THESE THINGS HAPPENING IN LESS THAN A 24-HOUR TIME
5 PERIOD.

6 Q. AND THE EARLY MUMMIFICATION OF HER LIPS AND
7 FINGERTIPS, ABOUT HOW LONG WOULD THAT TAKE?

8 A. DRYING OUT. THAT'S -- THEY'RE JUST DRYING OUT AND
9 SHRIVELING UP AND... YOU'RE ASKING ME TO SPECULATE IN A WAY,
10 BUT IT WOULD TAKE, YOU KNOW, I WOULD GUESS 24 TO 36 HOURS
11 BEFORE THOSE CHANGES WOULD BEGIN.

12 Q. ALL RIGHT, SIR. NOW, YOU WERE ASKED WHETHER OR NOT
13 THERE WAS EVIDENCE OF ANY TRAUMA TO THE VAGINAL AREA, AND YOU
14 INDICATED THERE WAS NOT.

15 A. VISIBLE TRAUMA.

16 Q. VISIBLE TRAUMA.

17 A. THAT'S CORRECT.

18 Q. OKAY. IS THAT UNUSUAL EVEN IN CASES WHERE SOMEONE
19 HAS BEEN SEXUALLY ASSAULTED?

20 A. NO. I'VE WORKED ON A NUMBER OF SEXUAL ASSAULT
21 HOMICIDES WHERE THE BRUISES, ABRASIONS, LACERATIONS WERE NOT
22 VISIBLE.

23 Q. ALL RIGHT, SIR.

24 A. AT LEAST TO MY EYE.

25 Q. YOU WERE ALSO ASKED WHETHER OR NOT -- ABOUT WHAT

2635

1 INFORMATION YOU HAD INDICATING A SEXUAL ASSAULT TOOK PLACE AS
2 OPPOSED TO SEXUAL ACT AND AN ATTACK ON THE VICTIM. WAS THE
3 VICTIM NOT -- I'M SORRY. EXCUSE ME. LET ME BACK UP. FROM
4 WHAT YOU WERE TOLD, WAS THE VICTIM NOT FOUND IN A SITUATION
5 SUGGESTIVE OF SEXUAL ASSAULT?

6 A. THE VICTIM WAS FOUND LYING ON HER BACK WITH HER --
7 SHE HAD A SOLITARY GARMENT ON, AS I REMEMBER A NIGHTGOWN,
8 WHICH WAS PULLED UP OVER HER, EXPOSING HER BODY, EXPOSING HER
9 BREASTS.

10 Q. ONE MOMENT, YOUR HONOR. DOCTOR, DO YOU RECALL
11 WHETHER OR NOT IN THE PENALTY PHASE OF THE TRIAL YOU WERE
12 PRESENTED WITH A SERIES OF PHOTOGRAPHS WHICH ASSISTED YOU IN
13 YOUR TRIAL TESTIMONY?

14 A. I DON'T RECALL THAT DIRECTLY. I HAVE AUTOPSY
15 PHOTOGRAPHS HERE IN MY FOLDER, BUT I DON'T HAVE A DIRECT
16 RECOLLECTION OF WHAT WE DID AT THE TRIAL.

17 MR. SALTER: ALL RIGHT. I THINK I'M JUST GOING TO
18 REST AT THIS POINT. I DON'T HAVE ANYTHING FURTHER.

19 THE COURT: ANYTHING IN REDIRECT?

20 MR. FLOYD: NO FURTHER QUESTIONS, YOUR HONOR.

21 THE COURT: ALL RIGHT, SIR. YOU'RE EXCUSED. THANK
22 YOU FOR COMING.

23 THE WITNESS: THANK YOU, YOUR HONOR.

24 THE COURT: ANYBODY ELSE THAT YOU HAD PLANNED ON
25 PUTTING UP TODAY? IS THERE ANYTHING ELSE?

2836

1 **MR. FLOYD:** I HAVE SOME THAT IF YOU WANT ME TO I CAN
2 PUT SOME SHORT WITNESSES UP OR WE CAN JUST WAIT UNTIL
3 TOMORROW, YOUR HONOR. IT'S YOUR PLEASURE. HE WAS THE LAST
4 ONE I HAD PLANNED. THANK YOU, DR. CARTER.

5 **THE COURT:** LET ME ASK YOU ABOUT YOUR SCHEDULE. HOW
6 MUCH LONGER DO YOU THINK YOU'LL TAKE? AND LET'S SEE. NOW,
7 YOU GOT TO BE HERE SOMEWHERE TOMORROW? YOU'VE GOT TO BE IN
8 FAMILY COURT AT 3:30?

9 **MR. FLOYD:** 3:30, YES, YOUR HONOR.

10 **THE COURT:** SO WE'RE GOING TO QUIT AROUND 3?

11 **MR. FLOYD:** 3:15. IT'S NOT LIKE I HAVE TO DO A LOT
12 OF PREPARATION FOR IT. IT'S NEXT FLOOR, ONE FLOOR DOWN.

13 **THE COURT:** 3 TO 3:15 WE'LL QUIT?

14 **MR. FLOYD:** (NODDED HEAD UP AND DOWN.)

15 **THE COURT:** OKAY. ALL RIGHT. SO IF YOU HAVE -- IF
16 WE START BACK, SAY, AT -- WELL, HOW MUCH TIME DO YOU THINK IT
17 WILL TAKE YOU TO FINISH?

18 **MR. FLOYD:** I HAVE MS. FULLWOOD AND I DON'T THINK
19 SHE'LL BE AS LONG AS -- AS LONG AS MR. STONE BECAUSE I'LL
20 SHORT-CIRCUIT THAT A LITTLE BIT. WE DO HAVE SOME -- THE
21 D.N.A. PERSON. THOSE WITNESSES WILL BE NO LONGER THAN DR.
22 CARTER WAS BECAUSE I ONLY WANT TO BRING OUT ONE OR TWO POINTS
23 ON EACH ONE OF THOSE PEOPLE. I HAVE SOME FAMILY MEMBERS THAT
24 I'LL PROBABLY BE 15 MINUTES AT THE MOST WITH EACH ONE, MAYBE
25 THREE OF THOSE.

2637

1 **THE COURT:** IF WE START AT 10 IN THE MORNING, HAVE
2 YOU HAVE GOT A PRETTY GOOD CHANCE OF FINISHING BY 3 OR 3:15?

3 **MR. FLOYD:** YES, SIR, I THINK SO.

4 **THE COURT:** ALL RIGHT. AND FROM Y'ALL'S STANDPOINT,
5 HOW MUCH DO Y'ALL PLAN ON PUTTING UP? I MEAN, YOU MAY NOT
6 KNOW YET, BUT JUST GIVE ME SOME -- GIVE ME A BALL PARK.

7 **MR. SALTER:** RIGHT OFF THE TOP OF MY HEAD, YOUR
8 HONOR, I WOULD THINK ONLY TWO OR THREE WITNESSES, FOUR
9 WITNESSES AT THE MOST, VERY SHORT -- RELATIVELY SHORT
10 WITNESSES FOR THE MOST PART. MR. CHASE WILL TESTIFY NO
11 LONGER THAN MR. HUMPHRIES DID. MR. DUDEK, WHO WAS THE
12 APPELLATE ATTORNEY, BECAUSE THERE'S AN ISSUE ABOUT FAILURE TO
13 RAISE THE DIRECTED VERDICT MOTION ON DIRECT APPEAL. LET'S
14 SEE.

15 **THE COURT:** WOULD YOU LIKE TO JUST PLAN ON STARTING
16 WEDNESDAY MORNING?

17 **MR. SALTER:** YES, SIR. THAT WOULD BE FINE.

18 **THE COURT:** ALL RIGHT. AND WE'LL JUST -- DOES THAT
19 SUIT Y'ALL?

20 **MR. FLOYD:** THAT'S FINE, YOUR HONOR, BECAUSE I -- I
21 FEEL COMFORTABLE I COULD FINISH BY THAT TIME TOMORROW.

22 **THE COURT:** WELL, YOU CAN JUST GO AHEAD AND PLAN
23 THEN TO HAVE YOUR WITNESSES READY TO START AT 10:00 WEDNESDAY
24 MORNING.

25 **MR. SALTER:** ALL RIGHT, SIR.

2638

1 **THE COURT:** AND LET ME JUST CHECK ONE THING HERE.
2 AND IF WE DO THAT, YOU WON'T HAVE ANY TROUBLE GETTING YOUR
3 EVIDENCE UP PROBABLY BY ABOUT LUNCH ON WEDNESDAY.

4 **MR. SALTER:** I'M THINKING LUNCH OR MAYBE, YOU KNOW,
5 MAYBE SHORTLY THEREAFTER AFTER LUNCH.

6 **THE COURT:** OKAY. AND Y'ALL ANTICIPATE THAT RATHER
7 THAN DOING THE CLOSING ARGUMENT RIGHT NOW YOU'D RATHER GO
8 BACK AND PREPARE -- GET THE TRANSCRIPT OF THIS TRIAL, PREPARE
9 POST-TRIAL BRIEFS AND---

10 **MR. FLOYD:** I THINK THAT WOULD BE MORE INSTRUCTIVE
11 FOR THE COURT, TOO, YOUR HONOR.

12 **THE COURT:** IS THAT -- IS THAT---

13 **MR. SALTER:** THERE'S NO OBJECTION FROM THE STATE.
14 THAT'S BEEN OUR PRACTICE FOR THE MOST PART, YOUR HONOR.

15 **THE COURT:** SO WE WOULD -- SO ONCE WE'RE DONE WITH
16 THE TESTIMONY, WE'LL JUST BE DONE.

17 **MR. SALTER:** YES, SIR, YOUR HONOR.

18 **THE COURT:** WE MIGHT HAVE A LITTLE DISCUSSION TO
19 KIND OF TRY TO NARROW SOME OF THE ISSUES BUT... ALL RIGHT.
20 WELL, WE'LL JUST -- WE'LL START BACK AT 10:00 TOMORROW WITH
21 THE HOPEFUL ANTICIPATION THAT THE APPLICANT CAN FINISH BY THE
22 TIME YOU HAVE TO GO TO FAMILY COURT, AND THEN WE'LL START AT
23 10:00 WEDNESDAY WITH THE STATE'S EVIDENCE AND WE SHOULD BE
24 DONE WEDNESDAY. AND THEN I'LL HAVE -- I DO HAVE SOME OF YOUR
25 PARTNERS COMING OVER HERE ON THURSDAY FOR SOMETHING ON

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1 LOCKLAIR.

2 MR. SALTER: UNFORTUNATELY NOT JUST MY PARTNER BUT
3 MY SUPERVISOR.

4 THE COURT: ALL RIGHT. ALL RIGHT THEN. I'LL SEE
5 Y'ALL AT 10:00 TOMORROW.

6 MR. FLOYD: THANK YOU, YOUR HONOR.

7 MR. SALTER: THANK YOU, YOUR HONOR.

8 (WHEREUPON, THE TRIAL CONCLUDED FOR THE DAY AT 4:51
9 P.M. AND RESUMED THE FOLLOWING DAY, JULY 11, 2006, AS
10 FOLLOWS.)

11 THE COURT: THANKS. BE SEATED. GOOD MORNING.

12 MR. SALTER: YOUR HONOR, IF I MIGHT, THERE'S A
13 PACKET -- THERE'S A PACKET ON THE---

14 THE COURT: OH, YEAH.

15 MR. SALTER: THAT HAS NOTHING TO DO WITH THIS CASE.
16 I WAS ASKED TO HAND THAT UP---

17 THE COURT: IS THAT FROM SALLY ELLIOTT?

18 MR. SALTER: FROM SALLY ELLIOTT.

19 THE COURT: OKAY. THANK YOU VERY MUCH.

20 MR. SALTER: I HAVE NO IDEA WHAT IT IS BUT...

21 THE COURT: IT'S SOME CASH.

22 MR. SALTER: IF I HAD KNOWN THAT, YOUR HONOR, I
23 WOULD HAVE OPENED IT.

24 THE COURT: Y'ALL READY?

25 MS. KIMBROUGH: YES, YOUR HONOR.

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1 MR. FLOYD: READY, YOUR HONOR.

2 THE COURT: GO AHEAD.

3 MR. FLOYD: YOUR HONOR, WE CALL STEVE DERRICK.

4 STEVE DERRICK, AFTER BEING DULY SWORN,
5 TESTIFIED AS FOLLOWS:

6 DIRECT EXAMINATION

7 BY MR. FLOYD:

8 Q. MR. DERRICK, WHERE ARE YOU EMPLOYED?

9 A. I'M EMPLOYED WITH THE SOUTH CAROLINA LAW ENFORCEMENT
10 DIVISION.

11 Q. AND DID YOU HAVE ANY INVOLVEMENT WITH THE GARY TERRY
12 CASE?

13 A. YES, SIR, I DID.

14 Q. WHAT WAS YOUR POSITION IN S.L.E.D. AT THAT TIME?

15 A. I WAS A SENIOR EXAMINER IN THE DEPARTMENT OF LATENT
16 PRINT AND CRIME SCENE.

17 Q. OKAY. NOW, IN CONNECTION WITH YOUR INVESTIGATION IN
18 THIS MATTER, DID YOU OBTAIN SOME FINGERPRINTS OFF OF SOME
19 BEER CANS?

20 A. YES, SIR.

21 Q. AND WHERE WERE THOSE BEER CANS LOCATED?

22 A. TO THE BEST OF MY MEMORY, I BELIEVE THEY WERE IN THE
23 LIVING ROOM ON THE COFFEE TABLE.

24 Q. DO YOU REMEMBER HOW MANY BEER CANS THERE WERE?

25 A. FOUR OR FIVE, TO THE BEST OF MY MEMORY.

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1 Q. AND WERE YOU ABLE TO OBTAIN A USABLE PRINT FROM THE
2 BEER CANS?

3 A. NO, SIR. THERE WAS ONE PRINT THAT HAD ENOUGH
4 CHARACTERISTICS THAT IT WAS IDENTIFIABLE, BUT IT WAS NEVER
5 IDENTIFIED TO ANYONE.

6 Q. OKAY. WELL, WHAT I MEANT WAS YOU FOUND A PRINT THAT
7 WAS SUFFICIENT IN DETAIL TO IDENTIFY WITH SOMEONE.

8 A. YES, SIR.

9 Q. DID YOU TEST THAT PRINT AGAINST GARY TERRY?

10 A. YES, SIR.

11 Q. AND IT DID NOT MATCH GARY TERRY.

12 A. NO, SIR.

13 Q. DID YOU CHECK THAT PRINT AGAINST URAI JACKSON?

14 A. YES, SIR.

15 Q. DID IT MATCH URAI JACKSON?

16 A. NO, SIR.

17 Q. AND THESE BEER CANS, WEREN'T THEY FAIRLY CLOSE TO
18 WHERE THE BODY WAS FOUND?

19 A. YES, SIR.

20 Q. NOW, YOU DID FIND A PRINT THAT YOU IDENTIFIED AS MR.
21 TERRY'S ON THE PHONE BOX. IS THAT CORRECT?

22 A. YES, SIR.

23 Q. AND YOU'VE ALSO FOUND SOME OTHER PRINTS ON THE PHONE
24 BOX THAT YOU WERE NOT ABLE TO IDENTIFY. IS THAT CORRECT?

25 A. THEY HAD INSUFFICIENT CHARACTERISTICS TO BE SUITABLE

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1 TO IDENTIFY OR TO NEGATE TO ANY INDIVIDUAL.

2 Q. AND THERE'S NO WAY TO TELL THE AGE OF A FINGERPRINT,
3 IS THERE?

4 A. NO, SIR.

5 Q. IN FACT, WERE YOU AWARE OF A FEW YEARS BACK WHEN
6 THEY HAD A FINGERPRINT FROM THE WORLD WAR II ERA ON A LETTER?
7 DID YOU READ ABOUT THAT?

8 A. YES, SIR. AND KEEP IN MIND THAT DIFFERENT SURFACES
9 AND ENVIRONMENTAL AREAS THAT THEY'RE KEPT IN ALSO CAN AFFECT
10 THE LONGEVITY OF A PRINT. PAPER IS ONE OF THOSE ITEMS THAT
11 CAN HOLD PRINT FOR DECADES IN A CONTROLLED ENVIRONMENT.

12 Q. AND AS FAR AS THAT GOES, THIS PRINT COULD HAVE BEEN
13 THERE FOR DAYS.

14 A. YES, SIR.

15 Q. OR WEEKS.

16 A. IT WOULD DEPEND ON THE WEATHER.

17 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

18 CROSS-EXAMINATION

19 BY MS. BROWN:

20 Q. MR. DERRICK, MY NAME IS MELODY BROWN. I WORK WITH
21 THE ATTORNEY GENERAL'S OFFICE. YOU TESTIFIED EARLIER THAT
22 YOU RECALL THE TESTIMONY AT TRIAL IN '97. YOU REMEMBER
23 TESTIFYING. THAT'S CORRECT?

24 A. YES, MA'AM.

25 Q. I WANT TO SHOW YOU PAGE 1441 OF THE TRANSCRIPT. DO

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1 YOU RECALL, IN REVIEWING THIS, YOUR TESTIMONY? YOU WERE
2 CROSSED BY MR. STONE, AND MR. STONE ASKED YOU ABOUT BEER
3 CANS. DOES THAT LOOK FAMILIAR TO YOU?

4 A. NO, MA'AM. I HAVEN'T SEEN MY TRANSCRIPT UNTIL NOW.

5 Q. OKAY. I WANT TO DIRECT YOU TO LINE 19.

6 A. YEAH.

7 Q. AND READ LINE 19 TO 25 TO YOURSELF.

8 A. OKAY.

9 Q. I'D LIKE TO ASK YOU A QUESTION ABOUT THAT.

10 A. (THE WITNESS COMPLIES AND READS.)

11 MR. FLOYD: MS. BROWN, WHAT PAGE? WHAT PAGE?

12 MS. BROWN: IT'S 1441.

13 MR. FLOYD: OKAY.

14 THE WITNESS: YES, MA'AM.

15 BY MS. BROWN:

16 Q. DO YOU RECALL THAT TESTIMONY?

17 A. YES, MA'AM.

18 Q. WHERE WERE THE BEER CANS LOCATED?

19 A. ACCORDING TO THAT TESTIMONY, THEY WERE DRAINING IN
20 THE SINK.

21 Q. WELL, DID YOU FIND THE BEER CANS IN THE LIVING ROOM
22 OR DID YOU FIND THEM IN THE SINK?

23 A. I WOULD HAVE TO GO IN MY TRANSCRIPT---

24 Q. DO YOU RECALL---

25 A. ---BECAUSE I HAVE NOT SEEN THE CRIME SCENE

1 PHOTOGRAPHS AND IT'S NOT LISTED IN THE CASE REPORT WHERE THE
2 BEER CANS WERE, SO I WOULD RELY ON MY TESTIMONY. I'M GOING
3 FROM MEMORY, AND IT'S BEEN OVER A DECADE.

4 Q. I UNDERSTAND. I UNDERSTAND. SO YOU LIFTED TWO
5 PRINTS FROM THE CRIME SCENE; CORRECT?

6 A. TWO IDENTIFIABLE PRINTS.

7 Q. TWO IDENTIFIABLE PRINTS.

8 A. THAT'S CORRECT.

9 Q. AND YOU WERE QUALIFIED AS A CRIME SCENE ANALYST IN
10 THE SEPTEMBER TRIAL; RIGHT?

11 A. YES, MA'AM.

12 Q. AND HAVE YOU CONTINUED YOUR TRAINING AND PRACTICE IN
13 THAT DISCIPLINE SINCE THAT TIME?

14 A. ALL THE WAY UP 'TIL DECEMBER OF LAST YEAR WHEN I
15 TRANSFERRED OUT, BUT I STILL MAINTAIN MY STATUS IN THE
16 VARIOUS ASSOCIATIONS, KEEP UPDATED MATERIAL, AND ATTEND
17 CONFERENCES.

18 Q. WELL, WERE YOU SUBSEQUENTLY QUALIFIED AN EXPERT IN
19 OTHER TRIALS SINCE THE '97 TRIAL?

20 A. YES, MA'AM.

21 Q. OKAY. OKAY. NOW, THE TELEPHONE BOX WAS OUTSIDE THE
22 HOME; RIGHT?

23 A. THAT'S CORRECT.

24 Q. AND YOU LIFTED A PRINT FROM THAT TELEPHONE BOX.

25 A. YES, MA'AM.

1 Q. NOW, THE PHONE BOX HAD SOME WIRES OUT OF IT?

2 A. TO THE BEST OF MY MEMORY.

3 Q. OKAY. SO BEING A CRIME SCENE EXPERT, THAT WOULD BE
4 ALMOST A MINI CRIME SCENE, WOULD IT NOT?

5 A. IT'S PART OF THE TOTALITY OF THE ENTIRE CRIME SCENE.

6 Q. THE WIRES WERE IN DISARRAY IN THAT.

7 A. THAT'S CORRECT.

8 Q. AND THAT'S WHERE YOU LIFTED ONE IDENTIFIABLE PRINT.

9 A. WAS OFF THE BOX.

10 Q. AND ACCORDING TO YOUR TRIAL TESTIMONY, THE SECOND
11 PRINT THAT YOU LIFTED WERE -- WAS OFF OF A BEER CAN.

12 A. THAT'S CORRECT.

13 Q. IN THE KITCHEN SINK.

14 A. ACCORDING TO MY TESTIMONY, THAT WOULD BE CORRECT.

15 Q. AND THE VICTIM'S BODY -- DO YOU REMEMBER THE
16 LOCATION OF THE VICTIM'S BODY?

17 A. TO THE BEST OF MY MEMORY, IT WAS BETWEEN THE HALLWAY
18 AND THE LIVING ROOM.

19 Q. OKAY. NOT IN THE KITCHEN.

20 A. NO.

21 Q. OKAY. SO ONE PRINT IN THE SINK AWAY FROM THE BODY.
22 ANOTHER PRINT AT A TELEPHONE BOX, OBVIOUSLY IN DISARRAY, PART
23 OF THE CRIME.

24 A. YES, MA'AM.

25 Q. OKAY. NOW, YOU TOOK SOME PRINTS FROM MR. TERRY;

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1 CORRECT?

2 A. THAT'S CORRECT, TO THE BEST OF MY MEMORY.

3 Q. OKAY. I WANT TO SHOW YOU WHAT WAS MARKED AS STATE'S
4 EXHIBITS 18 A., B., AND C., AND THEY WERE INTRODUCED AT
5 TRIAL.

6 MR. FLOYD: OKAY.

7 BY MS. BROWN:

8 Q. I WANT TO SEE IF YOU CAN IDENTIFY THESE FOR US,
9 PLEASE.

10 A. YES, MA'AM, I CAN IDENTIFY THEM.

11 Q. OKAY. AND WHAT ARE THEY?

12 A. THESE ARE THE THREE INKED FINGERPRINT CARDS I TOOK
13 OF GARY TERRY.

14 Q. OKAY. AND YOU TOOK THREE. DID YOU USE ALL THREE IN
15 YOUR COMPARISON?

16 A. I CAN'T RECALL.

17 Q. OKAY. BUT OF THOSE THREE, WHETHER YOU USED THOSE OR
18 JUST ONE OF THOSE, HOW MANY POINTS IN COMMON DID YOU FIND IN
19 THE PRINT FROM THE TELEPHONE BOX? DO YOU RECALL?

20 A. A SUFFICIENT NUMBER TO AFFECT THE IDENTIFICATION.

21 Q. AND YOU WERE SURE OF THAT.

22 A. YES, MA'AM.

23 Q. AND YOU KNOW THAT YOU DID THIS BECAUSE OF A
24 SIGNATURE OR HOW IS IT THAT YOU KNOW THAT YOU USED THIS
25 PARTICULAR CARD?

1 A. TO THE BEST OF MY MEMORY IN THIS CASE, THERE WAS A
2 CARD ON FILE THAT WAS NOT A VERY CLEAR CARD OF MR. TERRY, AND
3 WE WERE SEEKING MR. TERRY TO GET CLEARER PRINTS ON...

4 Q. OKAY. AND THIS IS YOUR SIGNATURE?

5 A. YEAH. SO WHEN WE GOT AN OPPORTUNITY TO GET TO MR.
6 TERRY, I TOOK THREE INKED FINGERPRINT CARDS OF HIS FINGERS.

7 Q. OKAY. SO TO THE LEFT OF THE CARD, YOU'VE GOT YOUR
8 SIGNATURE.

9 A. YES, MA'AM.

10 Q. WHAT ABOUT THE SIGNATURES AT THE TOP CORNER OF THE
11 CARD?

12 A. OKAY. THE INITIALS THAT'S AT THE TOP CORNER OF THE
13 CARD---

14 Q. THE INITIALS.

15 A. ---ONE SET OF INITIALS IS MINE. THERE ARE FOUR --
16 YEAH, FOUR OTHER SETS OF INITIALS ON THE CARD. THAT WAS
17 OTHER QUALIFIED EXAMINERS THAT INDEPENDENTLY COMPARED THIS
18 LATENT TO THIS INKED FINGERPRINT CARD OR THESE INKED
19 FINGERPRINT CARDS.

20 Q. IS THAT STANDARD S.L.E.D. PROCEDURE?

21 A. YES, MA'AM.

22 Q. NOW, YOU ALSO TESTIFIED AT TRIAL THAT YOU WERE AN
23 EXPERT -- OR AS AN EXPERT IN BLOOD SPATTER ANALYSIS; CORRECT?

24 A. THAT'S CORRECT.

25 Q. AND YOU'VE KEPT UP WITH THAT DISCIPLINE SINCE '97 AS

1 WELL?

2 A. YES, MA'AM.

3 Q. OKAY. I'D LIKE TO SHOW YOU ADDITIONAL EXHIBITS,
4 WHAT WAS MARKED STATE'S EXHIBIT 53, 59, 58, AND 57.

5 MR. FLOYD: YOUR HONOR, I UNDERSTAND THAT YOU HAVE
6 PRETTY WIDE DISCRETION IN WHERE TO GO ON CROSS-EXAMINATION.
7 IT SEEMS TO ME WE'RE GOING WELL BEYOND THE SCOPE OF WHAT WE
8 PUT UP HERE. WE'RE GETTING INTO A DIFFERENT AREA ALTOGETHER.

9 THE COURT: OKAY. THAT'S FINE.

10 MS. BROWN: WOULD YOU LIKE ARGUMENT, YOUR HONOR?

11 THE COURT: HUH-UH. IF THAT'S AN OBJECTION, I
12 OVERRULE IT.

13 MR. FLOYD: THANK YOU.

14 BY MS. BROWN:

15 Q. I WONDER IF YOU COULD IDENTIFY THOSE FOR US.

16 A. YES, MA'AM, I CAN IDENTIFY ALL OF THESE PICTURES.

17 Q. AND WHAT ARE THEY PICTURES OF?

18 A. THESE ARE PHOTOGRAPHS OF THE INTERIOR OF THE HOUSE
19 OF THE CRIME SCENE I WORKED THAT DAY.

20 Q. OKAY. TAKING INTO ACCOUNT THE SPATTER EVIDENCE AND
21 THE CRIME SCENE IN GENERAL, DO YOU HAVE AN OPINION AS TO WHAT
22 POSITION THE VICTIM WAS IN WHEN SHE WAS STRUCK ON THE BACK OF
23 THE HEAD?

24 A. SPECIFIC BLOWS TO SPECIFIC POSITIONS IN THIS CASE I
25 CAN'T SPECIFICALLY SAY. I CAN SAY THAT MS. JACKSON RECEIVED

1 ONE BLOW AT LEAST IN A SEMI UPRIGHT POSITION WHICH WOULD BE
2 THE SPATTER THAT WAS ON THE WALL NEXT TO WHAT APPEARS TO BE A
3 SMALL DESK, AND THEN THERE WERE MULTIPLE BLOWS THAT TOOK
4 PLACE WHILE MS. JACKSON WAS ON THE FLOOR WITH HER HEAD
5 BETWEEN THE HALLWAY AND THE LIVING ROOM.

6 Q. THE HEAD ON THE FLOOR, MULTIPLE BLOWS.

7 A. YES, MA'AM.

8 Q. OKAY. AGAIN, TAKING INTO ACCOUNT THE CRIME SCENE
9 AND THE PHOTOGRAPHS THAT YOU HAVE THERE THAT YOU'VE REVIEWED,
10 DO YOU HAVE AN OPINION WHETHER THERE WAS A SEXUAL CONTEXT TO
11 THE CRIME ITSELF?

12 MR. FLOYD: YOUR HONOR, I OBJECT. HE HAS NO
13 EXPERTISE IN SEXUAL CONTENT. HE'S A FINGERPRINT AND BLOOD
14 SPATTER PERSON.

15 THE COURT: WELL, WHAT -- WHAT -- KEEPING IN MIND
16 THAT WE'RE NO LONGER CONCERNED WITH WHETHER OR NOT THE
17 DEFENDANT IS GUILTY BUT ONLY WITH WHETHER OR NOT HIS COUNSEL
18 PERFORMED EFFECTIVELY, WHAT'S THE RELEVANCE OF THIS?

19 MS. BROWN: PART OF THE ALLEGATION IN THE ACTION IS
20 THAT YOU DIDN'T GO OVER THE FORENSIC EVIDENCE AND YOU DIDN'T
21 LOOK AT ALIBI AND YOU DIDN'T LOOK AT THE STATEMENTS IN THE
22 CONFESSION, AND WE'RE ATTEMPTING TO DEMONSTRATE THIS IS THE
23 EVIDENCE AND THIS IS WHAT THEY HAD, AND THEY HAD TO COMPARE
24 THAT WHEN THEY WERE CONSIDERING THEIR DEFENSES.

25 THE COURT: I DIDN'T FOLLOW THAT.

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1 **MS. BROWN:** OKAY. THE ALLEGATION IS THAT THE
2 DEFENSE COUNSEL -- BOTH DEFENSE COUNSEL DID NOT GO IN AND
3 LOOK AT ALL THE FORENSIC EVIDENCE AND COME UP WITH A
4 PARTICULAR DEFENSE. THAT'S THE ALLEGATIONS AT LEAST
5 SIMPLIFIED.

6 **THE COURT:** A PARTICULAR -- A PARTICULAR DEFENSE OR
7 JUST SOME PARTICULAR DEFENSE? SOME DEFENSE?

8 **MS. BROWN:** PART OF THAT -- AS I UNDERSTAND THEIR
9 ALLEGATION, PART OF THAT IS THAT THEY DIDN'T GO THROUGH THE
10 CONFESSION AND TAKE OUT PORTIONS AND SEE IF THERE WAS ANY
11 FORENSIC EVIDENCE THAT SUPPORTED A FIGHT AND POSSIBLY
12 MANSLAUGHTER, AND FRANKLY WE ONLY HAVE TWO OR THREE QUESTIONS
13 THAT SHOW THE CRIME SCENE AND THE POSITION OF THE BODY WHICH
14 TENDS TO NEGATE THE POSSIBILITY OF AN UPRIGHT BATTLE.

15 **THE COURT:** IS THERE A SPECIFIC DEFENSE THAT YOU
16 ASSERT THAT TRIAL COUNSEL SHOULD HAVE ATTEMPTED TO DEVELOP
17 THROUGH THIS WITNESS OR OTHER WITNESSES THAT RELATES TO
18 WHETHER OR NOT THERE WAS A SEXUAL ASSAULT?

19 **MR. FLOYD:** YES, YOUR HONOR. WE---

20 **THE COURT:** WHAT IS IT?

21 **MR. FLOYD:** THAT'S BEEN DEVELOPED THROUGH DR.
22 CARTER.

23 **THE COURT:** JUST TELL ME WHAT IT IS. WHAT'S THE---

24 **MR. FLOYD:** THERE WAS NO EVIDENCE OF A SEXUAL
25 ASSAULT. THERE WAS NO VAGINAL TEARING, NO VAGINAL BRUISING

1 IN ALL OF THIS. THAT -- THAT CAME OUT THROUGH DR.
2 CARTER WHO---

3 THE COURT: WELL, I MEAN, THAT'S -- THAT'S NOT WHAT
4 I'M TALKING ABOUT. I MEAN, THAT -- OBVIOUSLY THE QUESTION OF
5 WHETHER OR NOT THE DEFENDANT IS GUILTY IS AN ISSUE FOR ALL --
6 FOR ALL THE INDICTMENTS THAT WERE BEFORE THE COURT AT THAT
7 TIME, BUT IS THERE SOME DEFENSE THAT YOU CONTEND THAT COUNSEL
8 SHOULD HAVE DEVELOPED AT TRIAL THAT THEY DID NOT DEVELOP,
9 SOMETHING OTHER THAN HE'S NOT GUILTY?

10 MR. FLOYD: YES. WE DID FEEL THAT THERE WAS --
11 SHOULD HAVE BEEN A DEVELOPMENT OF A MANSLAUGHTER POSSIBILITY.

12 THE COURT: ALL RIGHT.

13 MR. FLOYD: AND, OF COURSE, THE PROVOCATION IS IN
14 MITIGATION.

15 THE COURT: ALL RIGHT. THEN I -- I OVERRULE THE
16 OBJECTION. GO AHEAD.

17 MS. BROWN: THANK YOU, YOUR HONOR. NOW, DO YOU HAVE
18 AN OPINION AS TO WHETHER THERE WAS A SEXUAL CONTEXT TO THE
19 CRIME ITSELF?

20 MR. FLOYD: YOUR HONOR, I OBJECT. THIS EVIDENCE
21 DOES NOT -- THIS -- THIS WITNESS DOES NOT HAVE ANY EXPERTISE
22 IN WHETHER OR NOT THERE WAS ANY KIND OF SEXUAL ASPECT TO THE
23 CRIME.

24 MS. BROWN: HE'S---

25 MR. FLOYD: HE'S A FINGERPRINT ANALYSIS AND BLOOD

1 SPATTER ANALYSIS. IT HAS NOTHING TO DO WITH SEX.

2 THE COURT: DID YOU SAY HE WAS QUALIFIED AS A CRIME
3 SCENE...

4 MS. BROWN: YES, SIR, AT TRIAL AND HE CONTINUED HIS
5 EDUCATION SINCE TRIAL.

6 THE COURT: HE WAS QUALIFIED AS A CRIME SCENE WHAT?

7 MS. BROWN: EXPERT.

8 THE COURT: WHICH IS WHAT?

9 MS. BROWN: HE CAN ANALYZE A CRIME SCENE AND TAKE
10 FROM THAT CERTAIN DISCOVERY MEASURES THAT INDICATES AN
11 INVESTIGATION OF CERTAIN ITEMS.

12 THE COURT: SO YOUR QUESTION WAS: IS THERE A SEXUAL
13 ASPECT?

14 MS. BROWN: COULD HE TELL FROM THE CRIME SCENE THE
15 POSITION OF THE BODY AND PARTICULARLY IF THERE WAS A SEXUAL
16 CONTEXT TO THE CRIME ITSELF, NOT IF IT HAPPENED, SIMPLY WAS
17 THERE A SUGGESTION---

18 THE COURT: WELL, I DON'T REALLY UNDERSTAND WHAT YOU
19 MEAN BY SEXUAL CONTEXT.

20 MS. BROWN: WELL, IF I MAY OFFER, YOUR HONOR,
21 PERHAPS IF I COULD SHOW THE COURT---

22 THE COURT: ARE YOU GOING TO ASK HIM -- YOU'RE
23 ASKING HIM WHETHER OR NOT THERE'S ANY -- HE SEES ANY EVIDENCE
24 THAT SHE WAS RAPED?

25 MS. BROWN: IF THAT WOULD BE AN INVESTIGATION POINT,

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1 YES, YOUR HONOR. IF THERE WAS ANYTHING IN THE CRIME SCENE
2 THAT WOULD SUGGEST THERE WAS A SEXUAL CONTEXT, THEN THAT'S
3 WHAT AN INVESTIGATOR WOULD LOOK FOR, ANY EVIDENCE OF A SEXUAL
4 CRIME AT THAT POINT.

5 THE COURT: ALL RIGHT. SO YOU'RE -- YOU'RE
6 APPROACHING IT FROM THE STANDPOINT OF -- OF NOT SO MUCH WHAT
7 HAPPENED BUT HOW THE INVESTIGATION WENT.

8 MS. BROWN: CORRECT, YOUR HONOR.

9 THE COURT: OKAY.

10 MR. FLOYD: YOUR HONOR, WE'D ASK THAT HE BE
11 QUALIFIED IN THAT AREA. THERE'S BEEN---

12 THE COURT: WELL, I THINK HE IS QUALIFIED IN THE
13 AREA OF HOW AN INVESTIGATION GOES AND HOW -- WHAT LEADS AN
14 OFFICER OR WHAT LEADS AN INVESTIGATOR TO LOOK AT DIFFERENT
15 THINGS WHEN THEY COME TO A CRIME SCENE. HE WAS QUALIFIED AT
16 THE TRIAL AS A CRIME SCENE EXPERT, WHATEVER THAT IS. GO
17 AHEAD.

18 MR. FLOYD: HE CERTAINLY WASN'T INQUIRED OF AS TO
19 ANY KIND OF IDEAS OR OPINIONS HE HAD IN THAT PARTICULAR AREA.
20 THAT ALL CAME FROM DR. CARTER WHO WE HAD UP HERE YESTERDAY.

21 THE COURT: I KNOW, BUT YOU TAKE THE -- YOU TAKE THE
22 POSITION THAT -- THAT THEY SHOULD HAVE DONE SOMETHING
23 REGARDING -- THAT THEY SHOULD HAVE BEEN MORE VIGOROUS IN
24 TRYING TO GET A MANSLAUGHTER CHARGE, AND SHE'S PROVEN THAT
25 EVEN THOUGH THAT MAY BE TRUE AND EVEN THOUGH YOU MAY HAVE

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1 BEEN ABLE TO DO IT, IT WOULDN'T HAVE MADE ANY DIFFERENCE IN
2 THE LONG RUN BECAUSE THEY WERE GOING TO FIND HIM GUILTY OF
3 MURDER BASED ON WHAT HE -- BASED ON THIS EVIDENCE OF A --
4 WELL, SEE, RIGHT NOW SHE'S EXPLORING THE SEXUAL EVENT. SO I
5 OVERRULE THE OBJECTION.

6 MR. FLOYD: THANK YOU, YOUR HONOR.

7 BY MS. BROWN:

8 Q. WOULD YOU ANSWER THE QUESTION, PLEASE, MR. DERRICK?

9 A. I'M LOST. WOULD YOU REPEAT THE QUESTION?

10 Q. DO YOU REMEMBER IT? DO YOU HAVE AN OPINION, BASED
11 ON THE PHOTOGRAPHS THAT YOU'VE REVIEWED TODAY AND GOING BACK
12 TO YOUR TESTIMONY BEFORE, WHETHER THERE WAS A SEXUAL CONTEXT
13 TO THE CRIME ITSELF BASED ON THE PHOTOGRAPHS FROM THE CRIME
14 SCENE?

15 A. THAT -- THAT WOULD CALL FOR SPECULATION ON MY PART,
16 PRIMARILY BY THE LIMITED ATTIRE THAT THE VICTIM WAS WEARING.
17 IS THAT A BYPRODUCT OF THE ASSAULT? WAS IT A POSED POSITION?
18 IT'S SPECULATION. THERE'S TOO MANY VARIABLES.

19 Q. FIRST OF ALL, WOULD YOU SHOW THE PICTURE TO THE
20 COURT, PLEASE, PICTURE 53?

21 A. (THE WITNESS COMPLIES.)

22 Q. AND WOULD YOU EXPLAIN WHAT LED YOU TO BELIEVE THAT
23 THERE WAS SOME SEXUAL CONTEXT?

24 MR. FLOYD: YOUR HONOR, I OBJECT. HE JUST SAID HE
25 DIDN'T HAVE ANY OPINION. THAT WOULD BE SPECULATION.

1 **THE COURT:** ISN'T THAT WHAT HE JUST SAID?

2 **MS. BROWN:** WELL, AS I UNDERSTOOD IT, IT WOULD BE
3 SPECULATION TO THE CRIME. I'M SORRY. PERHAPS I
4 MISUNDERSTOOD THE ANSWER. DO YOU HAVE AN OPINION AS TO ANY
5 SEXUAL CONTEXT IN REGARD---

6 **MR. FLOYD:** OBJECTION.

7 **MS. BROWN:** ---TO THE CRIME SCENE?

8 **MR. FLOYD:** ASKED AND ANSWERED.

9 **THE COURT:** OVERRULED.

10 **THE WITNESS:** AS FAR AS A SEXUAL ACT WOULD GO IN
11 THIS CASE AS IN ALL CASES, THAT'S FOR THE FORENSIC
12 PATHOLOGIST TO DO THAT DETERMINATION. IN MY PREVIOUS
13 TESTIMONY, IT CALLS FOR SPECULATION ON MY PART WHETHER
14 THERE'S A SEXUAL CONNOTATION INVOLVED OR NOT, AND I BASE THAT
15 SIMPLY ON THE LIMITED ATTIRE THAT IS REPRESENTED IN THE
16 PICTURE BY MS. JACKSON. WAS IT A POSED BODY? WAS IT A
17 SEXUAL ACT OR WAS THAT JUST THE RANDOM OCCURRENCE OF WHERE
18 THE CLOTHING LANDED AFTER SHE WAS ON THE FLOOR? I DON'T
19 KNOW.

20 BY MS. BROWN:

21 Q. OKAY. WHEN THAT PICTURE WAS TAKEN, THAT WAS THE WAY
22 THE BODY WAS DISCOVERED---

23 A. THAT'S CORRECT.

24 Q. WITH THE GOWN UP.

25 A. YES, MA'AM.

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1 Q. AND THE LEGS SPREAD.

2 A. YES, MA'AM.

3 Q. AND THAT'S CORRECT. OKAY. AND LET'S SEE. LASTLY,
4 I WANT TO SHOW YOU WHAT WAS MARCHED -- MARKED STATE'S EXHIBIT
5 4, 5, AND 6. I WANT TO ASK YOU IF YOU CAN IDENTIFY THESE
6 PHOTOGRAPHS FOR US.

7 A. YES, MA'AM.

8 Q. OKAY. AND WHAT ARE THEY?

9 A. TWO OF THE PHOTOGRAPHS REPRESENT THE -- I GUESS THE
10 SIDE DOOR OR THE DOOR THAT GOES TO THE CARPORT, AND THE OTHER
11 PHOTOGRAPH IS THE INTERIOR OF THE KITCHEN OF THE VICTIM'S
12 RESIDENCE.

13 Q. OKAY. AND DO YOU HAVE AN OPINION AS TO WHETHER
14 THERE WAS A FORCED ENTRY INTO THE HOME BASED ON THAT CRIME
15 SCENE?

16 A. YES, MA'AM. BASED ON THE BROKEN GLASS IN STATE'S
17 EXHIBIT NUMBER 4, IT WOULD BE AN INDICATION OF A FORCED
18 ENTRY.

19 Q. AND WOULD YOU SHOW THOSE PHOTOGRAPHS TO THE JUDGE
20 AND SHOW HIM WHAT YOU WERE POINTING TO, PLEASE?

21 A. (THE WITNESS COMPLIES.) BROKEN GLASS WHICH WAS ON
22 THE DOOR WHICH IS OPEN IN STATE'S EXHIBIT NUMBER 5, INTERIOR
23 OF THE KITCHEN.

24 MS. BROWN: OKAY. THANK YOU, MR. DERRICK. I HAVE
25 NO FURTHER QUESTIONS, YOUR HONOR.

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1 THE COURT: ANY REDIRECT?

2 MR. FLOYD: JUST A COUPLE, YOUR HONOR.

3 REDIRECT EXAMINATION

4 BY MR. FLOYD:

5 Q. NOW, MR. DERRICK, YOU HAVE NO IDEA OF WHEN THAT
6 WINDOW WAS BROKEN, DO YOU?

7 A. WELL, IF IT HAD BEEN BROKEN FOR AN EXTENDED PERIOD
8 OF TIME, THEY LEFT THE BROKEN GLASS ON THE FLOOR, SO...

9 Q. I UNDERSTAND THAT, BUT YOU REALLY HAVE NO WAY OF
10 KNOWING WHEN IT WAS BROKEN.

11 A. A SPECIFIC TIME, NO.

12 Q. OKAY. IN FACT, THE OWNER OF THE HOUSE MAY HAVE
13 LOCKED HERSELF OUT AND HAD TO BREAK IT TO GET IN. IS THAT
14 CORRECT?

15 A. IT'S A POSSIBILITY.

16 Q. OKAY. NOW, AS TO THE FINGERPRINT ON THE PHONE BOX,
17 YOU WERE NOT ABLE TO MAKE AN IDENTIFICATION OF MR. TERRY ON
18 THAT UNTIL AFTER HE WAS ACTUALLY ARRESTED FOR THE CRIME AND
19 HIS D.N.A. CAME BACK. IS THAT CORRECT?

20 A. TO THE BEST OF MY MEMORY IN THIS CASE, WE HAD A CARD
21 OF MR. TERRY'S THAT WAS ON FILE FOR WHATEVER REASON. THE
22 CARD WAS NOT EXTREMELY CLEAR. THERE WERE CHARACTERISTICS
23 WHICH WERE NOTED IN THAT CARD SPECIFICALLY TO THE RIGHT RING
24 FINGER THAT WERE IN THE SAME UNIT RELATIONSHIP TO THE LATENT
25 ON THE PHONE BOX. BECAUSE OF THE LACK OF SUFFICIENT CLARITY,

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1 THE CALL WAS NOT MADE UNTIL I COULD OBTAIN A BETTER CARD TO
2 SEE THE REST OF THE RIDGE DETAIL. I CAN'T TELL YOU WHETHER
3 THE IDENTIFICATION WAS BEFORE THE D.N.A. OR AFTER BECAUSE I
4 DON'T KNOW WHEN THE D.N.A. RESULTS CAME OUT. I BELIEVE IT
5 WAS IN APRIL OF -- BEAR WITH ME A MOMENT. IT WAS ON
6 APRIL 10TH, 1995, THAT I DID THE COMPARISON OF THE LATENT TO
7 THE THREE INKED PRINT CARDS I TOOK OF MR. TERRY, AND IT WAS
8 ON 4/10 OF '95 WHEN I MADE THE INITIAL CALL, AND THEN SENDING
9 IT TO SUBSEQUENT EXAMINERS FOR THEIR INDEPENDENT EVALUATION
10 INCLUDING THE DEPARTMENTAL LIEUTENANT, THE REPORT WAS NOT
11 ISSUED UNTIL JUNE 15TH OF '05 (SIC).

12 Q. SO ACTUALLY YOU HAD ALREADY TRIED TO MAKE A
13 COMPARISON OF MR. TERRY'S PRINTS BEFORE THE D.N.A. CAME OUT.

14 A. YES, SIR.

15 Q. IN FACT, DIDN'T YOU HAVE ABOUT EIGHT SAMPLES OF MR.
16 TERRY'S FINGERPRINTS ON RECORD?

17 A. I DON'T RECALL THE NUMBER.

18 Q. AND YOU ALSO RAN THAT PRINT THROUGH AFIS, DIDN'T
19 YOU?

20 A. THAT'S CORRECT.

21 Q. AND THAT'S THE SYSTEM THAT HAS---

22 A. EVERYBODY.

23 Q. ---EVERYBODY IN IT?

24 A. YES, SIR.

25 Q. AND THERE WERE NO MATCHES. IS THAT CORRECT?

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1 A. THAT'S CORRECT.

2 Q. AND, IN FACT, ISN'T WHAT HAPPENED IS THAT WHEN MR.
3 TERRY GOT ARRESTED FOR THIS CRIME BUT AFTER THE D.N.A. CAME
4 BACK, YOU WENT OVER TO THE JAIL AND TOOK ANOTHER PRINT FROM
5 HIM AND THEN MADE THE MATCH?

6 A. MR. TERRY WAS ARRESTED AND WAS IN JAIL, AND I DID GO
7 TAKE THE PRINT CARD. I DO NOT KNOW WHEN THE D.N.A. REPORT OR
8 RESULTS WERE ISSUED.

9 Q. OKAY. BUT HE WAS IN JAIL FOR THIS CRIME WHEN YOU
10 WENT OVER TO TAKE THIS NEW CARD, WASN'T HE?

11 A. I DON'T RECALL. I KNOW HE WAS IN JAIL AND I TOOK
12 THE PRINTS AT THE COUNTY JAIL.

13 Q. NOW, ALSO AS TO THAT GLASS, ISN'T IT A POSSIBILITY
14 THAT THE GLASS COULD HAVE BEEN BROKEN ON THE WAY OUT?

15 A. TO THE BEST OF MY MEMORY, THE ABUNDANCE OF THE GLASS
16 WAS ON THE INSIDE KITCHEN FLOOR WHICH WOULD INDICATE THE
17 DIRECTION OF FORCE CAME FROM THE OUTSIDE.

18 Q. HOWEVER, IF THE DOOR WERE SLAMMED SUFFICIENTLY HARD
19 AND YOU HAD SOME DEFECT IN THE GLASS OR A PREVIOUS LITTLE
20 CRACK OR SOMETHING, IT COULD HAVE FALLEN EITHER WAY, COULDN'T
21 IT?

22 A. NO, SIR, BECAUSE THE DIRECTION OF FORCE WOULD HAVE
23 BEEN COMING OUT BY SLAMMING THE DOOR. THAT WOULD HAVE BEEN
24 AN OBJECT IN MOTION COMING TO A SUDDEN STOP KIND OF LIKE THE
25 SEAT BELT THEORY. SO WHEN YOUR CAR HITS SOMETHING AT 25

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1 MILES AN HOUR, IT STOPS, BUT YOU'RE STILL TRAVELING 25 MILES
2 AN HOUR. THE SAME PRINCIPLE WOULD APPLY TO A DEFECT IN THE
3 GLASS, AND THE GLASS SHOULD HAVE WENT FORWARD OUT INTO THE
4 CARPORT.

5 Q. WHEN THE FORCE STOPS IN THE CAR, YOU GO FORWARD,
6 DON'T YOU?

7 A. RIGHT. SO IF YOU SLAM THE DOOR, THE DOOR IS HEADED
8 TOWARD THE CARPORT, BASED ON MY PHOTOGRAPHS.

9 Q. NO. WHEN YOU SLAM THE DOOR, THE DOOR IS GOING
10 TOWARDS THE HOUSE, ISN'T IT, IF YOU SLAM IT BACKWARDS?

11 A. NO, SIR.

12 Q. WHEN YOU SLAM IT SHUT---

13 A. WHEN I SLAM IT SHUT, TO THE BEST OF MY MEMORY IN THE
14 PHOTOGRAPH I JUST LOOKED AT, THAT DOOR OPENED INTO THE
15 KITCHEN. THAT WAS ON THE WOOD DOOR, NOT THE STORM DOOR. SO
16 THEY WERE CLOSING FROM THE INSIDE OUT.

17 MS. BROWN: YOUR HONOR, IF THE WITNESS IS TESTIFYING
18 FROM THE PHOTOGRAPH, MAY I HAND THE PHOTOGRAPH BACK UP? I
19 TOOK IT AWAY FROM THE WITNESS.

20 THE COURT: SURE.

21 MR. FLOYD: I'LL HAND IT TO HIM, MELODY.

22 MS. BROWN: OKAY.

23 THE WITNESS: THIS IS THE ONE.

24 BY MR. FLOYD:

25 Q. THIS IS THE ONE?

1 A. YEAH, THIS ONE. THAT WINDOW PANE IS IN THAT WOOD
2 DOOR WITH THE HINGES RIGHT HERE. THE STORM DOOR OPENS TO THE
3 CARPORT. THE WOOD DOOR OPENED INTO THE KITCHEN. SO TO SLAM
4 THE WOOD DOOR WOULD HAVE THE DIRECTION HEADED TOWARD THE
5 CARPORT.

6 Q. OKAY. WHAT IF THE DOOR WERE OPENED WHEN IT SLAMMED?

7 A. I DON'T UNDERSTAND.

8 Q. WHAT IF THE DOOR WERE OPENED SLAMMED INTO THE HOUSE?

9 A. THEN THE GLASS WOULD HAVE BEEN BEHIND THE DOOR
10 AGAINST THE WALL INSTEAD OF IN THE CENTER OF THE KITCHEN
11 FLOOR.

12 Q. DEPENDING ON WHERE IT MET RESISTANCE.

13 A. DEPENDING ON WHERE IT MET RESISTANCE.

14 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

15 MS. BROWN: NO FURTHER QUESTIONS, YOUR HONOR.

16 THE COURT: ALL RIGHT, SIR. YOU CAN STEP DOWN.
17 THANK YOU.

18 THE WITNESS: THANK YOU, YOUR HONOR.

19 MR. FLOYD: WE CALL NANCY SKRABA.

20 NANCY SKRABA, AFTER BEING DULY SWORN, TESTIFIED
21 AS FOLLOWS:

22 THE CLERK: WHEN YOU'RE COMFORTABLY SEATED, IF YOU
23 WOULD STATE YOUR FULL NAME AND SPELL YOUR LAST NAME FOR ME.

24 THE WITNESS: MY NAME IS NANCY SKRABA, S-K-R-A-B-A.
25

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DIRECT EXAMINATION

BY MR. FLOYD:

Q. AND WHERE ARE YOU EMPLOYED, MS. SKRABA?

A. I WORK FOR THE SOUTH CAROLINA LAW ENFORCEMENT
DIVISION.

Q. WHAT IS YOUR POSITION?

A. I'M A FORENSIC SEROLOGIST AND D.N.A. ANALYST.

Q. DID YOU DO ANY WORK IN CONNECTION WITH THE GARY
TERRY CASE?

A. YES, I DID.

Q. AND CAN YOU TELL US WHAT ITEMS CAME TO YOU FOR
ANALYSIS?

A. YES. I RECEIVED A BLOOD STANDARD FROM URAI JACKSON,
VAGINAL SWAB, VAGINAL WASH, ORAL SWAB, RECTAL SWAB,
FINGERNAIL SCRAPINGS, SWAB COLLECTED FROM A METAL BAR, A SWAB
COLLECTED FROM A PIECE OF WOOD, AND A BLOOD STANDARD FROM
GARY TERRY.

Q. DID YOU RECEIVE SOME HAIRS?

A. NOT THAT I RECALL.

Q. YOU NEVER RECEIVED ANY PUBIC HAIRS?

A. NO, I DON'T BELIEVE I DID.

Q. AND THE FINGERNAIL SCRAPINGS, DID YOU IDENTIFY BLOOD
IN THOSE?

A. YES, I DID.

Q. AND WERE THEY ANALYZED---

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1 A. YES.

2 Q. DID YOU KNOW WHOSE BLOOD IT WAS?

3 A. IT WAS SENT TO LILLY GALLMAN FOR D.N.A. TESTING.

4 Q. DID YOU DO ANY TESTING YOURSELF?

5 A. I DIDN'T DO ANY D.N.A. TESTING. I DID SEROLOGY.

6 Q. OKAY. DID YOU DO -- WELL, DID THEY SEND YOU LIKE A
7 HAIR SAMPLE FOUND ON A POTENTIAL WEAPON?

8 A. I DON'T RECALL ANY HAIR SAMPLES.

9 Q. AND SO YOU DIDN'T RECEIVE ANY HAIR SAMPLES FROM
10 ANYBODY IN CONNECTION WITH THIS CASE.

11 A. NOT THAT I REMEMBER, NO.

12 Q. IN A CASE DO YOU NORMALLY RECEIVE HAIR SAMPLES IF
13 THEY'RE AVAILABLE?

14 A. WE DO NOW, YES.

15 MR. FLOYD: OKAY. THANK YOU. NO FURTHER QUESTIONS.

16 MS. BROWN: THANK YOU, YOUR HONOR.

17 CROSS-EXAMINATION

18 BY MS. BROWN:

19 Q. DO YOU HAVE A COPY OF THE REPORT THAT YOU ISSUED ON
20 FEBRUARY 1ST, 1994 -- OR '95? EXCUSE ME.

21 A. FEBRUARY 6TH? FEBRUARY 1ST?

22 Q. LET ME SHOW YOU AN ITEM AND SEE IF YOU CAN IDENTIFY
23 THIS.

24 A. YES, FEBRUARY 6TH. YES.

25 Q. IT IS FEBRUARY 6TH? AND AT THE FIRST PART HERE IT

2664

1 SAYS FEBRUARY 1ST?

2 A. I SIGNED IT ON THE 6TH OF FEBRUARY---

3 Q. YOU GO BY -- EXCUSE ME. YOU GO BY YOUR SIGNATURE
4 DATE.

5 A. YES.

6 Q. FEBRUARY 6TH, '95. I SEE. AND WHAT IS THIS REPORT?

7 A. THIS IS MY SEROLOGY REPORT.

8 Q. AND DO YOU HAVE THE RESULTS OF YOUR EXAMINATIONS ON
9 THIS REPORT?

10 A. YES, I DO.

11 Q. AND YOU DID FIND SEMEN IN THIS REPORT?

12 A. YES, I DID.

13 Q. AND WHAT DID YOU FIND SEMEN IN?

14 A. THE VAGINAL WASH AND THE RECTAL SWAB.

15 MS. BROWN: THANK YOU. NO FURTHER QUESTIONS.

16 THE COURT: YOU CAN STEP DOWN, MA'AM.

17 MR. FLOYD: NO FURTHER QUESTIONS. LILLY GALLMAN,
18 PLEASE, YOUR HONOR.

19 LILLY S. GALLMAN, AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 THE CLERK: WHEN YOU'RE COMFORTABLY SEATED, GIVE US
22 -- STATE YOUR FULL NAME FOR THE COURT REPORTER.

23 THE WITNESS: OKAY. THANK YOU. MY NAME IS LILLY
24 SMALLS GALLMAN.

25

DIRECT EXAMINATION

BY MR. FLOYD:

Q. AND, MS. GALLMAN, WHERE DO YOU WORK?

A. I WORK FOR THE SOUTH CAROLINA LAW ENFORCEMENT
DIVISION.

Q. WHAT'S YOUR POSITION THERE?

A. I'M A FORENSIC D.N.A. ANALYST.

Q. AND DID YOU PERFORM DUTIES IN YOUR POSITION ON THE
GARY TERRY CASE?

A. YES, I DID.

Q. WERE YOU FORWARDED SOME FINGERNAIL SCRAPINGS?

A. YES, I WAS.

Q. WAS ANY ANALYSIS DONE ON THE FINGERNAIL SCRAPINGS?

A. YES. I ATTEMPTED TO -- WELL, I LOOKED AT THEM AND I
WAS NOT ABLE TO -- TO DEVELOP A D.N.A. PROFILE FROM THE
FINGERNAIL SCRAPINGS, THE RIGHT FINGERNAIL SCRAPINGS.

Q. WERE THERE TESTS AVAILABLE THAT COULD HAVE DONE THAT
AT THE TIME?

A. AT THAT TIME WE PERFORMED R.F.L.P. WHICH IS A
DIFFERENT TYPE FROM WHAT WE -- THE TESTS WE PERFORM NOW IN
D.N.A., AND AT THAT TIME WE REQUIRED QUITE -- REQUIRED A LOT
OF D.N.A. TO DO THAT TEST. AND SO IT WAS BASED ON
INSUFFICIENT SAMPLE THAT I COULD NOT DEVELOP A D.N.A.
PROFILE.

Q. WOULD YOU AGREE WITH ME THOUGH THAT THERE WERE

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1 PLACES THAT THEY COULD HAVE BEEN SENT AT THE TIME?

2 A. TO HAVE ANOTHER TEST DONE? YES.

3 Q. AND THIS OTHER TEST REQUIRED SMALLER PORTIONS OF THE
4 MATERIAL?

5 A. SMALLER SAMPLE SIZE, YES.

6 Q. AND -- BUT S.L.E.D. DID NOT SEND IT OUT FOR THOSE
7 TESTS?

8 A. NO, WE DID NOT. I ONLY DEVELOPED A D.N.A. PROFILE
9 FROM THE VAGINAL SWAB AND THE ANAL SWAB IN THIS CASE.

10 Q. OKAY. NOW, DID YOU GET -- RECEIVE ANY PUBIC HAIRS
11 TO TEST?

12 A. I DID NOT.

13 Q. DID YOU RECEIVE ANY HAIRS TO TEST IN THIS CASE?

14 A. I DID NOT, NO. I DID NOT.

15 Q. WERE YOU AWARE -- AND YOU MAY NOT KNOW THIS. WERE
16 YOU AWARE THAT PUBIC HAIRS WERE RECOVERED FROM THE SCENE?

17 A. NO, I WAS NOT.

18 Q. FOR THOSE HAIRS TO BE TESTED, WOULD YOU HAVE BEEN
19 THE ONE THEY WOULD HAVE SENT THEM TO?

20 A. THEY WOULD HAVE FIRST GONE TO THE TRACE DEPARTMENT
21 FOR COMPARISON WHETHER THEY WERE FROM -- TO ELIMINATE WHETHER
22 THEY WERE FROM THE VICTIM OR FROM AN UNKNOWN PERSON.

23 Q. UH-HUH.

24 A. AND THEN AT THAT TIME A DECISION WOULD HAVE BEEN
25 MADE AS TO WHETHER THEY WERE SENT ON FOR D.N.A. OR NOT.

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1 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

2 CROSS-EXAMINATION

3 BY MS. BROWN:

4 Q. MS. GALLMAN, YOU WERE ASKED ON DIRECT IF THERE WAS
5 THE CAPABILITY IF YOU COULD SEND THIS FINGERNAIL SCRAPING OUT
6 FOR TESTING. IF YOU WERE ASKED TO SEND IT OUT, WOULD YOU
7 SEND IT OUT?

8 A. YES, WE WOULD HAVE.

9 Q. OKAY. THE SAME THING ABOUT OTHER ITEMS THAT YOU
10 WERE ASKED ABOUT THAT YOU DID NOT RECEIVE. IF YOU RECEIVED
11 ITEMS, WOULD YOU HAVE TESTED THEM?

12 A. YES.

13 Q. OKAY. NOW, IN THE R.F.L.P. TEST, THAT WAS THE TEST
14 THAT S.L.E.D. DID AT THE TIME THAT YOU DID YOUR ANALYSIS IN
15 THIS CASE?

16 A. YES, IT WAS.

17 Q. OKAY. AND THAT'S THE TEST THAT YOU DID.

18 A. YES.

19 Q. AND DOES S.L.E.D. STILL USE R.F.L.P.?

20 A. NO, WE DO NOT.

21 Q. WHAT DO YOU USE NOW?

22 A. WE DO P.C.R.---

23 Q. OKAY.

24 A. ---WHICH IS POLYMERASE CHAIN REACTION.

25 Q. NOW, WAS THAT BECAUSE THE CHANGE -- THE P.C.R.

1 PRODUCED BETTER RESULTS OR WHAT WAS THE EXACT REASON?

2 A. THE REASON WAS THAT IT'S AN ADVANCEMENT IN D.N.A.
3 YOU'RE ABLE TO USE A SMALLER SAMPLE TO DEVELOP A D.N.A.
4 PROFILE. THE BASIS FOR IT IS JUST THAT, THAT YOU CAN USE A
5 SMALLER SAMPLE.

6 Q. IT'S JUST THAT YOU CAN USE THE SMALLER SAMPLE.
7 DOESN'T HAVE TO DO WITH RELIABILITY OF THE TEST.

8 A. NO, IT DOES NOT.

9 MS. BROWN: THE COURT'S INDULGENCE FOR JUST A
10 MOMENT, PLEASE. NO FURTHER QUESTIONS, YOUR HONOR. THANK
11 YOU.

12 MR. FLOYD: NO QUESTIONS, YOUR HONOR. THANK YOU.
13 YOUR HONOR, I DON'T KNOW WHETHER -- I GUESS MR. DERRICK WENT
14 AHEAD AND LEFT, BUT I WAS GOING TO SAY WE CERTAINLY HAVE NO
15 FURTHER NEED OF MS. SKRABA OR MS. GALLMAN, IF THE STATE
16 DOESN'T. THEY WERE HERE UNDER MY SUBPOENA. MR. DERRICK
17 EITHER -- LOOKS LIKE HE ALREADY LEFT. YOUR HONOR, WE WOULD
18 CALL BETH FULLWOOD.

19 ELIZABETH C. FULLWOOD, AFTER BEING DULY SWORN,
20 TESTIFIED AS FOLLOWS:

21 THE CLERK: PLEASE STATE YOUR FULL NAME WHEN YOU'RE
22 COMFORTABLY SEATED.

23 THE WITNESS: ELIZABETH C. FULLWOOD.
24
25

DIRECT EXAMINATION

BY MR. FLOYD:

Q. AND, MS. FULLWOOD, WHERE ARE YOU EMPLOYED?

A. AT THE LEXINGTON COUNTY PUBLIC DEFENDER AGENCY.

Q. AND HOW LONG HAVE YOU BEEN THERE?

A. SINCE 1991.

Q. '91? AND ARE YOU STILL EMPLOYED WITH THEM?

A. THAT'S CORRECT.

Q. AND WERE YOU ONE OF THE APPOINTED LAWYERS FOR GARY
TERRY?

A. YES.

Q. AND DID YOU PARTICIPATE IN THE PREPARATION AND
INVESTIGATION AND THE TRIAL ITSELF?

A. YES.

Q. NOW, DO YOU RECALL THE TRIAL OFF THE TOP OF YOUR
HEAD?

A. BITS AND PIECES.

Q. NOW, DO YOU REMEMBER THAT THERE WAS A CONFESSION OF
SORTS IN THIS MATTER?

A. YES, VAGUELY.

Q. DID YOU DISCUSS WITH MR. STONE WHETHER OR NOT THE
CONFESSION SHOULD BE ADDRESSED IN THE OPENING STATEMENT?

A. I DON'T HAVE ANY INDEPENDENT RECOLLECTION OF THAT.
WE PROBABLY DID.

Q. DO YOU RECALL WHETHER OR NOT THERE WAS A

1 JACKSON/DENNO HEARING BEFORE THE TRIAL ACTUALLY STARTED?

2 A. I'M SURE THERE WAS. IN FACT, I KNOW THERE WAS THAT.

3 Q. AND DID THE TWO OF YOU -- DID YOU EXPECT THE STATE
4 TO USE THE CONFESSION IN THE GUILT PHASE OF THE -- OF THE
5 CASE?

6 A. YES.

7 Q. AND HAD YOU NOT -- HAD YOU ANTICIPATED THAT THEY
8 WERE NOT GOING TO USE IT IN THE GUILT PHASE, THEN WOULD --
9 WOULD YOU HAVE SUGGESTED IT BE MENTIONED IN THE OPENING
10 STATEMENT?

11 A. IF WE'D KNOWN IT WAS NOT?

12 Q. RIGHT.

13 A. WE WOULD NOT HAVE MENTIONED IT.

14 Q. NOW, WERE THERE ANY BITS OF EVIDENCE OR TESTIMONY
15 THAT CAME OUT IN THE TRIAL THAT YOU DIDN'T OBJECT TO WHICH
16 WAS A TACTICAL DECISION?

17 A. THAT'S A BROAD QUESTION, AND I HAVEN'T BEEN PROVIDED
18 A COPY OF THE TRIAL TRANSCRIPT TO REVIEW. IF YOU WANT TO ASK
19 ME ABOUT SOMETHING SPECIFIC, I'LL BE GLAD TO -- TO ANSWER IT.
20 BUT I CAN'T RECALL---

21 Q. OKAY.

22 A. ---THE TRIAL AS A WHOLE.

23 Q. OKAY. DID YOU MAKE ANY TYPE OF OBJECTION OR MOTION
24 IN LIMINE TO THE STATE'S USE OF TESTIMONY IN THE PENALTY
25 PHASE?

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1 A. I DON'T RECALL.

2 Q. IF THE RECORD DOES NOT REFLECT ANY SUCH MOTION, WAS
3 THAT A DECISION THAT WAS MADE FOR TACTICAL REASONS?

4 A. I'M NOT SURE WHAT YOU'RE REFERRING TO REALLY.

5 Q. IF THERE WERE NO OBJECTIONS IN THE RECORD TO ANY OF
6 THE PENALTY PHASE TESTIMONY PUT FORTH BY THE STATE, IF
7 THERE'S NO OBJECTION IN THE RECORD, DO YOU RECALL ANY
8 TACTICAL REASON OR DECISION MADE AT THAT TIME FOR NOT
9 OBJECTING TO IT OR MOVING IN LIMINE IN RELATION TO IT?

10 A. AGAIN, THAT QUESTION IS SO BROAD THAT I JUST REALLY
11 CANNOT RECALL EACH DETAIL OF -- OF CATEGORY OF EVIDENCE THAT
12 WAS PUT UP BY THE STATE IN THE PENALTY PHASE.

13 Q. DID YOU MAKE A MOTION FOR DIRECTED VERDICT?

14 A. IF THE RECORD SHOWS THAT I DID, THEN I DID.

15 Q. I'M GOING TO SHOW YOU 15 -- PAGE 1537 OF THE
16 TRANSCRIPT. DO YOU NOTICE A HIGHLIGHTED PORTION THERE?

17 A. YES, I SEE THAT.

18 Q. WOULD YOU PUBLISH THE HIGHLIGHTED PORTION?

19 A. "YOUR HONOR, AT THIS TIME WE WOULD MOVE FOR A
20 DIRECTED VERDICT ON ALL CHARGES CONTAINED IN THE INDICTMENT
21 ON GROUNDS THAT THE EVIDENCE TAKEN AS A WHOLE IN THE LIGHT
22 MOST FAVORABLE TO THE STATE IS INSUFFICIENT TO CONVINCE A
23 RATIONAL TRIER OF FACTS BEYOND A REASONABLE DOUBT THAT THE
24 STATE HAS PROVED EVERY ELEMENT OF THE OFFENSES CHARGED."

25 Q. AND WAS THAT THE FULL EXTENT OF THE DIRECTED VERDICT

1 MOTION?

2 A. YES.

3 Q. NOW, DO YOU RECALL THAT THIS -- THIS CASE WAS
4 BASICALLY A CIRCUMSTANTIAL EVIDENCE CASE THAT WAS PUT ON BY
5 THE STATE?

6 A. WELL, I DON'T -- I'M NOT SURE I WOULD CHARACTERIZE
7 IT LIKE THAT. THEY HAD THE D.N.A. THEY HAD THE FINGERPRINT.
8 I MEAN, CERTAINLY -- I GUESS THOSE CATEGORIES OF EVIDENCE
9 YOU -- THEY USED TO REACH THE INFERENCE THAT HE WAS THE
10 PERPETRATOR OF THE OFFENSES. IT'S NOT WHAT I WOULD CALL A
11 COMPLETELY CIRCUMSTANTIAL CASE.

12 Q. WOULD YOU AGREE WITH ME THAT THE EVIDENCE DID NOT
13 SHOW THAT THERE HAD BEEN A SEXUAL ASSAULT?

14 A. I WOULD NOT AGREE WITH THAT.

15 Q. THANK YOU. WOULD YOU AGREE WITH ME THAT DR. CARTER
16 HIMSELF SAID THAT THERE WAS NO VAGINAL TEARING, NO BRUISING,
17 NO CUTTING?

18 A. THOSE WERE HIS FINDINGS; THAT'S CORRECT.

19 Q. OKAY. NOW, WOULD YOU AGREE WITH ME THAT THAT RAISES
20 AT LEAST THE ARGUMENT THAT THE SEX COULD HAVE BEEN
21 CONSENSUAL?

22 A. IT WOULD BE A TENUOUS ARGUMENT BUT, YES.

23 Q. AND WERE YOU AWARE OF THE CONTENT OF MR. TERRY'S
24 CONFESSION?

25 A. YES.

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1 Q. WOULD YOU AGREE WITH ME THAT THAT CONFESSION AT
2 LEAST RAISED THE ARGUMENT OF MANSLAUGHTER?

3 A. YES.

4 Q. DID Y'ALL DO ANYTHING -- DID YOU PUT UP ANY KIND OF
5 DEFENSE IN YOUR SIDE OF THE CASE TO RAISE -- TO GET THE
6 STATEMENT IN?

7 A. NO, WE DID NOT. THE ONLY WAY WE COULD HAVE DONE
8 THAT WAS THROUGH HIS TESTIMONY.

9 Q. OKAY.

10 A. HE CHOSE NOT TO TESTIFY.

11 Q. DID YOU HAVE ANY INFORMATION THROUGH YOUR
12 INVESTIGATION, CONTACTS WITH POTENTIAL WITNESSES, THAT COULD
13 HAVE IN ANY WAY CORROBORATED MR. TERRY'S STATEMENT?

14 A. NO. WE HAD THE GUILT/INNOCENCE PHASE VERY
15 THOROUGHLY INVESTIGATED. WE TALKED TO ALL THE PEOPLE THAT AT
16 ONE POINT OR ANOTHER IN TIME HE HAD IDENTIFIED AS POTENTIAL
17 ALIBI WITNESSES. WE INTERVIEWED MS. JACKSON'S NEIGHBORS AS
18 FAR AS HER HABITS AND ASSOCIATIONS. WE WERE UNABLE TO
19 DEVELOP ANY EVIDENCE THAT CORROBORATED HIS STATEMENT TO THE
20 POLICE OR ANY OTHER SUBSEQUENT STATEMENTS HE MADE TO US
21 INSOFAR AS A DEFENSE MIGHT GO.

22 Q. NOW, THE STATEMENT DID COME IN IN THE PENALTY PHASE,
23 DIDN'T IT?

24 A. IF THE RECORD SO SHOWS, THEN IT DID.

25 Q. OKAY. DID YOU MAKE REQUESTS OF THE COURT FOR

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1 CHARGES ON STATUTORY MITIGATING CIRCUMSTANCES?

2 A. I'M SURE WE DID.

3 Q. ARE YOU FAMILIAR WITH SECTION 16-3-20, SUBSECTION 8?

4 A. EIGHT?

5 Q. (NODDED HEAD UP AND DOWN.)

6 A. YES.

7 Q. OKAY. AND WOULD YOU AGREE WITH ME THAT A STATUTORY
8 MITIGATING SECTION -- A STATUTORY MITIGATING CIRCUMSTANCE IS
9 THAT THE DEFENDANT WAS PROVOKED BY THE VICTIM INTO COMMITTING
10 THE MURDER?

11 A. THAT IS WHAT THAT SECTION OF THE CODE PROVIDES.

12 Q. OKAY. BUT IF THE STATEMENT WAS INTO EVIDENCE AT
13 THAT TIME, WOULD YOU AGREE WITH ME THAT THERE WAS EVIDENCE IN
14 THE RECORD OF THE PROVOCATION?

15 A. THERE WAS SOME EVIDENCE. HOWEVER, UNDER THE FACTS
16 AND CIRCUMSTANCES OF THIS CASE I DO NOT BELIEVE IT WOULD HAVE
17 BEEN WISE TO TRY TO ARGUE PROVOCATION. THE JURY HAD ALREADY
18 FOUND HIM GUILTY OF THESE CRIMES. TO TRY TO COME IN AT THE
19 PENALTY PHASE AND BASICALLY SAY THIS WOMAN ASKED FOR IT WOULD
20 PROBABLY BE VERY OFFENSIVE TO THE JURY AND WOULD NOT BE THE
21 TYPE OF ARGUMENT THAT WOULD PERSUADE THEM TO RECOMMEND LIFE
22 AS A SENTENCE.

23 Q. WELL, DID YOU EVEN CONSIDER IT?

24 A. PROBABLY. AGAIN, I DON'T HAVE ANY INDEPENDENT
25 RECOLLECTION.

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1 Q. WELL, AT THAT POINT IN TIME HIS LIFE WAS AT STAKE,
2 WAS IT NOT?

3 A. YES.

4 Q. AND WOULDN'T YOU TRY TO USE EVERY POSSIBLE CARD
5 WHICH YOU MIGHT HAVE IN THAT REGARD?

6 A. NOT IF IN MY PROFESSIONAL JUDGMENT THE ARGUMENT WAS
7 NOT EFFECTIVE AND NOT THE TYPE OF ARGUMENT THAT WAS
8 PERSUASIVE TO A JURY, NO.

9 Q. DID YOU EVER ARGUE CIRCUMSTANTIAL EVIDENCE TO THE
10 JURY IN EITHER THE GUILT OR THE PENALTY PHASE?

11 A. I DO NOT RECALL. THE RECORD WILL REFLECT WHETHER OR
12 NOT THAT WAS ARGUED.

13 Q. NOW, DO YOU RECALL WHETHER OR NOT YOU MADE ANY
14 OBJECTION TO THE JURY CHARGE?

15 A. IN WHICH PHASE?

16 Q. EITHER PHASE.

17 A. AGAIN, I DO NOT RECALL. THE RECORD WOULD REFLECT.

18 Q. IF YOU DID NOT MAKE AN OBJECTION TO THE CHARGE, WAS
19 THERE SOME TACTICAL REASON FOR THAT?

20 A. UNLESS YOU CAN DIRECT ME TO ANY PARTICULAR CHARGE, I
21 CAN'T ANSWER THAT QUESTION.

22 Q. ALL RIGHT. HOW ABOUT THE JUDGE'S CHARGE ON MALICE?

23 A. AS FAR AS THAT CHARGE, WHAT -- JUST IN GENERAL WHAT
24 ABOUT HIS CHARGE ON MALICE?

25 Q. WELL, WOULD YOU AGREE WITH ME THAT IT'S NOT A

1 CORRECT STATEMENT OF THE LAW THAT MALICE -- THERE'S AN
2 IMPLICATION OF MALICE FROM THE USE OF A DEADLY WEAPON.

3 A. I DON'T AGREE WITH THAT. THAT'S IN THE STANDARD
4 CHARGE.

5 Q. OKAY.

6 A. THAT CHARGE THAT YOU WERE GOING OVER YESTERDAY WITH
7 MR. STONE IS STRAIGHT OUT OF THE CHARGE BOOKS.

8 Q. YOU DON'T THINK INFERENCE IS THE APPROPRIATE TERM
9 RATHER THAN IMPLICATION?

10 A. THAT CHARGE IS THE ONLY CHARGE---

11 THE COURT: Y'ALL DON'T HAVE TO DEBATE THE
12 CORRECTNESS OF THE CHARGE. I CAN FIGURE THAT OUT.

13 MR. FLOYD: FINE.

14 BY MR. FLOYD:

15 Q. BUT THERE -- SO THERE'S NO TACTICAL REASON NOT TO
16 OBJECT TO THAT.

17 A. NO.

18 Q. WAS THERE ANY TACTICAL REASON NOT TO OBJECT TO THE
19 PORTION OF THE CHARGE WHERE THE JUDGE COMMENTED THAT IF THE
20 JURY FOUND THAT A BLOW CAUSED THE DEATH -- WAS THERE ANY
21 REASON YOU DIDN'T OBJECT TO THAT?

22 A. I DON'T CONSIDER THAT TO BE A COMMENT ON THE FACTS.

23 MR. FLOYD: OKAY. THANK YOU. NO FURTHER QUESTIONS.
24
25

2677

CROSS-EXAMINATION

BY MR. SALTER:

Q. GOOD MORNING.

A. GOOD MORNING.

Q. LET ME JUST ASK A FEW QUESTIONS. I BELIEVE YOU HAD BEEN AT THE P.D.'S OFFICE FOR -- YOU'D BEEN THE P.D., RATHER, FOR SIX YEARS, I BELIEVE, AT THE TIME OF THE TRIAL?

A. YES.

Q. BEFORE YOU WENT TO THE PUBLIC DEFENDER'S OFFICE, WHERE DID YOU WORK?

A. RIGHT BEFORE I WAS AT THE PUBLIC DEFENDER'S OFFICE I WAS IN PRIVATE PRACTICE BRIEFLY, BUT BEFORE THAT I WAS AT APPELLATE DEFENSE FOR EIGHT YEARS.

Q. EIGHT YEARS? AND WHAT WERE YOUR RESPONSIBILITIES AT APPELLATE DEFENSE?

A. TO REPRESENT INDIGENT CRIMINAL DEFENDANTS AND P.C.R. APPEALS FROM THE CRIMINAL CONVICTIONS INCLUDING CAPITAL CASES.

Q. AND THAT WOULD -- PART OF YOUR RESPONSIBILITIES WOULD INCLUDE REVIEWING TRANSCRIPTS FOR JURY CHARGE -- ANY ERROR IN JURY CHARGES, ET CETERA; CORRECT?

A. ANY ERROR IN ANY ASPECT OF A JURY TRIAL OR A GUILTY PLEA OR A POST-CONVICTION RELIEF HEARING.

Q. AND HAD YOU HANDLED ANY DEATH PENALTY CASES ON DIRECT APPEAL?

2678

1 A. A NUMBER OF THEM. PLEASE DON'T ASK ME HOW MANY, BUT
2 I'D -- PROBABLY BETWEEN SEVEN AND NINE DEATH PENALTY APPEALS
3 WHILE I WAS THERE.

4 Q. HOW ABOUT YOUR FELONY TRIAL EXPERIENCE PRIOR TO THE
5 TRIAL IN THIS CASE?

6 A. WELL, I'D BEEN PUBLIC -- CHIEF PUBLIC DEFENDER FOR
7 SIX YEARS AND I'D HAD A NUMBER OF FELONY TRIALS INCLUDING AT
8 LEAST TWO DEATH PENALTY CASES.

9 Q. AND A NUMBER OF OTHER MURDER CASES AS WELL?

10 A. YES.

11 Q. HOW DID YOU AND YOUR CO-COUNSEL DIVIDE YOUR
12 RESPONSIBILITIES?

13 A. BASED ON A NUMBER OF CONSIDERATIONS INCLUDING TRYING
14 TO MAKE THE WORKLOAD EVEN, GIVING PEOPLE RESPONSIBILITIES IN
15 AREAS WHERE MAYBE THEY PREVIOUSLY HAD DONE WORK IN THE AREAS
16 OR HAD SOME PARTICULAR INTEREST IN THE AREA AND JUST LIKE
17 THAT.

18 Q. ALL RIGHT. DO YOU HAVE ANY IDEA HOW MANY TIMES YOU
19 MAY HAVE MET WITH MR. TERRY EITHER ALONE OR WITH YOUR
20 CO-COUNSEL OR ANOTHER MEMBER OF THE DEFENSE TEAM?

21 A. NUMEROUS TIMES. I CANNOT TELL YOU HOW MANY.

22 Q. MORE THAN, SAY, HALF A DOZEN?

23 A. OH, YES. YOU KNOW, I MET WITH HIM AT THE JAIL HERE,
24 AT THE JAIL IN RICHLAND COUNTY, AND AT THE DEPARTMENT OF
25 CORRECTIONS.

2579

1 Q. OKAY. AND Y'ALL DISCUSSED STRATEGIC MATTERS WITH
2 HIM?

3 A. YES. WE DISCUSSED ALL THE ASPECTS OF THE CASE, BOTH
4 -- IN BOTH PHASES OF TRIAL.

5 Q. ALL RIGHT. AND DID YOU KEEP HIM APPRISED OF THE
6 PROGRESS OF YOUR INVESTIGATION?

7 A. YES.

8 Q. ALL RIGHT.

9 A. IN ADDITION TO MR. STONE AND I MEETING WITH HIM, WE
10 HAD A MITIGATION SPECIALIST WHO WAS DEVELOPING INFORMATION TO
11 USE IN THE PENALTY PHASE, AND SHE MET WITH MR. TERRY ON A
12 NUMBER OF OCCASIONS.

13 Q. THANK YOU. YOU JUST TOUCHED ON MY NEXT QUESTION.
14 WHO WAS SHE?

15 A. VIVIAN MASSEY.

16 Q. AND HOW DID YOU WIND UP USING HER?

17 A. I HAD USED HER AS -- WHAT WAS TERMED LOOSELY AS A
18 MITIGATION EX -- MITIGATION ASSISTANT IN A PREVIOUS DEATH
19 PENALTY CASE. HER WORK WAS OF SUCH A HIGH CALIBER AND SHE
20 WAS SO GOOD AT ELICITING THE TYPE OF INFORMATION YOU NEED TO
21 PREPARE FOR A PENALTY PHASE OF A TRIAL THAT I BEGAN USING HER
22 AS A MITIGATION SPECIALIST.

23 Q. AND HER -- WHAT WOULD HER RESPONSIBILITIES HAVE
24 BEEN?

25 A. SHE WOULD INTERVIEW MR. TERRY AND GET INFORMATION AS

2680

1 TO HIS BACKGROUND. SHE WOULD GATHER RECORDS CONCERNING MR.
2 TERRY, INCLUDING BIRTH RECORDS, MEDICAL RECORDS FOR HIM AND
3 ALL MEMBERS OF HIS FAMILY, HIS PARENTS, SIBLING, SPOUSE,
4 CHILDREN, GET HIS SCHOOL RECORDS INCLUDING ANY RECORDS,
5 SPECIAL EDUCATION, NOT THAT I SPECIFICALLY RECALL HE WAS IN
6 SPECIAL ED, BUT SOMETIMES PEOPLE ARE. THEY WOULD COLLECT ANY
7 D.S.S. CONTACTS A PERSON HAD AND GET ALL OF THOSE RECORDS,
8 EMPLOYMENT RECORDS. BASICALLY EVERY PIECE OF PAPER EVER
9 GENERATED ABOUT A PERSON'S LIFE, THEY GATHER IT.

10 FROM THERE THEY DEVELOP PEOPLE THAT THEY WANT TO
11 TALK TO TO GET SOME INSIGHT INTO THE PERSON'S BACKGROUND. SO
12 THEY'LL INTERVIEW ALL THE FAMILY MEMBERS, THE EXTENDED
13 FAMILY, PAST EMPLOYERS, PAST SCHOOL TEACHERS, ANY TYPE OF
14 PEOPLE THAT HAVE COME INTO CONTACT WITH THE PARTICULAR CLIENT
15 THAT MIGHT HAVE INFORMATION THAT WE CAN USE TO PUT THEM IN A
16 MORE SYMPATHETIC LIGHT BEFORE A JURY.

17 Q. OKAY. NOW, DID YOU PERSONALLY FIND MR. TERRY TO BE
18 A COOPERATIVE INDIVIDUAL?

19 A. HE WASN'T -- HE WASN'T NOT COOPERATIVE AS FAR AS --
20 HE WASN'T OBNOXIOUS OR ANYTHING, BUT HE HAD A LOT OF PHYSICAL
21 COMPLAINTS THAT HE PREFERRED TO FOCUS ON RATHER THAN THE GIST
22 OF THE LITIGATION. IT WAS IN MY MIND SORT OF AN AVOIDANCE
23 TECHNIQUE.

24 Q. ALL RIGHT. DID YOU UTILIZE MS. MASSEY TO TRY TO
25 OBTAIN INFORMATION FROM HIM CONCERNING THE FACTS OF THE

2681

1 CRIME?

2 A. YES.

3 Q. OR HIS -- HIS VERSION OR HIS ACCOUNT OF WHAT---

4 A. WELL, SHE WOULD GO -- I'M SORRY. SHE WOULD GO OUT
5 AND TALK TO HIM AND SHE WOULD TALK TO HIM ABOUT WHATEVER HE
6 WOULD WANT TO TALK ABOUT. I MEAN, I THINK PART OF -- SHE
7 WOULD GO OUT THERE WITH A PLAN TO GET CERTAIN INFORMATION,
8 BUT PART OF THE WAY SHE DID THINGS - AND IT WAS VERY
9 PRODUCTIVE - IS SHE WOULD LET THE CLIENT THEMSELVES RAISE
10 WITH HER ANY CONCERNS OR ANY THOUGHTS THAT THEY HAD ABOUT ANY
11 MATTER.

12 Q. OKAY. AND WOULD YOU RELY UPON THE INFORMATION THAT
13 SHE RELAYED TO YOU WHICH CAME FROM MR. TERRY?

14 A. YES.

15 Q. OKAY. AND DID YOU -- LET ME SPECIFICALLY ASK YOU
16 ABOUT A FEW THINGS WE TALKED ABOUT LAST WEEK. DO YOU HAVE IN
17 YOUR FILE INFORMATION CONCERNING A JANUARY 20, 1997,
18 DISCUSSION IN WHICH MR. TERRY GAVE AN ACCOUNT?

19 A. JANUARY 20TH OF '97?

20 Q. YES, MA'AM.

21 A. YOUR HONOR, I'M SORRY. THIS IS A BULKY---

22 THE COURT: THAT'S OKAY. TAKE YOUR TIME.

23 THE WITNESS: ---PORTION OF THE FILE. MR. SALTER, I
24 HAVE NOTES FROM A TELEPHONE CONVERSATION I HAD WITH MR. TERRY
25 ON THAT DAY. AS FAR AS MS. MASSEY IS CONCERNED, I HAVE HER

2582

1 NOTES FROM A JANUARY 30TH AND A JANUARY 29 CONVERSATION SHE
2 HAD WITH HIM.

3 BY MR. SALTER:

4 Q. ALL RIGHT. WELL, WHAT DO YOUR NOTES REFLECT IN
5 TERMS OF YOUR CONVERSATION WITH MR. TERRY?

6 A. MY NOTES REFLECT THAT HE TOLD ME ON THAT DAY THAT HE
7 REMEMBERED DOING CRACK THE DAY AND THE NIGHT OF THE HOMICIDE,
8 THAT HE HAD BOUGHT A SHEET OF ACID AT FIVE POINTS ACROSS THE
9 STREET FROM GROUP THERAPY THAT DAY, DID FOUR HITS IN THE
10 AFTERNOON, SMOKED CRACK - MORE THAN ONE ROCK - BETWEEN 10 AND
11 11 IN THE MORNING.

12 Q. OKAY. NOW---

13 A. THEN IT SAYS, "SMOKED CRACK." THEN IT SAYS, "SMOKED
14 DURING WHOLE," AND THAT'S WHERE THE NOTES END.

15 Q. WOULD YOU HAVE ATTEMPTED TO VERIFY THIS INFORMATION?

16 A. WE WOULD HAVE.

17 Q. AND OBVIOUSLY YOU WEREN'T ABLE TO DO SO?

18 A. THAT'S CORRECT.

19 Q. DO YOU HAVE -- I APOLOGIZE; I SHOULD HAVE ALERTED
20 YOU EARLIER -- NOTES OF A FEBRUARY 24, 1997, DISCUSSION WITH
21 MR. TERRY OR A MAY 1ST, 1997, DISCUSSION, EITHER ONE OF
22 THOSE?

23 A. WOULDN'T YOU KNOW IT'S THE LAST ONE? YES, SIR.

24 Q. OKAY. WHAT INFORMATION DID HE IMPART IN THAT
25 INTERVIEW?

2683

1 A. THAT WAS AN INTERVIEW WITH MS. MASSEY.

2 MR. FLOYD: YOUR HONOR, I OBJECT TO ANY HEARSAY.

3 MR. SALTER: YOUR HONOR, IT'S NOT BEING OFFERED FOR
4 PROOF OF THE MATTER ASSERTED. IT'S BEING OFFERED TO
5 ESTABLISH WHAT INFORMATION WAS PROVIDED TO COUNSEL CONCERNING
6 WHAT THE DEFENDANT CLAIMED HAD OCCURRED IN THE DAYS
7 SURROUNDING THE CRIME AND TO SHOW WHAT -- PART OF THE PROBLEM
8 COUNSEL HAD IN THIS -- IN THIS CASE WAS, YOU KNOW, THE
9 STORIES CHANGED, AND THAT'S WHERE I'M HEADED WITH ALL OF
10 THIS.

11 THE COURT: ALL RIGHT. WELL, IT'S KIND OF HARD TO
12 KNOW -- I MEAN, THAT'S -- THAT IS A CREDIBLE ARGUMENT AS TO
13 IT NOT BEING OFFERED TO PROVE THE TRUTH OF THE MATTER
14 ASSERTED, BUT IT'S REALLY HARD TO MAKE A DEFINITIVE RULING ON
15 THAT UNTIL I HEAR WHAT THE STATEMENT IS. SO AT THIS POINT
16 I'M GOING TO -- I'M GOING TO OVERRULE THE OBJECTION, AND IF I
17 THINK DIFFERENTLY OF IT AFTER HEARING IT, I'LL CHANGE MY MIND
18 BUT THAT -- AT THAT POINT I'LL BE UNRINGING THE BELL. GO
19 AHEAD.

20 BY MR. SALTER:

21 Q. COULD YOU PLEASE RELATE WHAT INFORMATION WAS SHARED
22 CONCERNING -- JUST CONCERNING THE -- HIS ACCOUNT OF WHAT HAD
23 OCCURRED OR...

24 A. ON THAT DAY HE TOLD MS. MASSEY THAT MS. JACKSON'S
25 DAUGHTER HAD BEEN MARRIED TO A MAN BY THE NAME OF RODNEY FOX

2684

1 WHO MIGHT KNOW SOMETHING ABOUT THE MAN WHO SUPPOSEDLY LIVED
2 WITH MS. JACKSON'S DAUGHTER SHORTLY BEFORE HER MOTHER WAS
3 KILLED. ACCORDING TO MR. TERRY, THAT MAN HAD DONE TIME IN
4 PRISON, AND MR. TERRY BELIEVED THAT THAT PARTICULAR MAN HAD
5 SOMETHING TO DO WITH MRS. JACKSON'S DEATH.

6 MR. SALTER: YOUR HONOR, THAT'S AS FAR AS I INTEND
7 TO GO WITH THAT.

8 THE COURT: ALL RIGHT.

9 BY MR. SALTER:

10 Q. DID HE THEREAFTER CHANGE HIS -- HIS RESPONSE AS TO
11 WHAT -- WHAT INFORMATION HE PROVIDED?

12 A. I DON'T KNOW ABOUT THEREAFTER, BUT IT'S NOT THE ONLY
13 VERSION.

14 Q. SPECIFICALLY WITH REGARD TO---

15 A. WELL, ONE VERSION THAT CAME UP WAS HE TOLD US THAT
16 HE HAD BEEN HAVING AN AFFAIR WITH MS. JACKSON AND THAT AROUND
17 THE TIME OF HER DEATH HE HAD BEEN AT HER HOUSE HAVING
18 INTERCOURSE, AND HE HEARD THE SOUND OF A CAR DRIVING SLOWLY
19 BY MS. JACKSON'S HOUSE. AND FROM SOUND OF THE VEHICLE, IT
20 SOUNDED TO HIM THAT IT WAS THE VEHICLE THAT HIS LIVE-IN
21 GIRLFRIEND DROVE, AND HE OPINED THAT LATER ON HIS GIRLFRIEND
22 HAD SNUCK BACK AND KILLED MS. JACKSON OUT OF JEALOUSY.

23 Q. AND DID HE AT SOME POINT ULTIMATELY INDICATE TO YOU
24 THAT HE HAD, IN FACT, BEEN TO THE VICTIM'S HOME ON THE DAY
25 THAT SHE WAS KILLED?

1 A. YES.

2 Q. ALL RIGHT. SO HE HAD GIVEN A NUMBER OF DIFFERENT
3 ACCOUNTS OR SUGGESTED OTHER PEOPLE WHO---

4 A. YES.

5 Q. ---MIGHT HAVE BEEN RESPONSIBLE?

6 A. THAT'S CORRECT.

7 Q. ALL RIGHT. AGAIN, YOU WERE UNABLE TO FIND WITNESSES
8 TO CORROBORATE ANY OF THIS?

9 A. WE HAD MR. DAVIS AND HIS ASSOCIATES INTERVIEW ALL OF
10 THE PEOPLE THAT HE MENTIONED, AND THERE WAS NOTHING THAT
11 DEVELOPED THAT WE COULD HAVE USED EITHER TO -- TO POINT THE
12 FINGER AT SOMEONE ELSE OR TO CORROBORATE THE VERSION OF --
13 OF -- OF -- OF THE STATEMENT THAT IT WAS A MANSLAUGHTER
14 SITUATION.

15 Q. ALL RIGHT. AND YOU WERE UNABLE TO -- MR. DAVIS IS
16 THE PRIVATE INVESTIGATOR? IS THAT CORRECT?

17 A. THAT'S CORRECT.

18 Q. ALL RIGHT. AND YOU WERE UNABLE TO DEVELOP AN ALIBI?

19 A. NO, WE -- AND THAT WAS ANOTHER -- THAT WAS ANOTHER
20 VERSION THAT HE HAD BEEN WITH -- WITH HIS LIVE-IN GIRLFRIEND
21 AND THEN LATER HIS FATHER FISHING ON THE NEXT DAY, AND WE
22 WENT OUT TO THE PLACE WHERE HE HAD BEEN STAYING AND THOSE
23 PEOPLE WERE NOT HELPFUL AS FAR AS AN ALIBI DEFENSE.

24 Q. ALL RIGHT. AND DID THE FACT THAT YOU WERE PROVIDED
25 WITH DIFFERENT ACCOUNTS MAKE YOUR REPRESENTATION ANY MORE

1 DIFFICULT, OR PREPARATION I SHOULD SAY?

2 A. WELL, IT WOULD BE MORE TIME-CONSUMING BECAUSE, OF
3 COURSE, YOU'RE OBLIGED TO INVESTIGATE THESE VARIOUS VERSIONS
4 OF WHAT HAPPENED. I MEAN, I THINK YOU HAVE A PROFESSIONAL
5 RESPONSIBILITY TO DO SO, BUT I MEAN, IN THE END YOU'VE GOT TO
6 MAKE YOUR BEST DEFENSE ON WHAT YOU'VE GOT TO WORK WITH IN A
7 PARTICULAR CASE.

8 Q. ALL RIGHT. NOW, DO YOU RECALL WHETHER OR NOT -- I
9 BELIEVE IT WAS DIANE GIBSON AT THE TIME. DO YOU RECALL
10 WHETHER OR NOT Y'ALL HAD HER INTERVIEWED?

11 A. OH, YES, WE DID.

12 Q. HOW ABOUT ALLEN AND MICHELLE GIBSON?

13 A. I'M PRETTY SURE WE DID.

14 Q. ALL RIGHT. AND YOU HAD MR. DAVIS GO TALK TO THE
15 PEOPLE WHO LIVED UP AT THE LAKE?

16 A. UH-HUH.

17 Q. ALL RIGHT. NOW, Y'ALL OBVIOUSLY HAD A NUMBER OF
18 EXPERTS THAT TESTIFIED IN THE PENALTY PHASE OF THE TRIAL.

19 A. THAT'S RIGHT.

20 Q. BUT YOU ALSO HAD DONALD GIRNDT, I BELIEVE?

21 A. WE HAD HIM, YES. WE USED HIM.

22 Q. AND HE'S A CRIME SCENE EXPERT; CORRECT?

23 A. THAT'S RIGHT.

24 Q. A FINGERPRINT EXPERT?

25 A. FINGERPRINT, SPATTER, TRACE.

1 Q. OKAY. AND DID YOU ASK -- I'M SORRY. LET ME
2 BACKTRACK. DID YOU ALSO HAVE A D.N.A. EXPERT?

3 A. RON OSTROWSKI OUT OF CHARLOTTE.

4 Q. NOW, NEITHER OF THESE GENTLEMEN TESTIFIED.

5 A. NO.

6 Q. WHY WOULD THAT BE?

7 A. BECAUSE THEY DID NOT HAVE ANY TESTIMONY THAT WOULD
8 HAVE BEEN HELPFUL TO MR. TERRY'S DEFENSE.

9 Q. AND DID YOU -- DID YOU HAVE THEM ASSIST YOU IN
10 REVIEWING THE FORENSIC EVIDENCE THAT THE STATE HAD?

11 A. OH, YES.

12 Q. NOW, THERE WERE A NUMBER OF ITEMS -- THE RECORD
13 REFLECTS THAT A NUMBER OF ITEMS WERE NOT TESTED. THERE
14 WAS -- TESTED BY THE STATE. DID EITHER OF YOUR EXPERTS
15 SUGGEST THAT FURTHER TESTING SHOULD BE DONE EITHER BY THEM OR
16 BY SOMEONE ELSE?

17 A. I BELIEVE WE DISCUSSED THE POSSIBILITY THAT WE COULD
18 HAVE THESE ITEMS TESTED, BUT WE DECIDED THAT WE DID NOT WANT
19 TO HAVE THE ITEMS TESTED.

20 Q. AND THAT WOULD BE BECAUSE?

21 A. WELL, IF THE STATE HADN'T DONE IT, THEN THAT WAS A
22 HOLE THAT WE COULD PUNCH IN THEIR CASE, AND THEN WHEN IT CAME
23 DOWN TO IT, WHAT WE HAD TO DO DURING THE FIRST PHASE OF THE
24 TRIAL IS PUNCH AS MANY HOLES AS WE COULD, SO WE DIDN'T WANT
25 TO PATCH THEM UP FOR THE PROSECUTION.

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1 Q. ALL RIGHT. IS IT FAIR TO SAY THAT MUCH OF YOUR
2 INVESTIGATION WITH RESPECT TO YOUR USE OF THESE EXPERTS WAS
3 NOT FRUITFUL FOR THE DEFENSE?

4 A. IT DID NOT LEAD TO THE DEVELOPMENT OF ANY EVIDENCE
5 THAT WE COULD USE. IT WAS FRUITFUL IN THE SENSE THAT THEY
6 HELPED US PREPARE FOR CROSS-EXAMINATION OF THE STATE'S
7 EXPERTS.

8 Q. AND DO YOU RECALL WHETHER OR NOT MR. GIRNDT WAS ABLE
9 TO DEVELOP A LATENT PRINT AND IDENTIFY THAT?

10 A. I HAVE A HAZY RECOLLECTION. WE HAD GONE OUT TO THE
11 SCENE WHERE MS. JACKSON HAD LIVED - MR. STONE, MR. GIRNDT,
12 MYSELF, AND DETECTIVE FRIER - AND I THINK AT THAT TIME -- I
13 THINK IT WAS AT THAT TIME THAT MR. GIRNDT TOOK A LOOK AT THE
14 PHONE BOX, AND I HAVE A HAZY RECOLLECTION THAT -- THAT HE
15 FOUND SOMETHING ELSE ON THERE, BUT, AGAIN, THAT WAS NOT
16 HELPFUL TO US.

17 Q. ALL RIGHT. NOW, Y'ALL FILED DISCOVERY MOTIONS?

18 A. YES.

19 Q. AND SUPPLEMENTAL MOTIONS FOR DISCOVERY?

20 A. RIGHT.

21 Q. THOSE WERE ALL RULED ON -- RULED UPON BEFORE THE
22 TRIAL; CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND YOU HAD THE -- THOSE RESPONSES. DO YOU RECALL
25 WHETHER OR NOT YOUR CLIENT EVER INDICATED TO YOU WHETHER OR

1 NOT HE WAS RIGHT-HANDED OR LEFT-HANDED?

2 A. I DON'T RECALL. HE COULD HAVE, BUT AT THIS POINT IN
3 TIME I JUST DON'T REALLY REMEMBER THAT WELL.

4 Q. DID YOU TRY TO MAKE ANY EFFORT TO NEGOTIATE A PLEA
5 ON BEHALF OF YOUR CLIENT?

6 A. I'M SURE WE DID. YOU ALWAYS DO IN THIS TYPE OF
7 CASE. I DON'T HAVE ANY INDEPENDENT RECOLLECTION OF IT, AND
8 OBVIOUSLY THE STATE DID NOT EXTEND ANY PLEA OFFER.

9 Q. ALL RIGHT. GOING INTO THE TRIAL, WHAT WAS YOUR
10 OPINION AS LEAD COUNSEL AND THAT OF YOUR CO-COUNSEL -- WHAT
11 WAS Y'ALL'S OPINION AS TO HOW BEST TO DEFEND YOUR CLIENT IN
12 THE GUILT OR INNOCENCE PHASE OF THE TRIAL?

13 A. TO TRY TO POINT OUT AS MANY GAPS AND INCONSISTENCIES
14 AS WE COULD IN THE STATE'S CASE TO TRY TO ESTABLISH
15 REASONABLE DOUBT. THIS WASN'T THE TYPE OF CASE WHERE WE HAD
16 ANY EVIDENCE THAT WE COULD PUT UP THAT WOULD SUPPORT A
17 VERDICT OF NOT GUILTY, AND WE HAD TO ALWAYS BE MINDFUL OF THE
18 NEED TO STAY CREDIBLE TO THE JURORS WHEN WE REACHED THE
19 SECOND PHASE OF TRIAL.

20 Q. ALL RIGHT. NOW, WITH RESPECT TO THE MARCH 24, 1995,
21 STATEMENT THAT WAS LATER INTRODUCED IN THE PENALTY PHASE AS
22 STATE'S EXHIBIT 68, YOU INDICATED EARLIER THAT THERE WAS A
23 JACKSON V. DENNO HEARING AND THAT YOU PRESUMED THAT THE STATE
24 WAS GOING TO INTRODUCE THE STATEMENT IN THE GUILT PHASE OF
25 THE TRIAL.

1 A. THAT IS CORRECT.

2 Q. AND THAT WAS BECAUSE THE HEARING WAS -- THE DENNO
3 HEARING WAS PRETRIAL?

4 A. THAT'S RIGHT.

5 Q. AND THE STATE NEVER MADE ANY AFFIRMATIVE
6 REPRESENTATION THAT THEY WERE GOING TO ENTER HIS -- THE
7 STATEMENT IN THE GUILT PHASE, DID THEY?

8 A. IT WAS JUST OUR ASSUMPTION.

9 Q. BECAUSE THAT WAS PART OF THE EVIDENCE THAT THEY HAD
10 IMPLICATING YOUR CLIENT.

11 A. THAT'S RIGHT. THEY HAD A CONFESSION.

12 Q. ALL RIGHT. NOW, DO YOU -- DO YOU RECALL WHETHER OR
13 NOT Y'ALL HAD MADE A DECISION AS TO WHETHER OR NOT MR. TERRY
14 WOULD TESTIFY PRIOR TO THE OPENING COMMENTS BEING MADE?

15 A. I DON'T HAVE ANY INDEPENDENT RECOLLECTION, BUT THAT
16 IS SOMETHING THAT YOU WOULD ALWAYS DISCUSS WITH A CLIENT WELL
17 BEFORE THE TRIAL OF A CASE.

18 Q. WOULD YOU HAVE---

19 A. AND HAVE SOME PRELIMINARY IDEA OF WHAT THEIR
20 DECISION WAS GOING TO BE.

21 Q. ALL RIGHT. BUT WOULD YOU HAVE MADE THE ULTIMATE
22 DECISION BY THAT POINT OR LATER ON?

23 A. WELL, LATER ON BECAUSE YOU -- YOU ALWAYS HAVE TO
24 RESPOND TO WHAT -- WHAT'S HAPPENING DURING A TRIAL. YOU HAVE
25 TO BE -- HAVE SOME FLEXIBILITY WHEN YOU'RE LITIGATING.

2691

1 Q. ALL RIGHT. NOW, WHEN THE STATE FAILED TO INTRODUCE
2 THE MARCH 24, 1995, STATEMENT AND THE JUDGE RULED THAT Y'ALL
3 COULDN'T GO INTO IT ON CROSS-EXAMINATION OF SCOTTIE FRIER,
4 WOULD THAT HAVE BEEN A FACTOR THAT Y'ALL CONSIDERED IN
5 DETERMINING -- IN DETERMINING WHETHER OR NOT TO ADVISE YOUR
6 CLIENT AS TO SHOULD HE TESTIFY OR NOT TESTIFY?

7 A. YES.

8 Q. ALL RIGHT. WHAT WAS THE ULTIMATE ADVICE THAT Y'ALL
9 GAVE MR. TERRY WITH RESPECT TO HIS DECISION TO TESTIFY OR
10 NOT?

11 A. AGAIN, I HAVE NO INDEPENDENT RECOLLECTION, BUT I
12 FEEL SURE THAT OUR ADVICE WAS NOT TO TESTIFY.

13 Q. ALL RIGHT. WHY WOULD THAT HAVE BEEN?

14 A. BASED ON OUR OBSERVATIONS OF HIM AND HIS GENERAL
15 DEMEANOR, OUR ASSESSMENT OF HOW WELL HE COULD MOST LIKELY
16 STAND UP UNDER CROSS-EXAMINATION, AND IF I'M NOT MISTAKEN, HE
17 HAD A PRIOR CRIMINAL RECORD THAT COULD BE USED FOR
18 IMPEACHMENT PURPOSES.

19 Q. ALL RIGHT. NOW, WITH RESPECT TO YOUR DIRECTED
20 VERDICT MOTION THAT YOU WERE ASKED ABOUT ON DIRECT
21 EXAMINATION---

22 A. UH-HUH.

23 Q. ---AS SOMEONE WHO HAS EXPERIENCE AS AN APPELLATE
24 ATTORNEY AS WELL, DO YOU THINK THAT THE ARGUMENT YOU MADE WAS
25 SUFFICIENT TO PRESERVE A CHALLENGE TO THE SUFFICIENCY OF THE

(2692

1 STATE'S EVIDENCE?

2 A. YES.

3 Q. WHAT WAS YOUR UNDERSTANDING AS TO WHETHER OR NOT
4 THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY---

5 A. THERE WAS ENOUGH---

6 Q. ---ON A CRIME -- ON A CRIME OF CRIMINAL SEXUAL
7 CONDUCT IN THE FIRST DEGREE?

8 A. THERE'S ENOUGH EVIDENCE TO GO TO THE JURY WHICH IS
9 THE ONLY THING THAT THE TRIAL COURT IS CONCERNED WITH AT THAT
10 STAGE. IT'S NOT GOING TO WEIGH THE EVIDENCE.

11 Q. AT THE TIME OF YOUR REPRESENTATION, WERE YOU
12 FAMILIAR WITH BATSON VERSUS KENTUCKY?

13 A. YES.

14 Q. IT'S NOT SOMETHING THAT WAS NEW TO YOU OBVIOUSLY.

15 A. NO.

16 Q. DID IT COME UP ON APPEAL?

17 A. YES. I'VE BRIEFED IT BEFORE.

18 Q. SO BEFORE YOU EVER BECAME A TRIAL ATTORNEY YOU WERE
19 FAMILIAR WITH THAT.

20 A. YES.

21 Q. AND WERE YOU FAMILIAR WITH THE IDEA THAT YOU COULD
22 MAKE A BATSON MOTION PREDICATED UPON THE STATE'S CHALLENGE ON
23 THE BASIS OF GENDER?

24 A. YES.

25 Q. ALL RIGHT. DO YOU RECALL WHY THE DEFENSE DID NOT

2693

1 MAKE A BATSON MOTION?

2 A. WELL, IN REVIEWING THE NOTES AND THE TRANSCRIPT, WE
3 GOT THE BEST JURY THAT WE COULD HAVE OUT OF THAT PANEL. WHEN
4 YOU'RE PICKING A JURY LIKE THAT, THEY'RE COMING UP IN THE
5 ORDER THAT THEY'RE QUALIFIED. SO YOU CAN SIT THERE AND YOU
6 CAN THINK ABOUT HOW YOU'RE GOING TO USE YOUR STRIKES OR YOU
7 CAN ANTICIPATE HOW YOUR OPPONENT IS GOING TO USE THEIR
8 STRIKES. YOU CAN FIGURE OUT WHAT JURY YOU WANT TO TRY TO
9 HAVE, AND WE GOT WHAT WE WERE TRYING TO HAVE.

10 Q. AND THE OVERRIDING CONCERN FROM YOUR PERSPECTIVE
11 WOULD BE TO SELECT JURORS WHO WERE OPPOSED TO CAPITAL
12 PUNISHMENT; CORRECT?

13 A. YES.

14 Q. AND, CONVERSELY, THE STATE'S WOULD BE TO PUT THOSE
15 PEOPLE ON THERE THAT THEY THINK WOULD BE MORE LIKELY TO
16 RENDER A DEATH SENTENCE; CORRECT?

17 A. RIGHT.

18 Q. NOW, YOUR CLIENT WOULD HAVE BEEN PAROLE-ELIGIBLE IF
19 HE HAD RECEIVED A LIFE SENTENCE, WOULD HE NOT?

20 A. THAT'S CORRECT.

21 Q. DO YOU REMEMBER PRESENTING LOUANNE TERRY AS A
22 WITNESS IN THE PENALTY PHASE OF THE TRIAL?

23 A. THAT I DO RECALL.

24 Q. AND DO YOU RECALL ANY COMMENTS SHE MAY HAVE MADE
25 WHICH WOULD HAVE INJECTED PAROLE?

(2694

1 A. SHE MADE THE GRATUITOUS COMMENT, NOT IN RESPONSE TO
2 ANY QUESTION THAT I HAD ASKED, THAT SHE WISHED FOR HER SOON-
3 TO-BE EX-HUSBAND TO RECEIVE A LIFE SENTENCE SO AT LEAST HER
4 CHILDREN -- SOMETHING TO THE EFFECT SO AT LEAST MY CHILDREN
5 WILL BE ABLE TO SEE THEIR DADDY FREE IN 20 YEARS.

6 Q. ALL RIGHT. AFTER HER TESTIMONY DID THAT -- DID THAT
7 CAUSE YOU SOME CONCERN THAT PAROLE ELIGIBILITY HAD NOW BEEN
8 INJECTED INTO THE TRIAL?

9 A. IT HAD BEEN INJECTED INTO THE TRIAL.

10 Q. ALL RIGHT.

11 THE COURT: WHO WAS THIS NOW?

12 THE WITNESS: THE DEFENDANT'S ESTRANGED WIFE.

13 BY MR. SALTER:

14 Q. AND DID YOU THEREAFTER MAKE A REQUEST TO CHARGE ON
15 THE PLAIN AND ORDINARY MEANING?

16 A. I BELIEVE THE RECORD REFLECTS I DID.

17 Q. IN FACT, I'LL SHOW YOU A TWO-PAGE DOCUMENT, IF I
18 MIGHT, WHICH WAS INTRODUCED AT TRIAL AS COURT'S EXHIBIT 17,
19 AND I ASK IF YOU CAN IDENTIFY THIS.

20 A. IT LOOKS LIKE A -- MY REQUEST TO CHARGE.

21 Q. THIS WOULD BE A REQUEST TO CHARGE ON THE PLAIN AND
22 ORDINARY MEANING?

23 A. RIGHT.

24 MR. SALTER: ALL RIGHT. I OFFER THIS AS A
25 RESPONDENT'S EXHIBIT. I BELIEVE 2?

2695

1 **THE COURT:** IT'S ADMITTED.

2 (DEFENDANT'S EXHIBIT 2 WAS RECEIVED IN EVIDENCE.)

3 BY MR. SALTER:

4 Q. AND THEREAFTER THE TRIAL JUDGE GAVE THE CHARGE YOU
5 REQUESTED, DID HE NOT?

6 A. I BELIEVE HE DID.

7 Q. THANK YOU. YOU WERE ASKED EARLIER ABOUT THE IMPLIED
8 MALICE CHARGE?

9 A. UH-HUH.

10 Q. AND I BELIEVE YOU SAID THAT FROM YOUR UNDERSTANDING
11 THAT WAS CONSISTENT WITH THE CHARGE BOOK CHARGE.

12 A. THAT'S CORRECT.

13 Q. YOU WERE ALSO ASKED ABOUT INTERPOSING AN OBJECTION
14 TO THE STATE'S PENALTY PHASE EVIDENCE, A BROAD QUESTION
15 CONCERNING THAT. WHAT IS YOUR UNDERSTANDING ABOUT THE
16 STATE'S ABILITY TO PRESENT EVIDENCE OF AN ACCUSED'S BAD
17 CHARACTER IN THE PENALTY PHASE?

18 A. IT'S CERTAINLY MUCH BROADER THAN YOU WOULD -- YOU
19 WOULD BE ABLE TO IN A REGULAR CRIMINAL TRIAL. SINCE THE
20 FOCUS OR ONE OF THE FOCUSES OF A PENALTY PHASE IS THE
21 CHARACTER OF THE ACCUSED, THEY ARE ALLOWED TO INTRODUCE
22 EVIDENCE OF BAD CHARACTER.

23 Q. ALL RIGHT. NOW, YOU TALKED ABOUT MS. TERRY'S
24 COMMENT BEING GRATUITOUS?

25 A. UH-HUH.

2696

1 Q. AND UNSOLICITED. HAD YOU WORKED WITH HER TO PREP
2 HER TESTIMONY?

3 A. I HAD MET WITH HER AND TALKED TO HER FOR SEVERAL
4 HOURS THE DAY BEFORE SHE TESTIFIED - THAT WAS DURING THE
5 24-HOUR GRACE PERIOD - TO GET AN IDEA OF WHAT SHE COULD
6 HONESTLY AND SINCERELY TESTIFY TO THAT MADE SENSE AND WOULD
7 PROBABLY BE PERSUASIVE TYPE OF TESTIMONY. WE FELT THAT WE
8 NEEDED TO CALL MS. TERRY AS A WITNESS BECAUSE WE THOUGHT IT
9 WOULD LOOK FUNNY TO THE JURY IF THE DEFENDANT'S WIFE DIDN'T
10 TESTIFY ON HIS OWN -- IN HIS DEFENSE EVEN THOUGH THEY WERE
11 ESTRANGED BY THAT POINT. AFTER WORKING WITH HER FOR SEVERAL
12 HOURS, I WENT INTO COURT WITH THE IDEA THAT SHE WAS GOING TO
13 PRESENT A CERTAIN TYPE OF TESTIMONY, AND WHEN SHE GOT UP ON
14 THE STAND, IT WAS ALL OVER THE PLACE. IT HAD VERY LITTLE TO
15 DO WITH WHAT WE HAD DISCUSSED FOR HOURS THE DAY BEFORE.

16 Q. AND YOU'D NEVER SUGGESTED TO HER TO INTERJECT PAROLE
17 ELIGIBILITY.

18 A. ABSOLUTELY NOT.

19 Q. DID YOU EVER BROACH THAT WITH HER?

20 A. I DON'T BELIEVE I EVER DISCUSSED PAROLE ELIGIBILITY
21 WITH MS. TERRY.

22 Q. OKAY. ONE OF THE ALLEGATIONS THAT WAS DELVED INTO
23 YESTERDAY CONCERNED THE FAILURE TO CHALLENGE FOR CAUSE OR TO
24 STRIKE A JUROR, GEORGIA MILLER? DO YOU HAVE ANY -- ANY NOTES
25 CONCERNING MS. MILLER?

1 A. UH-HUH. I DO.

2 THE COURT: LET'S -- LET'S TAKE A LITTLE BREAK WHILE
3 SHE LOOKS FOR THOSE NOTES, AND THEN WE'LL COME BACK AND
4 RESUME.

5 THE WITNESS: I'VE GOT IT.

6 THE COURT: THAT'S OKAY.

7 THE WITNESS: YOU WANT TO BREAK ANYWAY.

8 THE COURT: I WAS TRYING TO BLAME IT ON YOU.

9 THE WITNESS: FOR ONCE I HAVE IT RIGHT IN HAND.

10 MR. SALTER: YOUR HONOR, WHEN WE COME BACK, I ONLY
11 HAVE ABOUT TWO OR THREE MORE QUESTIONS.

12 THE COURT: OKAY.

13 THE WITNESS: THANK YOU, ED.

14 MR. SALTER: I'M SORRY.

15 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

16 THE COURT: BE SEATED, PLEASE. WAS THAT A LONG
17 ENOUGH BREAK FOR YOU TO FIND YOUR---

18 THE WITNESS: I FINALLY WAS ABLE TO LOCATE THOSE
19 NOTES.

20 THE COURT: VERY GOOD.

21 BY MR. SALTER:

22 Q. HAVE YOU HAD AN AMPLE OPPORTUNITY TO REVIEW THOSE?

23 A. I THINK SO.

24 Q. NOT JUST FIND THEM? OKAY. DOES THAT REFRESH YOUR
25 RECOLLECTION IN TERMS OF WHY YOU DID NOT INTERPOSE A

2698

1 CHALLENGE FOR CAUSE OR STRIKE JUROR MILLER?

2 A. THAT'S NUMBER 163?

3 Q. YES, MA'AM.

4 A. I HAD HER RATED HIGH ON MY JUROR LIST. SHE DID MAKE
5 THAT COMMENT AND, IN FACT, I NOTE THAT IN THE NOTES, BUT IT
6 SEEMED LIKE SHE DIDN'T REALLY UNDERSTAND THE QUESTION. SHE
7 ACTUALLY SEEMED TO BE SOFT ON THE DEATH PENALTY AND A JUROR
8 WE WOULD WANT.

9 Q. OKAY. YOU WERE ASKED A SERIES OF QUESTIONS ABOUT
10 TESTING OF HAIRS, I BELIEVE?

11 A. UH-HUH.

12 Q. I SHOW YOU A TWO-PAGE DOCUMENT THAT APPEARS TO BE A
13 REPORT GENERATED BY S.L.E.D. SEE -- I WOULD ASK IF YOU'RE
14 FAMILIAR WITH THIS REPORT.

15 A. I'M SURE.

16 Q. WOULD THAT HAVE BEEN ONE THAT YOU RECEIVED?

17 A. YES, SIR.

18 Q. ALL RIGHT. AND FOR THE RECORD, WOULD YOU PLEASE
19 IDENTIFY THE REPORT?

20 A. IT IS A S.L.E.D. TRACE DEPARTMENT REPORT DATED
21 SEPTEMBER 4, 1997, PREPARED BY JOSEPH D. POWELL, EXAMINING
22 CERTAIN HAIR.

23 Q. OKAY. SO THAT -- THOSE HAIRS WERE EXAMINED BY MR.
24 POWELL?

25 A. YES.

2699

1 **MR. SALTER:** ALL RIGHT. I'D MOVE TO INTRODUCE THIS
2 DOCUMENT AS RESPONDENT'S EXHIBIT 3, YOUR HONOR.

3 **MR. FLOYD:** YOUR HONOR, WE'VE PREVIOUSLY BEEN SHOWN
4 THAT, AND WE HAVE NO OBJECTION TO ITS INTRODUCTION.

5 **THE COURT:** ALL RIGHT. IT'S ADMITTED.

6 (DEFENDANT'S EXHIBIT 3 WAS RECEIVED IN EVIDENCE.)

7 BY MR. SALTER:

8 Q. AFTER RECEIVING THAT REPORT, DID EITHER OF YOUR
9 EXPERTS SUGGEST THAT FURTHER TESTING ON THOSE HAIRS SHOULD BE
10 ..DONE?

11 A. NOT TO MY RECOLLECTION.

12 Q. NOW, LET ME ASK AN OBVIOUS QUESTION. WITH RESPECT
13 TO THE -- YOUR CLIENT'S HAIR, WHAT COLOR IS YOUR CLIENT'S
14 HAIR?

15 A. DARK BROWN, LIGHT BLOND, MAYBE A LITTLE GRAY IN
16 THERE NOW, BUT I DON'T THINK IT WAS THERE TEN YEARS AGO.

17 **MR. SALTER:** I DON'T BELIEVE I HAVE ANYTHING
18 FURTHER, YOUR HONOR.

19 REDIRECT EXAMINATION

20 BY MR. FLOYD:

21 Q. SO THE THEORY WAS TO TRY TO POKE HOLES IN THE
22 STATE'S CASE? THAT WAS YOUR THEORY OF DEFENSE?

23 A. YES, AS MUCH AS WE COULD.

24 Q. OF COURSE, THERE WEREN'T MANY HOLES LEFT WHEN YOU
25 OPEN UP WITH A CONFESSION, IS THERE, ADMITTING HE CONFESSED?

2700

1 A. THAT WAS A REGRETTABLE DECISION.

2 Q. IN FACT, WAS THERE EVER ANY ARGUMENT MADE OR
3 EVIDENCE PRESENTED OR ARGUMENT MADE TO THE JUDGE OR JURY
4 SUGGESTING THAT THE EVIDENCE FAILED TO ESTABLISH CRIMINAL
5 SEXUAL CONDUCT IN THE FIRST DEGREE?

6 A. THE RECORD WOULD REFLECT WHETHER OR NOT THERE WAS.

7 Q. NOR WAS THERE ANY EVIDENCE PRESENTED OR ARGUMENT
8 MADE AS TO WHETHER OR NOT THE BURGLARY FIRST WAS PROVEN, WAS
9 THERE?

10 A. AGAIN, THE RECORD WOULD REFLECT ONE WAY OR ANOTHER.

11 Q. OKAY. NOR WAS THERE EVER ANY EVIDENCE MADE --
12 EVIDENCE PRESENTED OR ARGUMENT MADE TO EITHER THE JUDGE OR
13 THE JURY THAT MANSLAUGHTER WAS APPROPRIATE RATHER THAN
14 MURDER.

15 A. THERE WAS NO EVIDENCE AT TRIAL THAT WOULD TEND TO
16 REDUCE IT TO A MANSLAUGHTER.

17 Q. WHAT ABOUT THE CONFESSION?

18 A. THAT WAS NOT IN EVIDENCE AT TRIAL.

19 Q. IT WAS IN EVIDENCE IN THE PENALTY PHASE, WASN'T IT?

20 A. IT WASN'T IN EVIDENCE DURING THE GUILT PHASE WHICH
21 IS, OF COURSE, WHEN YOU WOULD MAKE THOSE ARGUMENTS.

22 Q. WELL, YOU COULD STILL MAKE THOSE ARGUMENTS IN THE
23 PENALTY PHASE, CAN'T YOU?

24 A. NO.

25 Q. HUH?

2701

1 A. NO.

2 Q. DID YOU HEAR MR. STONE SAYING RESIDUAL DOUBT WAS ONE
3 OF THE...

4 A. WHAT I THINK HE MEANT OR WHAT I MEAN -- STUDIES HAVE
5 SHOWN THAT RESIDUAL DOUBT IS A FACTOR THAT LEADS JURIES TO
6 RECOMMEND LIFE SENTENCES. TO THE BEST OF MY KNOWLEDGE, IT'S
7 ONE OF THOSE SILENT THINGS. IT'S A PSYCHOLOGICAL FORCE AT
8 WORK, BUT I DON'T THINK YOU CAN REALLY ARGUE RESIDUAL DOUBT
9 TO THE JURY. YOU CERTAINLY CAN'T SUBMIT IT IN A COURT'S
10 CHARGE AS A -- AS A MITIGATING FACTOR.

11 Q. BUT PROVOCATION IS APPROPRIATE AS A MITIGATING
12 FACTOR, ISN'T IT?

13 A. IT IS ONE OF THE STATUTORY MITIGATING FACTORS.

14 Q. AND, IN FACT, IN YOUR DEFENSE YOU PUT UP EXPERTS WHO
15 CLAIM THAT HE HAD SOME TYPE OF EXPLOSIVE DISORDER OR... IS
16 THAT CORRECT?

17 A. RIGHT, THAT HE HAD SOME TYPE OF PHYSIOLOGICAL
18 ABNORMALITY THAT MADE IT DIFFICULT FOR HIM TO CONTROL HIS
19 EMOTIONS.

20 Q. RIGHT. AND, IN FACT, THERE WAS SOME EVIDENCE THAT
21 HE HAD A SPOT ON HIS BRAIN.

22 A. RIGHT.

23 Q. AND, IN FACT, DID HE HAVE A HISTORY OF BLACKOUTS AND
24 MEMORY LOSSES AND THINGS LIKE THAT?

25 A. I DON'T HAVE ANY INDEPENDENT RECOLLECTION. THAT

2702

1 DOES SOUND RIGHT THOUGH.

2 Q. OKAY. AND THAT MIGHT COULD ACCOUNT FOR -- FOR SOME
3 OF THE VARYING VERSIONS YOU HEARD FROM HIM.

4 A. IT'S POSSIBLE. THAT'S VERY POSSIBLE.

5 Q. NOW, THE EXPLOSIVE DISORDER DEFENSE WOULD KIND OF
6 DOVETAIL VERY NICELY WITH THIS STORY, WOULDN'T IT? THIS IS
7 HIS STATEMENT.

8 A. POSSIBLY, YEAH.

9 Q. BECAUSE IN THE STATEMENT HE WAS GRABBED BY THE HAIR,
10 .RESTRAINED FROM LEAVING, AND HE JUST LOST IT.

11 A. UH-HUH.

12 Q. DO YOU THINK IT WOULD BE BETTER FOR THE JURY TO
13 THINK THAT THAT'S WHAT HAPPENED OR THAT FOR THEM TO JUST
14 THINK HE JUST COLD-BLOODEDLY WENT IN THERE AND KILLED THIS
15 WOMAN? HE DIDN'T KNOW...

16 A. WELL, AGAIN, AT THE PENALTY PHASE OF A TRIAL YOU
17 CAN'T GO BACK AND TRY TO ARGUE THAT THE VERDICT WAS WRONG.
18 OKAY? YOU CAN GET INTO THE CIRCUMSTANCES OF THE CRIME, BUT
19 APART FROM THIS WHICH COULD VERY REASONABLY BE -- BEEN VIEWED
20 AS A SELF-SERVING STATEMENT, THERE WAS REALLY NOTHING TO
21 CORROBORATE IT. YOU'VE REALLY GOT TO BE CAREFUL WHEN YOU'RE
22 AT THE PENALTY PHASE OF THE TRIAL TRYING TO SHIFT THE BLAME
23 FOR THE CRIME ITSELF FROM THE DEFENDANT WHOSE LIFE IS IN THE
24 HANDS OF 12 PEOPLE WHO -- AND IT DEPENDS ON WHAT THEY THINK
25 OF HIM -- SHIFT IT FROM HIM TO THE VICTIM WHO THEY'VE ALREADY

2703

1 CONVICTED HIM OF KILLING.

2 Q. OF COURSE, IN THIS CASE ALSO WE HAD THE ADDED FACTOR
3 OR ADDED CIRCUMSTANCE THAT THERE WAS NO EVIDENCE OF FORCED
4 SEX.

5 A. I WOULD DISAGREE WITH THAT.

6 Q. WHAT EVIDENCE WAS THERE OF FORCED SEX?

7 A. THE POSITION OF THE WOMAN'S BODY WHEN SHE WAS FOUND,
8 THE FACT THAT THE BLOOD PATTERNS IN THE CARPET COULD BE
9 INTERPRETED AS HER HAVING BEEN TURNED OVER FOR SOME PURPOSE
10 SHORTLY BEFORE SHE DIED, THE POSITION OF HER CLOTHING ON THE
11 BODY. I WOULD DISAGREE THAT THERE WAS NO EVIDENCE OF FORCED
12 SEX. THERE IS EVIDENCE THAT IF A JURY BELIEVED IT AND GAVE
13 IT WEIGHT WOULD SUPPORT AN INFERENCE THAT THERE WAS FORCED
14 INTERCOURSE.

15 Q. DID YOU HEAR DR. CARTER HERE, THE EXPERT FOR THE
16 STATE, ADMIT THERE WAS NO EVIDENCE?

17 A. HE SAID THERE WAS NO EVIDENCE OF TEARS, LACERATIONS,
18 OR BRUISING.

19 Q. AND HE SAID HE HAD NO MEDICAL EVIDENCE AT ALL TO
20 INDICATE THERE WAS FORCED SEX.

21 THE COURT: Y'ALL -- Y'ALL DON'T NEED TO DEBATE
22 WHAT'S IN THE RECORD.

23 MR. FLOYD: OKAY. FINE.

24 THE WITNESS: SORRY.

25 THE COURT: THAT'S ALL RIGHT. IT'S NOT YOUR FAULT.

2704

1 IT'S JUST WE KNOW WHAT DR. CARTER SAID AND WE'VE GOT THE
2 TRIAL TRANSCRIPT FROM THE PREVIOUS TRIAL.

3 BY MR. FLOYD:

4 Q. NOW, DID -- DID YOU MAKE -- WHEN THE TESTIMONY OF
5 LOUANNE CAME OUT ABOUT THE YEARS, DID YOU MAKE ANY KIND OF
6 MOTION AT THAT TIME TO STRIKE THAT TESTIMONY AND FOR THE JURY
7 TO -- FOR THE JUDGE TO INSTRUCT THE JURY THAT THEY'RE TO
8 DISREGARD THAT TESTIMONY IN ANY WAY?

9 A. NO.

10 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

11 MR. SALTER: JUST VERY BRIEFLY.

12 RECROSS EXAMINATION

13 BY MR. SALTER:

14 Q. WHY DIDN'T YOU MAKE A MOTION?

15 A. BECAUSE IT WOULD HAVE DRAWN THE JURY'S ATTENTION TO
16 THE VERY THING THAT WE DID NOT WANT THEM TO KNOW ABOUT.

17 MR. SALTER: ALL RIGHT. THANK YOU. NOTHING
18 FURTHER.

19 THE COURT: OKAY.

20 THE WITNESS: THANK YOU, YOUR HONOR.

21 MR. FLOYD: YOUR HONOR, COULD I HAVE ONE MORE
22 QUESTION?

23 THE COURT: YES, ONE MORE QUESTION.
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REDIRECT EXAMINATION

BY MR. FLOYD:

Q. DID THE STATE EVER PRODUCE TO YOU ANY PHOTOGRAPHS OF GARY TERRY IN URAI JACKSON'S HOME?

A. NO, I DID NOT RECALL THAT AND I DON'T -- THERE ARE NONE IN MY FILE.

MR. FLOYD: OKAY. THANK YOU.

THE WITNESS: MAY I BE EXCUSED, YOUR HONOR?

THE COURT: YES, MA'AM.

THE WITNESS: THANK YOU, SIR.

MR. FLOYD: YOUR HONOR, WE'D CALL MS. DIANE GIBSON TERRY. I'M SORRY. GIBSON SMITH. I'M SORRY, DIANE.

DIANE G. SMITH, AFTER BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: WHEN YOU'RE COMFORTABLY SEATED, PLEASE STATE YOUR FULL NAME.

THE WITNESS: DIANE GIBSON SMITH.

DIRECT EXAMINATION

BY MR. FLOYD:

Q. AND, DIANE, DID YOU AT ONE TIME IN YOUR LIFE HAVE A RELATIONSHIP WITH GARY?

A. I DID.

Q. AND WAS THAT KIND OF IN THIS SAME TIME FRAME WHEN URAI JACKSON WAS KILLED?

A. YES.

1 Q. NOW, DID YOU HAVE ANY TYPE OF CONTACT WITH THE
2 SOLICITOR'S OFFICE AND THE PUBLIC DEFENDER'S OFFICE AFTER THE
3 MURDER? DID PEOPLE GET WITH YOU AND TRY TO GET YOUR
4 STATEMENT AND THINGS LIKE THAT?

5 A. THE SOLICITOR'S OFFICE AND THE DETECTIVE FOR THE
6 PUBLIC DEFENDER'S OFFICE.

7 Q. DID YOU HAND OVER ANY PHOTOGRAPHS OF GARY TERRY IN
8 URAI JACKSON'S HOUSE? DID YOU TURN OVER ANY PHOTOGRAPHS OF
9 THAT TO THE STATE?

10 A. I DID. ONE PICTURE OF ME AND HIM IN THE KITCHEN.

11 Q. AND THAT WAS IN URAI JACKSON'S KITCHEN?

12 A. YES.

13 Q. DO YOU RECALL WHEN YOU TURNED IT OVER OR WHO YOU
14 TURNED IT OVER TO?

15 A. NOT SPECIFICALLY, NO, I DON'T RECALL.

16 Q. BUT IT WAS SOMEBODY FROM THE SOLICITOR'S OFFICE?

17 A. YES, SIR.

18 Q. AND DID YOU TELL THEM WHAT IT WAS A PHOTOGRAPH OF,
19 OF HIM IN HER KITCHEN AND YOU IN HER KITCHEN?

20 A. YEAH, IT WAS OBVIOUS.

21 Q. BECAUSE THERE WAS SOME FRIENDSHIP INVOLVED. WEREN'T
22 YOU FRIENDS WITH MS. JACKSON AND HER DAUGHTER?

23 A. YES, SIR.

24 Q. AND WASN'T GARY A FRIEND OF -- OF THEM ALSO?

25 A. HE WAS A FRIEND OF SAMANTHA'S.

1 Q. OKAY. AND WERE Y'ALL IN -- IN HER HOUSE ON MORE
2 THAN ONE OCCASION?

3 A. ONE OR TWO. I MEAN, VERY FEW TOGETHER.

4 Q. OKAY. ONE OR TWO TIMES TOGETHER?

5 A. RIGHT.

6 Q. NOW, DID YOU EVER SEE GARY OR SEE URAI JACKSON WITH
7 GARY?

8 A. NO.

9 Q. OR IN THE SAME AREA AS GARY?

10 A. I LIVED RIGHT ACROSS THE STREET FROM HER, SO IT
11 DEPENDS ON WHAT -- WHEN YOU SAY AREA...

12 Q. OKAY. DID YOU EVER COME HOME FROM WORK ONE DAY AND
13 SEE HER IN YOUR YARD?

14 A. I RECALL SEEING HER. I DO NOT RECALL IF SHE WAS IN
15 MY YARD. SHE WAS WITHIN SPEAKING DISTANCE.

16 Q. OKAY. AND GARY WAS HOME AT THAT TIME?

17 A. I DON'T RECALL.

18 Q. DID YOU EVER TELL -- YOU KNOW PATRICIA TERRY, DO YOU
19 NOT?

20 A. YES, I DO.

21 Q. IS THAT GARY'S MOTHER?

22 A. YES, IT IS.

23 Q. DID YOU EVER TELL PATRICIA TERRY THAT YOU HAD TURNED
24 OVER A PHOTOGRAPH OF URAI SITTING IN GARY'S LAP TO THE
25 SOLICITOR?

1 A. NO. THE PICTURE I GAVE THE SOLICITOR'S OFFICE OF
2 GARY AND ME IN THE KITCHEN, I'M SITTING ON HIS LAP.

3 MR. FLOYD: NO FURTHER QUESTIONS. THANK YOU, DIANE.

4 CROSS-EXAMINATION

5 BY MR. SALTER:

6 Q. I'LL BE BRIEF, MA'AM. DO YOU RECALL HOW LONG YOU
7 HAD A RELATIONSHIP WITH MR. TERRY?

8 A. I MET HIM IN '87, AND I DON'T RECALL THE EXACT DATE
9 THAT I LEFT AND MOVED BACK HOME, BUT IT WAS AFTER THE MURDER.

10 Q. ALL RIGHT. WERE YOU LIVING WITH HIM AT THE TIME OF
11 THE CRIME?

12 A. YES.

13 Q. ALL RIGHT. NOW, THIS PHOTOGRAPH, I BELIEVE YOU SAID
14 THAT YOU AND MR. TERRY ARE DEPICTED IN THE PHOTOGRAPH?

15 A. YES, SIR.

16 Q. HOW SO? COULD YOU DESCRIBE IT FOR THE COURT?

17 A. HE'S SITTING IN A CHAIR AT THE KITCHEN TABLE, AND
18 I'M SITTING ON HIS LAP. I MEAN, IT WAS JUST A SIMPLE PICTURE
19 TAKEN OFF OF A REGULAR -- LIKE A 35 MILLIMETER CAMERA,
20 DISPOSABLE CAMERA.

21 Q. WAS MRS. JACKSON EVEN DEPICTED IN THE PHOTOGRAPH?

22 A. NO.

23 Q. AND THERE'S NO QUESTION BUT THAT YOU AND SAMANTHA AT
24 THE TIME AT LEAST, AT THE TIME OF THE CRIME, WERE FRIENDS.

25 A. YES, SIR.

(2709

1 Q. Y'ALL HAD BEEN FRIENDS FOR SOME TIME?

2 A. YES, SIR, SINCE I WAS SEVEN YEARS OLD.

3 Q. ALL RIGHT. BECAUSE Y'ALL LIVED CLOSE TO ONE
4 ANOTHER.

5 A. RIGHT.

6 Q. AND YOU NEVER SAW MS. JACKSON AND MR. TERRY
7 TOGETHER?

8 A. NO.

9 Q. NOW, WHAT KIND OF PERSON WAS MS. JACKSON IN TERMS OF
10 .LIKE BEING SOCIAL?

11 A. SHE KEPT TO HERSELF AND SHE WASN'T VERY SOCIAL. SHE
12 WORKED AND JUST STAYED AT HOME.

13 Q. DID YOU EVER SEE HER WITH ANY MAN?

14 A. NEVER.

15 Q. ALL RIGHT. NOW, YOU INDICATED EARLIER THAT YOU
16 SPOKE TO INVESTIGATORS BOTH WITH THE SOLICITOR'S OFFICE AND
17 WITH THE PUBLIC DEFENDER'S OFFICE?

18 A. YES, SIR.

19 Q. IS THAT CORRECT? DO YOU RECALL TO WHOM YOU GAVE THE
20 PHOTOGRAPH?

21 A. NO, I DON'T RECALL.

22 Q. MIGHT BE POSSIBLE THAT YOU GAVE IT TO ONE OF THE
23 INVESTIGATORS FOR THE DEFENSE?

24 A. NO. THE ONLY INVESTIGATOR I SPOKE TO FROM THE
25 DEFENSE CAME TO MY HOME, AND I DIDN'T---

2710

1 Q. OKAY.

2 A. ---GIVE ANYTHING TO HIM.

3 Q. YOU DON'T RECALL WHO YOU GAVE THE PHOTOGRAPH TO.

4 A. NO, I DO NOT.

5 Q. BUT, AGAIN, THERE'S NO QUESTION THAT YOU AND---

6 A. NO, NO DOUBT.

7 Q. ---SAMANTHA WERE FRIENDS.

8 A. OH, YES, SIR.

9 MR. SALTER: ALL RIGHT. THANK YOU.

10 REDIRECT EXAMINATION

11 BY MR. FLOYD:

12 Q. DIANE, DO YOU RECALL WHETHER OR NOT THERE HAD BEEN A
13 PARTY OVER AT MS. JACKSON'S HOUSE THAT WEEKEND?

14 A. I HAVE NO INFORMATION ABOUT THAT.

15 Q. ALL RIGHT. THERE'S NO QUESTION BUT THAT THAT
16 PICTURE WAS OF GARY AND YOU IN URAI'S KITCHEN.

17 A. CORRECT.

18 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

19 THE COURT: YOU CAN STEP DOWN, MA'AM.

20 MR. FLOYD: LOUANNE TERRY.

21 THE COURT: HOW MUCH MORE DO YOU -- DO YOU HAVE?

22 MR. FLOYD: VERY LITTLE, UNLESS MR. SALTER DOES A
23 GRUELING CROSS-EXAMINATION.

24 THE COURT: IS SHE THE LAST WITNESS?

25 MR. FLOYD: I HAVE PROBABLY ONE MORE AND IT WILL BE

2711

1 ABOUT AS BRIEF AS THE LAST ONE, SO HOW EVER YOU WANT TO GO,
2 JUDGE, WHETHER YOU WANT TO BREAK NOW AND DO IT---

3 THE COURT: IF WE KEEP GOING, ARE YOU GOING TO -- DO
4 YOU THINK YOU'D BE FINISHED BY WHEN?

5 MR. FLOYD: 12:30.

6 THE COURT: OKAY. GO AHEAD.

7 LOUANNE E. SMITH, AFTER BEING DULY SWORN,
8 TESTIFIED AS FOLLOWS:

9 THE CLERK: WHEN YOU'RE COMFORTABLY SEATED, PLEASE
10 STATE YOUR FULL NAME FOR THE COURT REPORTER.

11 COURT REPORTER: AND SPELL YOUR FIRST NAME.

12 THE WITNESS: MY NAME IS LOUANNE, L-O-U-A-N-N-E,
13 ELIZABETH SMITH, FORMERLY LOUANNE SMITH TERRY.

14 DIRECT EXAMINATION

15 BY MR. FLOYD:

16 Q. IS SMITH YOUR MAIDEN NAME?

17 A. YES, IT IS.

18 Q. WHERE ARE YOU FROM?

19 A. HARTSVILLE.

20 Q. WHERE DID YOU GROW UP?

21 A. I GREW UP IN HARTSVILLE AND GREENWOOD AND BACK TO
22 HARTSVILLE.

23 Q. OKAY. AND WHAT -- WHAT TYPE OF WORK DO YOU DO?

24 A. I'M A SCHOOL TEACHER.

25 Q. AND HOW LONG HAVE YOU BEEN A SCHOOL TEACHER?

1 A. EIGHTEEN YEARS.

2 Q. AND WAS YOUR DAD IN EDUCATION ALSO?

3 A. YES, SIR, HE WAS.

4 Q. WHERE WAS HE?

5 A. HE WAS -- HE STARTED OFF AS A TEACHER IN LAMAR, AND
6 HE WAS A JUNIOR HIGH SCHOOL PRINCIPAL IN HARTSVILLE. DID THE
7 IMMIGRATION AT GREENWOOD HIGH SCHOOL IN '69 AND '70. HE WENT
8 ON TO BECOME ASSISTANT COUNTY SUPERINTENDENT FOR DARLINGTON
9 COUNTY AND THEN THE HARTSVILLE AREA SUPERINTENDENT AND THEN
10 PROJECT SHARE WHICH IS A STATE PROJECT AND THEN HE RETIRED.

11 Q. OKAY. AND WHAT WAS YOUR RELATIONSHIP WITH GARY
12 TERRY?

13 A. I WAS MARRIED TO GARY.

14 Q. AND HOW LONG WERE Y'ALL MARRIED?

15 A. WE WERE MARRIED FROM JUNE 7TH, 1988, UNTIL DECEMBER
16 1997.

17 Q. AND DO YOU HAVE CHILDREN?

18 A. YES, SIR, WE HAVE FOUR CHILDREN.

19 Q. WHAT ARE THEIR AGES?

20 A. CURRENTLY DUBOSE IS 17. MORGAN IS 14; HE'LL BE 15
21 THE END OF THIS MONTH. AND THE TWINS ARE 13.

22 Q. OKAY. NOW, AT THE TIME THIS HAPPENED WITH URAI,
23 WERE YOU AND GARY STILL MARRIED?

24 A. WE WERE STILL MARRIED BUT NOT LIVING TOGETHER.

25 Q. Y'ALL WEREN'T LIVING TOGETHER AT THAT TIME? DO YOU

1 KNOW WHETHER OR NOT GARY EVER VISITED URAI JACKSON'S HOME?

2 A. I NEVER SAW GARY THERE, BUT GARY ON SEVERAL
3 OCCASIONS---

4 MR. SALTER: OBJECTION, YOUR HONOR, AT THIS POINT
5 BECAUSE IF SHE NEVER SAW HIM THERE, SHE CAN'T HAVE ANY
6 FIRSTHAND KNOWLEDGE. ALSO, ANYTHING -- ANYTHING THAT HE MAY
7 HAVE TOLD HER WOULD BE HEARSAY.

8 MR. FLOYD: WELL, YOUR HONOR---

9 THE COURT: ALL RIGHT. I'M GOING TO -- WELL, ARE
10 YOU GOING TO ASK HER WHAT SHE WAS TOLD?

11 MR. FLOYD: THAT WOULD BE THE MAIN -- YES, THE MAIN
12 THRUST OF IT. I WOULD ASK YOUR HONOR TO SEE IF I CAN NOW
13 MAYBE CORROBORATE IT WITH MY NEXT WITNESS AND MAYBE RESERVE
14 RULING ON IT AND LET ME PROFFER IT TO YOU NOW AS TO WHAT SHE
15 WOULD SAY.

16 THE COURT: ON WHAT THOUGH? YOU'RE ASKING -- YOU'RE
17 ASKING HER TO TESTIFY ABOUT WHAT GARY -- WHAT GARY TERRY TOLD
18 HER?

19 MR. FLOYD: YES, YOUR HONOR.

20 THE COURT: AND YOU'RE OFFERING IT -- AND IT WOULD
21 BE, I SUPPOSE, THAT HE TOLD HER HE HAD BEEN AT MS. JACKSON'S
22 HOUSE?

23 MR. FLOYD: WELL, IT'S KIND OF -- IT WOULD BE HIM
24 TELLING HER WHERE HE WAS GOING BEFORE HE LEFT AND WHY HE WAS
25 GOING THERE.

1 **THE COURT:** AND IT WOULD BE OFFERED TO PROVE THAT HE
2 WAS, IN FACT, GOING THERE?

3 **MR. FLOYD:** YES, YOUR HONOR.

4 **THE COURT:** ALL RIGHT. AND THEN WOULD THERE BE ANY
5 HEARSAY EXCEPTION THAT WOULD APPLY TO THAT?

6 **MR. FLOYD:** WELL, YOUR HONOR, OF COURSE, WE'VE GOT
7 MR. TERRY'S UNAVAILABILITY IF HE ASSERTS HIS FIFTH AMENDMENT.

8 **THE COURT:** HE'S NOT UNAVAILABLE IF HE -- THAT'S
9 FAIRLY WELL SETTLED. WELL, I'M GOING TO SUSTAIN THE
10 OBJECTION, AND THEN IF YOU HAVE SOME OTHER WAY OF ATTACKING
11 IT, YOU CAN.

12 **MR. FLOYD:** CAN I GO AHEAD AND PROFFER IT SO YOU'LL
13 KNOW WHAT -- WHAT WE HAVE?

14 **THE COURT:** I GUESS -- I GUESS YOU CAN GO AHEAD AND
15 PROFFER IT.

16 **MR. FLOYD:** THANK YOU, YOUR HONOR.

17 **THE COURT:** I'LL HOLD MY EARS.

18 **MR. SALTER:** THANK YOU, YOUR HONOR. I APPRECIATE
19 THAT, YOUR HONOR.

20 BY MR. FLOYD:

21 Q. HOW DID YOU KNOW HE KNEW HER?

22 A. ON SEVERAL OCCASIONS GARY TOLD ME THAT HE HAD DONE
23 SOME ODD JOBS, FIXING THE WASHING MACHINE, FIXING A LAWN
24 MOWER. AND IN MAY OF 1994 HE CAME TO MY HOME IN WINNSBORO
25 AND GOT A TELEPHONE CRIMPING TOOL WHICH WE HAD PREVIOUSLY

2715

1 BOUGHT FOR ONE OF OUR RESIDENCES WHERE WE HAD TO INSTALL OUR
2 OWN TELEPHONE LINE, RUN OUR OWN TELEPHONE LINE, AND HE
3 INDICATED TO ME THAT HE NEEDED THE TOOL TO TRY TO FIX MS.
4 JACKSON'S TELEPHONE LINE, AND THIS WAS BEFORE THE MURDER AND
5 IT WAS AROUND MOTHER'S DAY WEEKEND WHICH WOULD PLACE IT MID
6 MAY.

7 Q. OKAY. NOW, DID YOU MEET WITH MS. FULLWOOD BEFORE
8 YOUR TESTIMONY AT TRIAL?

9 A. VERY BRIEFLY.

10 Q. HOW LONG WOULD YOU SAY YOU MET WITH HER?

11 A. THE WEEK BEFORE THE TRIAL THERE WAS A GENERAL
12 MEETING OF THE DEFENSE TEAM, AND THAT MEETING LASTED MAYBE AN
13 HOUR? BUT THERE WERE A LOT OF PEOPLE AND A LOT OF GROUND
14 COVERED. BEFORE THE PENALTY PHASE, WE MET BRIEFLY HALF AN
15 HOUR, 45 MINUTES TOPS.

16 Q. OKAY. WERE YOU EVER TOLD NOT TO MENTION ANYTHING
17 ABOUT PAROLE ELIGIBILITY OR THE FACT THAT GARY MIGHT COME
18 HOME SOMEDAY?

19 A. NEVER.

20 Q. AND IF YOU HAD BEEN TOLD THAT, WOULD YOU HAVE
21 MENTIONED WHAT YOU SAID AT TRIAL? IF YOU HAD KNOWN THAT YOU
22 WEREN'T SUPPOSED TO SAY THAT, WOULD YOU HAVE MENTIONED IT AT
23 TRIAL?

24 A. NO, SIR.

25 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS. MR.

2716

1 SALTER MAY HAVE SOME QUESTIONS.

2 CROSS-EXAMINATION

3 BY MR. SALTER:

4 Q. LET ME MAKE SURE I'VE GOT THE RIGHT PERSON HERE.

5 YOU WENT TO THE UNIVERSITY OF SOUTH CAROLINA, DID YOU NOT?

6 A. YES, SIR.

7 Q. AND WHEN YOU WENT TO THE UNIVERSITY, WERE YOU IN THE
8 MARCHING BAND?

9 A. YES, SIR.

10 Q. YOU WERE. OKAY. I KNEW I HAD THE RIGHT PERSON.

11 YOU SAY YOU NEVER SAW YOUR HUSBAND GO INTO THE VICTIM'S HOME;
12 CORRECT?

13 A. I NEVER SAW HIM ENTER THE HOME. ON ONE OCCASION
14 WHEN HE HAD ME CARRY HIM TO MS. GIBSON'S RESIDENCE SO THAT HE
15 COULD PICK UP SOMETHING HE HAD LEFT, HE POINTED THE HOME OUT
16 TO ME AS BEING MS. JACKSON'S HOME AND BEING WHERE SAMANTHA
17 AND JOHN LIVED.

18 Q. OKAY. BUT THERE'S NO QUESTION THAT SAMANTHA KNEW
19 YOUR EX-HUSBAND; CORRECT?

20 A. THERE WERE PICTURES OF HER IN HIS PHOTO ALBUM.

21 Q. OKAY. YOUR HONOR, RESERVING MY EARLIER OBJECTION,
22 HOW LONG -- HOW LONG DID YOU SAY YOU WERE MARRIED TO MR.
23 TERRY?

24 A. FROM JUNE 7TH, 1988, UNTIL DECEMBER 1997.

25 Q. DECEMBER '97? IS IT FAIR TO SAY THAT HE WASN'T

2717

1 ENTIRELY HONEST WITH YOU DURING THE COURSE OF YOUR
2 RELATIONSHIP WITH HIM?

3 A. AT TIMES.

4 Q. AT TIMES? HOW SO?

5 A. HE LEFT ME FOR ANOTHER WOMAN. THAT'S NOT THE TYPE
6 OF BEING HONEST, BUT MS. GIBSON ACTIVELY PURSUED HIM AS A
7 GUEST IN MY HOME, AS A BABYSITTER FOR MY CHILDREN, ACTIVELY
8 PURSUED HIM. THE FAULT WITH THAT LIES IN NOT JUST ONE
9 DIRECTION. I ALSO MUST TAKE SOME BLAME. APPARENTLY I WAS
10 NOT DOING SOMETHING RIGHT AT HOME.

11 Q. ALL RIGHT. BUT IT'S FAIR TO SAY THAT HE WASN'T
12 ALWAYS HONEST WITH YOU; CORRECT?

13 A. NOT ALWAYS.

14 Q. ALL RIGHT. SO IF HE TOLD YOU THAT HE WAS -- THAT HE
15 WAS GOING OR HAD BEEN TO MS. JACKSON'S HOME, THAT ISN'T
16 NECESSARILY THE TRUTH, IS IT?

17 A. NOT NECESSARILY, BUT I HAD NO REASON TO DOUBT WHEN
18 HE CAME AND ASKED TO BORROW A TOOL AND THEN LATER RETURNED
19 THAT TOOL.

20 Q. YOU HAD NO REASON TO DOUBT EVEN THOUGH MS. JACKSON
21 WAS LIVING RIGHT ACROSS THE STREET FROM THE WOMAN THAT YOU
22 SAID ACTIVELY PURSUED YOUR HUSBAND.

23 A. AT THAT POINT WE WERE NOT LIVING TOGETHER.

24 Q. ALL RIGHT. DID YOU EVER CATCH HIM WITH ANYBODY
25 ELSE?

1 A. NO, I DID NOT.

2 Q. ALL RIGHT. Y'ALL WERE -- WAS HIS INVOLVEMENT WITH
3 MS. GIBSON THE ONLY THING THAT HE LIED TO YOU ABOUT?

4 A. I DON'T KNOW.

5 Q. YOU DON'T KNOW. NOW, LET ME BACKTRACK. DURING THE
6 COURSE OF YOUR MARRIAGE, IS IT FAIR TO SAY THAT HE WASN'T
7 WITH YOU A GOOD DEAL -- GOOD PORTION OF YOUR MARRIAGE?

8 A. WE SPENT MANY NIGHTS APART.

9 Q. AND WHY WAS THAT? NOT JUST BECAUSE OF THE AFFAIR
10 BUT THERE WERE OTHER REASONS AS WELL, WERE THERE NOT?

11 A. WE RESIDED IN SEPARATE CITIES WHEN WE WERE FIRST
12 MARRIED DUE TO MY JOB.

13 Q. OKAY. AND SO YOU HAVE NO IDEA WHAT HE WOULD HAVE
14 BEEN DOING WHILE YOU WERE RESIDING IN ANOTHER CITY, DO YOU?

15 A. I KNOW WHERE HE WAS FOR PART OF THAT TIME.

16 Q. WHERE WAS THAT?

17 A. HE WAS AT THE AIKEN YOUTH CORRECTION FACILITY.

18 MR. SALTER: ALL RIGHT. NOTHING FURTHER, YOUR
19 HONOR.

20 REDIRECT EXAMINATION

21 BY MR. FLOYD:

22 Q. DID HE EVER CONFESS TO YOU ABOUT BEING WITH OTHER
23 WOMEN?

24 A. YES, HE DID.

25 Q. AND DID HE CONFESS TO YOU ABOUT HAVING SEX WITH URAI

2719

1 JACKSON?

2 A. YES, HE DID.

3 MR. SALTER: OBJECTION AGAIN, YOUR HONOR.

4 THE COURT: WHEN WOULD THIS HAVE BEEN?

5 MR. FLOYD: WHEN DID HE CONFESS THAT?

6 THE COURT: WELL, WAIT A MINUTE NOW. YOU DIRECT --
7 YOU NEED TO -- I SUSTAIN THE OBJECTION TO THAT LAST QUESTION.
8 BUT YOU -- IF YOU WANT TO ASK HER THAT, YOU NEED TO DIRECT
9 HER IN THE QUESTION AS TO THE TIME FRAME IN WHICH YOU WANT
10 HER TO ANSWER OR AS TO WHICH YOU WANT HER TO ANSWER.

11 MR. FLOYD: THANK YOU, YOUR HONOR. DID YOU EVER
12 HAVE ANY DISCUSSION WITH GARY TERRY WHEN HE CONFESSED TO YOU
13 THAT HE HAD HAD CONSENSUAL SEX WITH URAI JACKSON?

14 THE COURT: SUSTAINED.

15 MR. SALTER: AGAIN---

16 THE COURT: SUSTAINED.

17 MR. FLOYD: I WAS GOING TO GO FROM THERE.

18 THE COURT: WELL, SHE'S GOING TO HAVE ALREADY
19 ANSWERED THE QUESTION BY THEN SO...

20 MR. FLOYD: OKAY.

21 THE COURT: SHE JUST NEEDS TO KNOW THE TIME FRAME IN
22 WHICH SHE IS -- OR AS TO WHICH SHE'S TO ANSWER THE QUESTION
23 BECAUSE THAT'S GOING TO AFFECT MY RULING, I BELIEVE.
24 BY MR. FLOYD:

25 Q. AT WHAT TIME DID YOU HAVE THIS DISCUSSION WITH MR.

2720

1 TERRY CONCERNING ANY RELATIONSHIP WITH URAI JACKSON?

2 A. AUGUST AND SEPTEMBER OF 1994 WHEN WE MADE AN ATTEMPT
3 TO RECONCILE OUR MARRIAGE.

4 Q. AND SO AT THAT POINT IN TIME?

5 MR. SALTER: I OBJECT, YOUR HONOR, JUST SO THE
6 RECORD IS CLEAR..

7 THE COURT: WHEN WAS THE CRIME?

8 MR. SALTER: MAY OF '94, YOUR HONOR. THIS IS --
9 THIS IS POST-CRIME.

10 MR. FLOYD: HE WAS ARRESTED IN '95, SOMETIME IN '95.
11 THE CRIME OCCURRED IN MAY OF '94. THIS CONVERSATION WAS --
12 WASN'T IT AUGUST OF '94?

13 THE WITNESS: YES, SIR..

14 MR. FLOYD: AUGUST OF '94.

15 MR. SALTER: THE REASON TO FABRICATE WOULD ALREADY
16 EXIST.

17 MR. FLOYD: HE WASN'T A SUSPECT AT THAT TIME, YOUR
18 HONOR.

19 THE COURT: THE QUESTION IS: DID HE ADMIT TO HAVING
20 CONSENSUAL SEX WITH THE VICTIM? AND THE ADMISSION WAS IN
21 AUGUST OF '94, AND YOU OBJECT TO THAT BECAUSE THE ANSWER
22 WOULD BE?

23 MR. SALTER: FIRST, IT'S HEARSAY. THERE'S ALSO --
24 HE ALSO HAS A REASON TO FABRICATE AND---

25 THE COURT: WELL---

1 **MR. SALTER:** I'M SORRY.

2 **THE COURT:** LET ME UNDERSTAND WHAT THE PURPOSE OF
3 THE TESTIMONY IS. YOU'RE -- YOU'RE GETTING AT THIS AS
4 EVIDENCE THAT THE DEFENSE COULD HAVE USED TO SHOW A BASIS ON
5 WHICH THE JURY COULD HAVE CONCLUDED THAT THE SEX WAS
6 CONSENSUAL?

7 **MR. FLOYD:** THAT'S CORRECT, YOUR HONOR.

8 **THE COURT:** WELL, I THINK THAT FOR PURPOSES OF
9 SHOWING SOMETHING THAT -- ALL RIGHT. HE IS SAYING THAT THE
10 DEFENSE -- THE DEFENSE COULD HAVE HAD A CONVERSATION WITH
11 THIS WITNESS BEFORE TRIAL, AND IN THAT CONVERSATION, IF THEY
12 HAD PURSUED IT THE WAY HE'S SUGGESTING THEY SHOULD HAVE, THEY
13 WOULD HAVE -- THE DEFENSE LAWYERS WOULD HAVE LEARNED THAT THE
14 DEFENDANT HAD MADE A STATEMENT TO HER IN THIS TIME FRAME THAT
15 HE HAD HAD SEX, CONSENSUAL SEX, WITH MS. JACKSON. SO TO THAT
16 EXTENT, IT'S NOT NECESSARILY OFFERED TO PROVE THE TRUTH OF
17 THE MATTER ASSERTED.

18 **MR. SALTER:** WELL, IF I MIGHT, YOUR HONOR?

19 **THE COURT:** IF -- I MEAN, I'M SATISFIED THAT IF THAT
20 STATEMENT -- IF THE SAME QUESTION HAD BEEN ASKED BY THE
21 DEFENSE LAWYERS AT THE TRIAL OF THE CASE, IT WOULD HAVE
22 BEEN -- THERE WOULD HAVE BEEN AN OBJECTION FOR HEARSAY AND IT
23 WOULD HAVE BEEN SUSTAINED.

24 **MR. SALTER:** I GUESS THAT'S MY PROBLEM, YOUR HONOR.

25 **THE COURT:** BUT -- BUT -- SO -- SO EVEN -- I MEAN,

1 HE'S OFFERING IT KIND OF ATTACKING THE FIRST PRONG OF
2 STRICKLAND. HERE IS SOMETHING COUNSEL SHOULD HAVE DONE
3 DIFFERENTLY. YOUR -- YOUR OBJECTION IS -- IS ADDRESSED AT
4 THE SECOND PRONG OF STRICKLAND. IT WOULDN'T HAVE MADE ANY
5 DIFFERENCE BECAUSE IT WAS HEARSAY ANYWAY; IT WOULD NEVER HAVE
6 COME IN. AND I THINK THAT'S PROBABLY RIGHT, BUT I STILL
7 THINK THEY'RE ENTITLED TO ELICIT THE TESTIMONY.

8 MR. SALTER: VERY WELL, YOUR HONOR.

9 THE COURT: SO I'M GOING TO OVERRULE THE OBJECTION.

10 MR. SALTER: THANK YOU, YOUR HONOR.

11 BY MR. FLOYD:

12 Q. NOW, THIS CONVERSATION THAT YOU HAD WITH -- WITH MR.
13 TERRY, THAT WAS WHEN Y'ALL WERE THINKING ABOUT GETTING BACK
14 TOGETHER?

15 A. YES, SIR.

16 Q. AND WAS THIS ONE OF THOSE CONFERENCES,
17 COMMUNICATIONS AND SO FORTH, WHERE YOU WERE BOTH BEING VERY
18 TRUTHFUL WITH EACH OTHER ABOUT WHAT YOU HAD DONE?

19 A. YES, SIR.

20 Q. AND IT'S AT THAT TIME THAT THIS STATEMENT WAS MADE
21 TO YOU.

22 A. YES, SIR.

23 Q. DID YOU INFORM THE DEFENSE LAWYERS OR THE DEFENSE
24 TEAM ABOUT THIS STATEMENT?

25 A. YES, SIR.

1 Q. AND DO YOU RECALL -- DID YOU DO THAT RIGHT AWAY WITH
2 THEM OR IN PLENTY OF TIME TO PREPARE FOR TRIAL?

3 A. YES.

4 Q. DID THEY ACT LIKE THEY WERE EVEN INTERESTED IN THAT
5 STATEMENT?

6 A. TO MY OPINION, THEY DIDN'T CARE WHAT I HAD TO SAY.

7 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

8 MR. SALTER: JUST BRIEFLY, YOUR HONOR.

9 RECROSS EXAMINATION

10 BY MR. SALTER:

11 Q. SO YOU TOLD THE DEFENSE ATTORNEYS ABOUT THIS
12 CONVERSATION; CORRECT?

13 A. YES.

14 Q. DO YOU REMEMBER WHO -- WHICH ONE OF THEM YOU TOLD?
15 BOTH OF THEM?

16 A. I BELIEVE IT WAS TAMMY KITCHENS WHO WAS ONE OF THE
17 INVESTIGATORS FOR THE DEFENSE TEAM.

18 Q. ALL RIGHT. YOU TOLD TAMMY KITCHENS.

19 A. AND---

20 Q. DID YOU TELL ANYBODY ELSE?

21 A. YES, VIVIAN MASSEY.

22 Q. YOU TOLD VIVIAN MASSEY.

23 A. AND I BELIEVE THAT I BROUGHT IT OUT TO BETH
24 FULLWOOD.

25 Q. ALL RIGHT. YOU TOLD MS. FULLWOOD ALSO.

1 A. I NEVER HAD A ONE-ON-ONE CONVERSATION WITH MR.
2 STONE.

3 Q. ALL RIGHT. SO YOUR TESTIMONY, AS I UNDERSTAND IT,
4 IS THAT YOU TOLD ALL THESE MEMBERS OF THE DEFENSE TEAM---

5 A. AT DIFFERENT TIMES.

6 Q. ---AT DIFFERENT TIMES THAT YOUR EX-HUSBAND HAD
7 ADMITTED TO HAVING CONSENSUAL SEX WITH THE VICTIM.

8 A. YES.

9 Q. IS THAT CORRECT? YOU STILL LOVE HIM, DON'T YOU?

10 A. HE'S THE FATHER OF MY CHILDREN. THERE IS NO FUTURE
11 FOR US.

12 Q. THAT'S NOT MY QUESTION, MA'AM. DO YOU STILL LOVE
13 HIM?

14 A. AS THE FATHER OF MY CHILDREN ONLY, SIR.

15 Q. AND YOU DON'T WANT TO SEE HIM DIE, DO YOU?

16 A. HONESTLY, I DON'T WANT TO SEE ANYONE DIE.

17 Q. BUT SPECIFICALLY YOUR EX-HUSBAND, YOU DON'T WANT HIM
18 TO DIE, DO YOU?

19 A. DO YOU?

20 Q. YES, MA'AM. NOW, ANSWER MY QUESTION.

21 A. I DON'T WANT TO SEE ANYONE, INCLUDING GARY TERRY,
22 PUT TO DEATH.

23 Q. BUT YOU ESPECIALLY DON'T WANT HIM PUT TO DEATH
24 BECAUSE HE'S THE FATHER OF YOUR CHILDREN; CORRECT?

25 A. HE IS THE FATHER OF MY CHILDREN. HE ALSO, THROUGH

1 TESTIMONY I'VE GIVEN YOU, LIED TO ME, HAS GIVEN ME VERY
2 LITTLE REASON TO BE LOYAL TO HIM. HE'S NOT GARNERED ANY
3 FAVORS FROM ME. HE BROKE MY HEART, BUT I DO NOT WANT TO SEE
4 HIM OR ANYONE ELSE PUT TO DEATH.

5 MR. SALTER: THANK YOU. NOTHING FURTHER, YOUR
6 HONOR.

7 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS,
8 LOUANNE. YOUR HONOR, WE CALL PATRICIA TERRY.

9 THE COURT: LET ME -- LET ME GO BACK BEFORE SHE
10 TESTIFIES TO THIS -- THIS HEARSAY STATEMENT OR ALLEGED
11 HEARSAY STATEMENT. I CAN'T FATHOM A WAY IN WHICH THAT
12 STATEMENT COULD EVER HAVE BEEN ADMITTED INTO THE TRIAL OF THE
13 CASE, AND HOPEFULLY YOU'LL -- I THINK THAT IT'S -- IT MIGHT
14 BE IMPORTANT TO CLARIFY THAT ON THE RECORD NOW AS TO HOW
15 Y'ALL THINK THAT STATEMENT MIGHT HAVE COME IN.

16 MS. KIMBROUGH: YOUR HONOR, AS TO THE STATEMENT THAT
17 MR. TERRY GOT A CRIMPING IRON TO GO FIX MS. JACKSON'S
18 TELEPHONE, WE THINK THAT UNDER 803(3) IT COULD COME IN, NOT
19 TO PROVE THAT HE ACTUALLY DID THAT, BUT BECAUSE IT GOES TO
20 HIS THEN EXISTING STATE OF MIND. AND I WOULD NOTE THAT AMONG
21 THOSE TYPES OF STATEMENTS THAT CAN COME IN ARE STATEMENTS
22 THAT GO TO INTENT, PLAN, MOTIVE, DESIGN, MENTAL FEELING, PAIN
23 AND BODILY HEALTH. IT DOESN'T PROVE THAT HE ACTUALLY DID IT.

24 THE COURT: WELL, THAT -- THAT WAS REALLY NOT WHAT I
25 WAS CONCERNED WITH. I WILL -- I WILL STATE THAT I DON'T

1 THINK ANY DEFENSE LAWYER IN THEIR RIGHT MIND WOULD HAVE
2 INTENTIONALLY PUT THE STATEMENT INTO EVIDENCE THAT HE HAD
3 PREVIOUSLY GOTTEN A CRIMPING IRON SO HE COULD GO FIX HER
4 TELEPHONE WHICH PUTS HIM -- PUTS HIM KNOWING EXACTLY WHERE
5 THE TELEPHONE BOX IS AND ALL THAT STUFF. BUT I'M TALKING
6 ABOUT THE STATEMENT THAT HE HAD HAD CONSENSUAL SEX WITH URAI
7 JACKSON. HOW COULD THAT COME INTO EVIDENCE?

8 MR. FLOYD: YOUR HONOR, I THINK UNDER OUR RULES AND
9 -- AND I REFER THE COURT TO STATE V. DOCTOR. STATE V.
10 DOCTOR, 413 S.E.2D 36. UNDER THE RULE AN EXCEPTION IS
11 MADE -- LET ME... UNDER RULE 804 WHERE YOU TALK ABOUT THE
12 DECLARANT BEING UNAVAILABLE...

13 THE COURT: UNDER 804. OKAY. ANYTHING -- ANY OTHER
14 WAY IN WHICH IT COULD HAVE COME IN?

15 MR. FLOYD: I THINK UNDER 804 -- AND I THINK WHAT
16 WE'RE ALSO HERE ABOUT TO DO IS TO PUT IN SOME OTHER TESTIMONY
17 THAT PROVIDES SOME CORROBORATION, AND I THINK THAT'S THE KEY
18 UNDER 804 WHEN -- IF YOU'VE GOT A SITUATION WHERE IT'S A
19 PRIVILEGE, THE REASON THEY'RE UNAVAILABLE IS BECAUSE OF A
20 PRIVILEGE, WHICH DOES OPEN THE DOOR TO GET THE STATEMENT IN,
21 THEN THE COURT HAS TO LOOK AT WHETHER OR NOT THERE IS
22 ANYTHING THAT COULD CORROBORATE THE STATEMENT OR SEEM TO MAKE
23 IT MORE TRUTHFUL THAN NOT. AND I THINK UNDER THAT EXCEPTION
24 THAT STATEMENT COULD GET IN, PARTICULARLY WHEN CORROBORATED
25 WITH HOW WE'RE ABOUT TO CORROBORATE IT.

1 THE COURT: OKAY. THANK YOU. SWEAR HER IN.

2 PATRICIA R. TERRY, AFTER BEING DULY SWORN,
3 TESTIFIED AS FOLLOWS:

4 THE CLERK: STATE YOUR FULL NAME WHEN YOU'RE
5 COMFORTABLY SEATED, PLEASE.

6 MR. SALTER: YOUR HONOR, BEFORE HE STARTS, DO I NEED
7 TO -- WILL I NEED TO RENEW MY OBJECTION OR WILL YOUR HONOR
8 JUST CONSIDER IT A CONTINUING OBJECTION?

9 THE COURT: TO?

10 THE WITNESS: YES, SIR.

11 THE COURT: THESE STATEMENTS?

12 MR. SALTER: YES, SIR.

13 THE COURT: YEAH, YOU'LL NEED TO RENEW YOUR
14 OBJECTION.

15 MR. SALTER: THANK YOU, SIR.

16 MR. FLOYD: BEFORE WE GET INTO THIS ALSO, YOUR
17 HONOR, AS TO THE TELEPHONE CRIMPING DEVICE---

18 THE COURT: UH-HUH.

19 MR. FLOYD: ---IT MAY HAVE BEEN RELEVANT -- THE
20 DEFENSE MAY HAVE WANTED TO PUT THAT IN TO SHOW THAT A
21 FINGERPRINT ON THE BOX WOULD HAVE BEEN PLACED THERE FOR SOME
22 OTHER REASON SEVERAL WEEKS EARLIER. SO IT -- IT MAY HAVE
23 BEEN USEFUL TO THE DEFENSE.

24 THE COURT: OKAY.
25

DIRECT EXAMINATION

BY MR. FLOYD:

Q. WOULD YOU STATE YOUR NAME FOR THE RECORD?

A. PATRICIA REGISTER TERRY.

Q. AND WHAT IS YOUR RELATION TO THE DEFENDANT?

A. HIS MOTHER.

Q. NOW, MS. TERRY, HAVE YOU EVER HAD ANY CONVERSATIONS
WITH URAI JACKSON?

A. YES.

Q. AND WHEN DID YOU HAVE CONVERSATIONS WITH HER?

A. IT WAS A FEW MONTHS BEFORE SHE PASSED AWAY.

Q. AND WHERE WERE YOU WHEN THE CONVERSATIONS OCCURRED?

A. AT MY HOME.

Q. AND HOW DID YOU HAPPEN TO HAVE THOSE CONVERSATIONS?

A. THE PHONE RANG AND I PICKED IT UP, AND IT WAS A SOFT
VOICE ON THERE THAT SAID -- YOU KNOW, WANTED TO SPEAK TO
GARY, AND I SAID HE WASN'T HERE. I ASKED WHO WAS CALLING,
AND SHE IDENTIFIED HERSELF.

Q. AND WHO DID SHE IDENTIFY HERSELF---

A. SHE IDENTIFIED HERSELF AS URAI JACKSON, THE MOTHER
OF SAMANTHA AND JOHN. AND I SAID, DO YOU WANT TO SPEAK WITH
-- YOU KNOW, I THOUGHT SHE WAS CALLING ABOUT ONE OF THEM.
AND SHE SAID, "NO, I WANT TO SPEAK TO GARY," WHICH NO ONE WAS
THERE BUT ME AT THE TIME.

Q. AND DID YOU HAVE ANY MORE CONVERSATIONS WITH HER

1 OTHER THAN THAT ONE TIME?

2 A. SHE CALLED ONCE AGAIN AND ASKED TO SPEAK TO GARY. I
3 SAID HE WASN'T THERE, AND SHE HUNG UP.

4 MR. SALTER: YOUR HONOR, AT THIS POINT I WILL
5 INTERPOSE AN OBJECTION. IT'S CLASSIC HEARSAY. I MEAN,
6 THERE'S NO WAY -- THERE'S NO WAY I COULD EVER...

7 THE COURT: WHEN SHE GETS AROUND TO SAYING---

8 MR. SALTER: ANYTHING SUBSTANTIVE?

9 THE COURT: ---ANYTHING SUBSTANTIVE IT COULD -- I
10 MEAN, REALLY THE STATEMENT AS TO WHO SHE WAS IS PERHAPS
11 HEARSAY, BUT WHEN SHE GETS AROUND TO SOMETHING THAT IS MORE
12 SUBSTANTIVE, I THINK IT COULD BE HEARSAY, BUT SO FAR IT'S
13 NOT.

14 BY MR. FLOYD:

15 Q. AND WAS THAT THE SUM TOTAL OF YOUR CONVERSATIONS---

16 A.. YES.

17 Q. ---WITH HER?

18 A. UH-HUH.

19 Q. THERE'S NO QUESTION SHE WAS CONTACTING YOUR HOUSE
20 LOOKING FOR GARY.

21 A. EXACTLY.

22 Q. IS THAT RIGHT?

23 A. RIGHT.

24 Q. ALL RIGHT. NOW, DID YOU EVER HAVE A CONVERSATION
25 WITH DIANE GIBSON ABOUT PHOTOGRAPHS GIVEN TO THE STATE?

1 A. YES.

2 MR. SALTER: I'LL OBJECT TO ANYTHING THAT MS. GIBSON
3 TOLD HER.

4 THE COURT: WELL, LET'S SEE WHAT THE QUESTION IS.

5 MR. FLOYD: OKAY.

6 BY MR. FLOYD:

7 Q. AND WHAT -- WHAT WERE YOU TOLD?

8 A. BY DIANE?

9 Q. UH-HUH.

10 A. THAT SHE HAD GIVEN PHOTOS TO THE SOLICITOR'S OFFICE.

11 Q. AND DID SHE SAY WHAT THOSE PHOTOS WERE?

12 THE COURT: WELL, NOW, I SUSTAIN THE OBJECTION.

13 MR. SALTER: THANK YOU, YOUR HONOR.

14 MR. FLOYD: YOUR HONOR, IN THIS SITUATION I DON'T
15 THINK IT'S HEARSAY BECAUSE THE DECLARANT IS AVAILABLE FOR
16 CROSS-EXAMINATION AND HAS ACTUALLY TESTIFIED.

17 THE COURT: I SUSTAIN THE OBJECTION.

18 MR. FLOYD: YOUR HONOR, UNDER 801(D), SUBSECTION 1,
19 IT'S NOT HEARSAY IF THE DECLARANT HAS TESTIFIED AT THE TRIAL
20 AND IS SUBJECT TO CROSS-EXAMINATION CONCERNING THE STATEMENT.

21 THE COURT: OKAY.

22 MR. FLOYD: CAN I ASK HER?

23 THE COURT: I AM RESOLVED TO SUSTAIN THE OBJECTION.

24 MR. FLOYD: OKAY. CAN I PROFFER IT?

25 THE COURT: I THINK YOU ALREADY DID. I MEAN, SHE --

1 SHE SAID THAT -- THAT MS. TERRY TOLD HER THAT SHE HAD GIVEN
2 THE PICTURE TO THE SOLICITOR'S OFFICE. SO THE STATEMENT --
3 THE PROFFER IS ALREADY IN. I'M JUST -- YOU'RE OFFERING THE
4 STATEMENT OF MS. TERRY TO PROVE THAT SHE DID, IN FACT, GIVE
5 THE PICTURE TO THE SOLICITOR'S OFFICE. THAT'S HEARSAY. AND
6 THE FACT THAT SHE WAS HERE AND AVAILABLE FOR CROSS-
7 EXAMINATION IS IRRELEVANT TO THE ANALYSIS OF HEARSAY. SO
8 SUSTAINED.

9 MR. FLOYD: I HAVEN'T ACTUALLY GOTTEN EVERYTHING IN.
10 . COULD I PROFFER WHAT---

11 THE COURT: WELL, YEAH, ASK THE NEXT QUESTION.

12 MR. FLOYD: OKAY. OKAY.

13 THE COURT: AND LET'S SEE WHAT THE OBJECTION IS.

14 MR. FLOYD: AND WHAT WERE YOU TOLD THE PICTURE WAS
15 OF?

16 THE WITNESS: I WAS TOLD THE PICTURES---

17 MR. SALTER: I OBJECT, YOUR HONOR.

18 THE COURT: ALL RIGHT. I'M GOING TO SUSTAIN THE
19 OBJECTION, BUT YOU CAN DO A PROFFER.

20 BY MR. FLOYD:

21 Q. OKAY. YOU CAN ANSWER.

22 A. I ASKED DIANE WERE THERE PICTURES OF HER AND GARY
23 AND URAI THERE. SHE SAID YES. I SAID WAS THE PICTURE
24 SHOWING MS. JACKSON, AND SHE SAID THE PICTURE WAS OF THE
25 THREE OR FOUR OF THEM SITTING ON A COUCH AND SHE WAS SITTING

1 ON GARY'S LAP, AND THE PICTURES WERE TURNED OVER TO THE
2 SOLICITOR'S OFFICE.

3 Q. NOW, DID YOU EVER HAVE ANY CONVERSATION WITH GARY
4 ABOUT URAI JACKSON?

5 A. ONLY BEFORE -- BEFORE IT HAPPENED. WHEN THE PHONE
6 CALLS CAME, I ASKED GARY WHAT WAS HIS RELATIONSHIP AND HE
7 JUST SAID---

8 MR. SALTER: OBJECTION, YOUR HONOR.

9 THE COURT: WELL, I DON'T THINK THAT THE
10 STATEMENT -- THE STATEMENTS THAT ARE -- THAT ARE MADE BY THE
11 WOMAN WHO CALLED AND IDENTIFIED HERSELF AS URAI JACKSON
12 WANTING TO KNOW WHERE GARY TERRY IS, THAT'S NOT HEARSAY
13 BECAUSE IT'S NOT OFFERED TO PROVE THAT SHE DID THAT. IT'S
14 OFFERED TO PROVE THAT SHE KNEW WHO HE WAS, AND THEY'RE
15 ULTIMATELY TRYING TO GET AROUND TO PROVING THAT THERE WAS
16 SOME TYPE OF RELATIONSHIP THAT EXISTED BEFORE THIS CRIME
17 OCCURRED. AND IF GARY TERRY HAD A CONVERSATION WITH HER IN
18 WHICH HE ANSWERED QUESTIONS - THE QUESTION: WHAT IS YOUR
19 RELATIONSHIP? - AND HE ANSWERS IT, THEN IT'S NOT OFFERED TO
20 PROVE THE TRUTH OF THE ANSWER. IT'S OFFERED TO PROVE THE
21 FACT OF THE ANSWER. THE FACT OF THE ANSWER IS EVIDENCE OF A
22 PRE-EXISTING RELATIONSHIP. SO ON THIS NARROW POINT I'M NOT
23 GOING TO SUSTAIN THAT OBJECTION. I OVERRULE IT, BUT, YOU
24 KNOW, IF THE SCOPE OF INQUIRY CHANGES, MY RULING COULD
25 CHANGE.

1 **MR. SALTER:** THANK YOU, YOUR HONOR.

2 BY MR. FLOYD:

3 Q. WHAT DID HE SAY?

4 A. HE SAID THAT THEY HAD A GOOD RELATIONSHIP, YOU KNOW,
5 AND I TOOK IT FROM WHAT HE WAS SAYING THEY DID HAVE A LOVING
6 RELATIONSHIP.

7 Q. OKAY. THANK YOU. OH, DID YOU INFORM THE DEFENSE
8 TEAM ABOUT THESE CONVERSATIONS?

9 A. I BELIEVE I DID TELL THEM THAT I HAD SPOKEN WITH MS.
10 JACKSON ON THE PHONE.

11 Q. OKAY.

12 A. AND I'M PRETTY SURE THAT, YOU KNOW, THERE'S A RECORD
13 OF THAT.

14 Q. OKAY. THANK YOU, MS. TERRY.

15 A. UH-HUH.

16 **MR. SALTER:** RESERVING MY OBJECTIONS, YOUR HONOR. I
17 REALIZE UNDER THE NEW RULES WE DON'T HAVE TO DO THAT, BUT I'M
18 JUST SO IN THE HABIT OF IT.

19 **THE COURT:** OKAY.

20 CROSS-EXAMINATION

21 BY MR. SALTER:

22 Q. WHEN YOUR SON SAID THAT HE HAD A GOOD RELATIONSHIP,
23 YOU TOOK THAT TO MEAN HE HAD A LOVING RELATIONSHIP?

24 A. YES, BECAUSE OF I ASKED HIM WHY WAS SHE CALLING AND
25 ASKING TO SPEAK WITH HIM, AND HE SAID, "WE'VE HAD A GOOD

1 RELATIONSHIP," AND I -- THE WAY HE SAID IT, IT WAS LIKE THEY
2 HAD RELATIONS. THAT'S THE WAY I TOOK IT.

3 Q. ANY TIME YOUR SON HAS A GOOD RELATIONSHIP WITH
4 SOMEBODY, HE'S HAD RELATIONS WITH THEM?

5 A. YOU'LL HAVE -- YOU WOULD HAVE TO GO BACK TO REALIZE
6 THAT HE -- HE HAD -- THE WOMEN IN HIS LIFE, LET'S PUT IT LIKE
7 THAT, WERE NOT IN HIS LIFE JUST FOR COMPANIONSHIP. I MEAN,
8 THAT'S THE ONLY WAY I CAN TELL YOU.

9 Q. THERE WERE A BUNCH OF THEM, WEREN'T THERE?

10 A. YES, HE HAD -- HE HAD -- HE HAD -- HE HAD HIS PICKS,
11 BUT HE DID HAVE RELATIONSHIPS WITH WOMEN.

12 Q. AND AT THE TIME ALL THIS OCCURRED HE WASN'T HAVING A
13 RELATIONSHIP WITH -- IS IT URAI OR URAI (DIFFERENT
14 PRONUNCIATIONS)?

15 A. I DON'T KNOW WHAT HER NAME -- REALLY, I DON'T KNOW
16 HOW TO PRONOUNCE IT.

17 Q. MRS. JACKSON.

18 A. I KNEW THAT HE AND DIANE WERE HAVING PROBLEMS AND,
19 YOU KNOW...

20 Q. BECAUSE DIANE WAS HIS GIRLFRIEND; RIGHT? BUT HE WAS
21 STILL MARRIED AT THE TIME.

22 A. YES.

23 MR. SALTER: ALL RIGHT. NOTHING FURTHER, YOUR
24 HONOR.

25 MR. FLOYD: THANK YOU, MS. TERRY.

1 **THE COURT:** UNLESS YOU ARE -- YOU'RE HAVING A
2 DISCUSSION WHICH I'M ASSUMING IS WHAT TO DO NEXT, IF
3 ANYTHING.

4 **MR. FLOYD:** YES, SIR.

5 **THE COURT:** SO WHY DON'T I LET YOU HAVE THAT
6 DISCUSSION OVER LUNCH AND GIVE YOU PLENTY OF TIME TO HAVE IT?
7 AND THEN WE'LL COME BACK AT 2:00 AND YOU CAN DECIDE -- YOU
8 CAN LET ME KNOW AT THAT TIME WHETHER OR NOT YOU HAVE ANY
9 FURTHER EVIDENCE.

10 **MR. FLOYD:** THAT WILL BE FINE.

11 **THE COURT:** ALL RIGHT. SEE Y'ALL AT 2:00.

12 (WHEREUPON, A LUNCH BREAK WAS TAKEN.)

13 **THE COURT:** THANK YOU. BE SEATED.

14 **MR. FLOYD:** JUDGE, THAT CONCLUDES THE TESTIMONY THAT
15 WE WILL BE PRESENTING.

16 **THE COURT:** ALL RIGHT. WELL, THEN, WE'LL -- AS WE
17 DISCUSSED YESTERDAY, Y'ALL JUST WANT TO START IN THE MORNING?

18 **MR. SALTER:** YES, SIR, YOUR HONOR. I'VE ALREADY
19 INSTRUCTED OUR WITNESSES TO BE HERE.

20 **THE COURT:** OKAY. JUST GIVE ME AN UPDATE ON WHAT
21 YOU THINK -- HOW LONG YOU THINK IT WILL TAKE.

22 **MR. SALTER:** I THINK IT WILL PROBABLY BE SHORTER
23 THAN WHAT WE HAD THIS MORNING.

24 **THE COURT:** SO WE SHOULD BE DONE BY LUNCH?

25 **MR. SALTER:** YES, SIR. I'VE ALREADY -- I'VE ALREADY

1 DISCUSSED WITH MR. FLOYD WHO THE WITNESSES ARE GOING TO BE.
2 I BELIEVE MR. CHASE AND THE PRIVATE INVESTIGATOR AND MR.
3 DUDEK AND I BELIEVE SCOTTIE FRIER, AND I BELIEVE THAT'S IT.

4 THE COURT: DO Y'ALL HAVE A WRITING THAT LISTS THE
5 SPECIFIC ALLEGATIONS OF INEFFECTIVENESS?

6 MR. FLOYD: WE HAVE -- IT'S NOT A TYPED WRITING FROM
7 OUR NOTES. WHAT WE CAN DO, YOUR HONOR, IS I GUESS MOVE TO
8 AMEND AND PROVIDE A BILL OF PARTICULARS OR AN AMENDED
9 APPLICATION WHICH WE CAN BE VERY SPECIFIC WITH.

10 THE COURT: ALL RIGHT. WELL, WHY DON'T WE DO THAT
11 INFORMALLY AND Y'ALL JUST COME UP WITH A TYPED LIST OF THE
12 SPECIFIC ISSUES THAT YOU INTEND TO ARGUE IN YOUR BRIEF? AND
13 THAT WILL GIVE THE ATTORNEY GENERAL SOME HELP, I THINK, IN
14 DECIDING WHAT TO PURSUE TOMORROW, AND THEN I THINK IT WOULD
15 BE HELPFUL TO US TO HAVE A DISCUSSION IN THE WAY OF ARGUMENT
16 BUT NOT IN THE WAY OF -- NOT TO THE POINT OF RULING TOMORROW
17 TO DEFINE TO -- TO NARROW THE ISSUES FOR YOUR BRIEFS SO THAT
18 EVERYBODY IS NOT GOING OFF IN A BUNCH OF DIFFERENT
19 DIRECTIONS. AND THEN Y'ALL CAN -- THEN IT WOULD SEEM TO ME
20 THAT YOU WOULD THEN STRUCTURE YOUR BRIEFS ACCORDING TO THAT
21 LIST, AT LEAST AS TO THE FIRST PRONG OF STRICKLAND, AND THEN
22 IN THE SECOND PRONG YOU WOULD -- YOU WOULD DO IT BOTH AS
23 INDIVIDUAL ERRORS AND THEN I SUPPOSE YOU WOULD PROBABLY ALSO
24 ARGUE THAT THERE'S A CUMULATIVE EFFECT---

25 MR. FLOYD: YES, SIR.

1 **THE COURT:** ---OF THE ALLEGED ERRORS. SO THAT -- I
2 KNOW THAT'S GOING TO HELP ME, AND I KNOW THAT WHEN WE GET TO
3 THE -- WHEN WE GET DONE TOMORROW, I'M GOING TO WANT TO SPEND
4 SOME TIME TELLING Y'ALL WHAT I THINK SO THAT YOU CAN
5 STREAMLINE YOUR EFFORTS IN TERMS OF DOING BRIEFS BECAUSE A
6 LOT OF THIS STUFF -- I MEAN, A LOT OF THAT STUFF I CAN TELL
7 YOU RIGHT OFF THE TOP OF MY HEAD THAT THERE'S NOTHING THERE,
8 AND OTHER STUFF THERE'S GOING -- IT'S GOING TO WARRANT SOME
9 DISCUSSION AND SOME STUDY. SO THAT'S WHAT I WOULD LIKE TO DO
10 TOMORROW.

11 MAYBE WHEN YOU FINISH WITH THE TESTIMONY, MAYBE IF
12 WE'RE CLOSE TO LUNCH, WE CAN FINISH IT BEFORE LUNCH. IF NOT,
13 WE CAN COME BACK AFTER LUNCH AND JUST HAVE A DISCUSSION. ANY
14 PROBLEM WITH THAT?

15 **MR. SALTER:** NO, SIR, YOUR HONOR.

16 **MR. FLOYD:** NO, YOUR HONOR.

17 **THE COURT:** SO IS IT GOING -- IT'S NOT GOING TO BE
18 ANY BIG DEAL TO TYPE THAT OUT, IS IT?

19 **MR. FLOYD:** NO, YOUR HONOR. WE'VE KIND OF GOT IT
20 HANDWRITTEN.

21 **THE COURT:** OKAY. WELL, WHY DON'T Y'ALL TYPE IT OUT
22 THIS AFTERNOON AND E-MAIL IT TO THE ATTORNEY GENERAL AND TO
23 ME THIS AFTERNOON SO THAT WE'LL HAVE IT IN PREPARATION FOR
24 TOMORROW?

25 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN

1 MR. FLOYD AND MR. SALTER.)

2 THE COURT: ALL RIGHT. I'LL SEE Y'ALL TOMORROW.

3 COURT REPORTER: WHAT TIME, JUDGE?

4 MR. FLOYD: THANK YOU, YOUR HONOR.

5 THE COURT: TEN O'CLOCK; RIGHT?

6 MR. SALTER: YES, SIR, YOUR HONOR. YOUR HONOR,
7 WOULD YOU LIKE US TO GO AHEAD AND HAVE A COPY OF THE
8 TRANSCRIPT ORDERED BEFORE WE BRIEF THE ISSUES BEFORE YOU OR
9 DO YOU JUST WANT US TO GO AHEAD AND DO THEM FROM OUR NOTES?

10 THE COURT: WELL, IT SEEMS TO ME THAT HAVING THE
11 TRANSCRIPT IS GOING TO NOT ONLY HELP Y'ALL AND ME BUT ALSO
12 THE APPELLATE COURT.

13 MR. SALTER: YES, SIR.

14 THE COURT: SO I WOULD SAY GO AHEAD AND GET THE
15 TRANSCRIPT.

16 MR. SALTER: ALL RIGHT. VERY WELL, YOUR HONOR.

17 (WHEREUPON, THE TRIAL CONCLUDED FOR THE DAY AT 2:00
18 P.M. AND RESUMED THE FOLLOWING DAY, JULY 12TH, 2006, AS
19 FOLLOWS.)

20 THE COURT: BE SEATED. ARE YOU READY?

21 MR. SALTER: YES, SIR, YOUR HONOR.

22 THE COURT: OKAY.

23 MR. SALTER: YOUR HONOR, BEFORE WE CALL OUR FIRST
24 WITNESS, I HAVE BRIEFLY DISCUSSED THIS WITH MR. FLOYD. THE
25 STATE WOULD LIKE TO NOTE SINCE THERE WAS -- THERE WERE SOME

1 PUBIC HAIRS THAT WERE NOT TESTED BY THE STATE BEYOND TO
2 DETERMINE WHETHER OR NOT THEY WERE CONSISTENT WITH THE
3 VICTIM, AND THEY WERE DETERMINED TO BE INCONSISTENT. I WOULD
4 WONDER WHETHER OR NOT MR. TERRY AND HIS COUNSEL WANT TO WAIVE
5 ANY ADDITIONAL TESTING OF THAT HAIR.

6 THE COURT: WANT TO WAIVE ANY ADDITIONAL TESTING.

7 MR. SALTER: FOR MITOCHONDRIAL D.N.A. TESTING
8 SPECIFICALLY BECAUSE IT HAS COME UP IN AT LEAST ONE OTHER
9 CASE SOME PLACE DOWN -- SOMETIME DOWN THE ROAD WHERE---

10 THE COURT: WELL, I -- I WAS KIND OF WONDERING ABOUT
11 THAT MYSELF. SO THERE WERE -- THERE WERE PUBIC HAIRS THAT
12 WERE FOUND.

13 MR. SALTER: YES, SIR.

14 THE COURT: WHERE SPECIFICALLY?

15 MR. SALTER: I BELIEVE ON A PUBIC COMBING OF THE
16 VICTIM.

17 THE COURT: OKAY. AND THOSE WERE TESTED AND FOUND
18 TO -- OR THEY WERE NEVER TESTED.

19 MR. SALTER: THEY WERE -- THEY WERE TESTED. THEY
20 WERE SUBMITTED TO AGENT POWELL, AND THAT WAS ONE OF THE
21 DOCUMENTS -- I ENTERED THIS YESTERDAY. AGENT POWELL'S
22 DETERMINATION WERE -- WAS THAT THEY WERE CAUCASIAN AND THEY
23 WERE INCONSISTENT WITH THE VICTIM.

24 THE COURT: INCONSISTENT WITH THE VICTIM.

25 MR. SALTER: (NODDED HEAD UP AND DOWN.)

1 **THE COURT:** NOW, WAS THAT FROM A VISUAL OBSERVATION
2 OF THEM OR WAS THAT FROM A -- FROM A -- FROM A D.N.A. TEST OF
3 IT?

4 **MR. SALTER:** THAT WAS JUST THE -- YOU DO A HAIR
5 ANALYSIS. IT USED TO BE PERFORMED BECAUSE -- FROM WHAT I
6 UNDERSTAND, S.L.E.D. STILL DOES NOT DO MITOCHONDRIAL D.N.A.
7 TESTING. SO THEY WOULDN'T -- THEY WOULD NOT DO D.N.A.
8 TESTING AT S.L.E.D. ON THE -- ON THE HAIR.

9 **THE COURT:** OKAY. WELL, MY OWN VIEW IS THAT IF
10 POST-CONVICTION RELIEF IS DENIED AND IF AFTER ALL OF THE
11 STATE APPEALS AND FEDERAL HABEAS OR POST-CONVICTION THERE
12 REMAINS AN ACTIVE SENTENCE OF DEATH, AT SOME POINT SOMEBODY
13 IS GOING TO COME BACK ON BEHALF OF MR. TERRY AND SAY, "WE
14 PETITION TO HAVE THESE HAIRS TESTED."

15 **MR. SALTER:** THAT'S MY PROBLEM. THAT'S WHY I WANT
16 TO...

17 **THE COURT:** AND SO MY -- MY OWN VIEW IS THAT -- I
18 MEAN, AT THIS STAGE IT'S UP TO -- IT'S UP TO THEM TO DECIDE
19 WHAT EVIDENCE THEY WANT TO PRESENT. IT WOULD BE UP TO THE
20 STATE TO DECIDE HOW, IF AT ALL, TO RESPOND. SO IT'S NOT UP
21 TO ME TO MAKE Y'ALL, EITHER ONE SIDE OR THE OTHER, TEST THESE
22 HAIRS, BUT IF ONE -- YOU KNOW, IF SOMEBODY WOULD TEST THEM
23 AND THEN -- THEN THAT WOULD PERHAPS ELIMINATE AN ENTIRE ROUND
24 OF LITIGATION AT SOME POINT IN THE FUTURE.

25 **MR. SALTER:** AND THAT'S WHAT I'M TRYING TO DO, YOUR

1 HONOR. I'M JUST TRYING TO HEAD THAT OFF IF I COULD.

2 THE COURT: SO, YOU KNOW, EVEN IF THEY -- SO YOUR
3 QUESTION IS: DO THEY WANT TO WAIVE IT?

4 MR. SALTER: YES, SIR.

5 THE COURT: I MEAN, THEY HAVE WAIVED IT. IF THEY --
6 HERE WE ARE TRYING THE CASE. THE RECORD IS OPEN, AND IT
7 APPARENTLY HASN'T BEEN TESTED. SO THE QUESTION IS WHETHER OR
8 NOT SOMEBODY NOW WANTS TO TEST IT.

9 MR. FLOYD: YOUR HONOR, WE HAD DISCUSSED THIS SOME
10 WITH MR. SALTER. WE WOULD HAVE NO PROBLEM WITH KEEPING THE
11 RECORD OPEN TO HAVE THE HAIRS TESTED. WE -- WE WOULD ALSO --
12 WOULDN'T HAVE ANY PROBLEM KEEPING IT OPEN TO HAVE THE
13 FINGERNAIL SCRAPINGS TESTED.

14 THE COURT: WELL, WHO WANTS TO DO THAT? DOES THE
15 STATE WANT TO DO IT?

16 MR. SALTER: NO, SIR.

17 MR. FLOYD: HUH?

18 MR. SALTER: NO, SIR.

19 MR. FLOYD: I THOUGHT S.L.E.D. WAS GOING TO DO IT.

20 MR. SALTER: NO.

21 MR. FLOYD: OH, I'M SORRY. OKAY.

22 MR. SALTER: WHAT I WAS TRYING TO EXPLAIN TO THE
23 JUDGE IS, FROM WHAT I UNDERSTAND, S.L.E.D. DOES NOT DO
24 MITOCHONDRIAL D.N.A. TESTING. SO THEY WOULD NOT---

25 MR. FLOYD: OH.

1 **MR. SALTER:** IT WOULD HAVE TO GO SOMEWHERE ELSE.

2 **THE COURT:** WELL, YOU KNOW, HOW ABOUT LET'S -- LET'S
3 LOOK AT IT THIS WAY. ALL RIGHT. NOW, I'M BACK TO THE
4 QUESTION THAT YOU ASKED.

5 **MR. SALTER:** YES, SIR.

6 **THE COURT:** YOU BASICALLY ARE POINTING OUT ON THE
7 RECORD THAT MR. TERRY AND HIS LAWYERS COULD HAVE EITHER
8 GOTTEN THOSE FINGERNAIL SCRAPINGS OR THOSE HAIRS TESTED ON
9 THEIR OWN OR THEY COULD HAVE ASKED ME TO ORDER THE STATE TO
10 DO IT.

11 **MR. SALTER:** YES, SIR.

12 **THE COURT:** AND THAT'S A FAIRLY OBVIOUS POSSIBILITY
13 THAT I'M QUITE CERTAIN OCCURRED NOT ONLY TO MR. TERRY BUT
14 ALSO TO MS. KIMBROUGH AND TO MR. FLOYD. SO THEIR DECISION
15 NOT TO DO THAT APPEARS TO BE A CONSCIOUS DECISION NOT TO DO
16 IT RATHER THAN A DECISION THAT WAS FOR LACK OF FUNDING, FOR
17 NOT THINKING ABOUT IT, NOT ENOUGH TIME, AND THAT KIND OF
18 THING, AND YOU JUST WANT THE RECORD TO BE CLEAR.

19 **MR. SALTER:** YES, SIR, YOUR HONOR.

20 **THE COURT:** THAT AFTER HAVING CONSULTED WITH THEIR
21 CLIENT, THE ATTORNEYS REPRESENTING MR. TERRY HAVE MADE A
22 CONSCIOUS DECISION NOT TO HAVE THAT EVIDENCE TESTED AND HAVE
23 THEREBY WAIVED THE RIGHT TO HAVE THAT TESTED AND SO THAT IF
24 IN THE FUTURE A PETITION IS FILED EITHER IN STATE OR FEDERAL
25 COURT TO STOP AN EXECUTION DATE SO THAT THESE TESTINGS CAN BE

1 DONE, THE STATE CAN RESPOND BY SAYING: THIS OPPORTUNITY WAS
2 GIVEN TO THEM IN THE PAST, AND THE APPLICANT MADE A CONSCIOUS
3 DECISION NOT TO HAVE THE TESTING DONE. AND YOU WILL ARGUE,
4 I'M SURE, AT THAT TIME THAT THE REASON THAT THE TESTING
5 WAS -- THAT THEY MADE THAT CONSCIOUS DECISION NOT TO HAVE THE
6 TESTING DONE WAS BECAUSE THEY KNEW WHAT THE RESULT OF THE
7 TESTING WOULD BE. AND SO---

8 MR. SALTER: THAT'S CORRECT, YOUR HONOR.

9 THE COURT: ---ALL OF THAT IN THE RECORD RIGHT NOW
10 IF WE -- WE'RE READY TO GO FORWARD.

11 MR. SALTER: YES, SIR.

12 THE COURT: IS THERE ANYTHING ELSE ON THAT POINT?

13 MR. SALTER: NO, SIR, YOUR HONOR, UNLESS MR. FLOYD
14 HAS ANYTHING.

15 MR. FLOYD: NO, YOUR HONOR. I THINK HE CAN MAKE
16 WHATEVER ARGUMENT HE WANTS, BUT I DON'T THINK HE CAN PRESUME
17 OUR POSITION ON THE POINT. WE SAY RIGHT NOW IF THE STATE
18 WANTS TO TEST THEM WE WOULD CONSENT TO AN ORDER HAVING THE
19 STATE TEST THEM.

20 THE COURT: WELL, THAT'S FINE, BUT MR. SALTER HAS
21 MADE IT CLEAR THAT THE STATE DOES NOT WANT TO TEST IT. NOW,
22 IF I ORDER THEM TO, THEY WILL, I SUPPOSE. BUT -- BUT WHAT
23 HE'S DOING IS HE'S KIND OF PUTTING YOU ON THE SPOT HERE AND
24 HE'S -- HE IS MAKING SURE THE RECORD REFLECTS THAT EVERYBODY
25 KNEW ABOUT THE POSSIBILITY OF HAVING THESE HAIRS TESTED, THAT

1 Y'ALL WERE ESSENTIALLY ASKED: DID YOU OR DID YOU NOT MAKE A
2 CONSCIOUS DECISION NOT TO HAVE THESE HAIRS AND THE FINGERNAIL
3 CLIPPINGS TESTED? AND YOUR RESPONSE APPEARS -- YOU KNOW, I'M
4 NOT TELLING YOU WHAT THE RESPONSE IS, BUT SOMEBODY READING
5 THIS RECORD AFTER THIS CONVERSATION THAT WE'VE HAD THIS
6 MORNING IS LIKELY TO LOOK AT THE RECORD AND SAY THE ANSWER TO
7 THAT QUESTION IS, YES, YOU DID MAKE A CONSCIOUS DECISION NOT
8 TO HAVE THESE HAIRS OR THOSE FINGERNAIL SCRAPINGS TESTED.

9 SO, I MEAN, I'M NOT -- I'M READY TO GO FORWARD. IF
10 Y'ALL WANT TO -- IF YOU HAVE SOMETHING ELSE YOU WANT TO SAY
11 OR IF YOU WANT TO HAVE TIME TO TALK TO YOUR CLIENT ABOUT IT,
12 THEN -- THEN I'LL GIVE IT TO YOU. I'LL GIVE YOU TIME.

13 MR. FLOYD: THANK YOU, YOUR HONOR. THEN AT THIS
14 POINT AT THIS TIME WE WOULD MAKE A MOTION THAT EITHER THE
15 STATE BE REQUIRED TO TEST THE ITEMS OR THAT THE RECORD BE
16 KEPT OPEN FOR US TO TEST THEM.

17 THE COURT: WHAT DO YOU SAY TO THAT?

18 MR. SALTER: THAT'S FINE. I THINK -- DO WE WANT TO
19 DO IT AT THIS POINT? I'D MUCH RATHER DO IT AT THIS JUNCTURE
20 THAN -- AS YOUR HONOR WAS SAYING, THAT WAS MY WHOLE POINT OF
21 RAISING THIS IN THE FIRST PLACE---

22 THE COURT: YEAH.

23 MR. SALTER: ---WAS NOT TO HAVE TO COME IN YEARS
24 DOWN THE ROAD---

25 THE COURT: UH-HUH.

1 MR. SALTER: ---AND THEN -- AND THEN HAVE TO DEAL
2 WITH IT AT THAT TIME.

3 THE COURT: OKAY. WELL, THE -- THE EVIDENCE IS IN
4 THE CUSTODY OF?

5 MR. SALTER: S.L.E.D.

6 THE COURT: S.L.E.D.

7 MR. SALTER: YES, SIR.

8 THE COURT: AND FROM -- WOULD IT BE -- DOES IT MAKE
9 ANY DIFFERENCE TO YOU -- WELL, YOU'RE SAYING THAT S.L.E.D. IS
10 BASICALLY GOING TO HAVE TO GET AN OUTSIDE TESTING ENTITY TO
11 DO THESE TESTS ANYWAY.

12 MR. SALTER: YES, SIR, AND THE ONLY PROBLEM -- THE
13 ONLY PROBLEM THEN BECOMES ONE OF CHAIN OF CUSTODY.

14 THE COURT: WELL, I MEAN, THAT'S A PROBLEM THAT
15 S.L.E.D. CAN -- CAN SOLVE.

16 MR. SALTER: I WOULD THINK SO, YOUR HONOR.

17 THE COURT: WOULDN'T IT -- WOULDN'T YOU PREFER --
18 WOULDN'T S.L.E.D., YOU THINK, OR FROM THE INTEREST OF THE
19 STATE, WOULDN'T THE STATE PREFER TO KEEP CONTROL OF THE CHAIN
20 OF CUSTODY AND DO THE TESTING YOURSELVES? OR, I MEAN, BE
21 RESPONSIBLE FOR GETTING THE OUTSIDE ENTITY TO DO IT RATHER
22 THAN TURNING THE EVIDENCE OVER TO -- I MEAN, I KNOW YOU
23 WOULDN'T TURN IT OVER TO THE DEFENSE BUT...

24 MR. SALTER: RIGHT. THAT WOULD BE FINE, YOUR HONOR.
25 IN FACT, YES, SIR, I WOULD LIKE FOR S.L.E.D., TO THE EXTENT

1 POSSIBLE, TO MAINTAIN THE CHAIN OF CUSTODY OBVIOUSLY.

2 THE COURT: OKAY. SO -- SO WHERE WE ARE NOW IS THAT
3 WE'RE GOING TO HOLD THE RECORD OPEN FOR THIS TESTING TO BE
4 DONE. THE STATE IS GOING TO DIRECT S.L.E.D. TO HAVE THE
5 TESTING DONE, AND THE RESULTS OF THE TESTS WILL BE MADE PART
6 OF THE RECORD IN WHATEVER FORM Y'ALL AGREE ON WHEN THE
7 TESTING IS COMPLETE THAT. THAT CAN BE EITHER BY RESUMING THE
8 HEARING SO THAT A WITNESS CAN COME IN AND TESTIFY OR IT CAN
9 BE BY AFFIDAVIT WITH THE -- WITH A REPORT ATTACHED, WHATEVER
10 Y'ALL CAN AGREE ON, AND I SUPPOSE IF YOU DON'T AGREE, WE'LL
11 HAVE TO -- WE'LL RECONVENE AND HEAR TESTIMONY.

12 MS. BROWN: YOUR HONOR---

13 MR. SALTER: VERY WELL, YOUR HONOR.

14 MS. BROWN: YOUR HONOR, IT'S PROBABLY A MINOR POINT,
15 BUT JUST FOR CLARITY SINCE THIS RECORD WILL BE REVIEWED, I
16 UNDERSTAND S.L.E.D. DOES NOT HAVE THE HAIR AT THIS TIME. IT
17 WAS TURNED BACK OVER TO LEXINGTON COUNTY, BUT WE WOULD LIKE
18 FOR LEXINGTON COUNTY TO DELIVER IT TO S.L.E.D. AND TO KEEP
19 THE CHAIN CONTINUOUS.

20 THE COURT: WELL, OKAY. THAT'S FINE WITH ME. Y'ALL
21 CAN TAKE CARE OF MAKING THAT HAPPEN; RIGHT?

22 MR. SALTER: YES, SIR, YOUR HONOR.

23 MS. BROWN: YES, SIR, YOUR HONOR.

24 MS. KIMBROUGH: YOUR HONOR, I WAS GOING TO SUGGEST
25 -- WE'VE HAD SIMILAR ISSUES ABOUT TESTING AND CHAIN OF

1 CUSTODY IN OTHER CASES. I CERTAINLY HAVE NO PROBLEM FINDING
2 OUT WHERE THE HAIR WOULD NEED TO BE TESTED, AND WE COULD
3 ARRANGE TO HAVE THE LEXINGTON COUNTY SHERIFF'S DEPARTMENT
4 DRIVE IT DIRECTLY THERE WITH---

5 THE COURT: WELL, I THINK THE WAY IT'S LEFT NOW IS
6 THAT S.L.E.D. WILL HANDLE THAT AND---

7 MS. KIMBROUGH: DO THEY -- WILL THEY RECEIVE THE
8 EVIDENCE AGAIN? BECAUSE THEY'VE TOLD ME IN THE PAST THAT
9 WHEN THEY'RE DONE WITH THE TESTING THEY JUST GIVE IT BACK TO
10 THE COUNTY.

11 MR. SALTER: IF THAT BECOMES A PROBLEM, THEN WE WILL
12 HAVE THE COUNTY DO IT. I MEAN, IF THAT'S -- IF THAT'S GOING
13 TO BE A PROBLEM WITH S.L.E.D. RECEIVING IT AGAIN, THEN WE
14 WOULD OBVIOUSLY ASK THAT THE COUNTY DO IT, BUT I WOULD RATHER
15 FOR A PROSECUTING -- A LAW ENFORCEMENT AGENCY TO MAINTAIN THE
16 CHAIN OF CUSTODY.

17 MS. KIMBROUGH: WE WOULD AGREE WITH THAT.

18 THE COURT: ALL RIGHT. WHY DON'T Y'ALL, AFTER YOU
19 HAVE HAD A CHANCE TO LOOK INTO THIS, JUST WRITE ME AND
20 DEFENSE COUNSEL A LETTER LETTING ME KNOW THE TIME FRAME IN
21 WHICH YOU EXPECT THIS MIGHT CAN OCCUR?

22 MR. SALTER: ALL RIGHT, SIR. THAT'S FINE. THANK
23 YOU, YOUR HONOR.

24 THE COURT: I MEAN, IT SHOULDN'T TAKE -- IT SHOULD
25 BE -- YOU SHOULD BE ABLE TO GET IT DONE WITHIN A COUPLE OF

1 MONTHS.

2 MR. SALTER: I WOULD CERTAINLY HOPE SO, YOUR HONOR.

3 THE COURT: OKAY.

4 MR. SALTER: I'D LIKE TO GET IT RESOLVED AS QUICKLY
5 AS POSSIBLE.

6 THE COURT: SO PROBABLY -- PROBABLY IT WILL NOT SLOW
7 US DOWN BECAUSE THE TESTING CAN BE DONE WITHIN THE TIME FRAME
8 THAT Y'ALL ANTICIPATE DOING YOUR POST-TRIAL BRIEFS ANYWAY.

9 MR. SALTER: I CERTAINLY HOPE SO, YOUR HONOR. I
10 WOULD THINK SO.

11 THE COURT: OKAY.

12 MR. SALTER: YOUR HONOR, OUR FIRST WITNESS WOULD BE
13 ROBERT DUDEK.

14 ROBERT M. DUDEK, AFTER BEING DULY SWORN,
15 TESTIFIED AS FOLLOWS:

16 THE CLERK: PLEASE HAVE A SEAT. WHEN YOU'RE
17 COMFORTABLY SEATED, STATE YOUR FULL NAME AND SPELL YOUR LAST
18 NAME FOR US, PLEASE.

19 THE WITNESS: ROBERT M. DUDEK, D-U-D-E-K.

20 DIRECT EXAMINATION

21 BY MR. SALTER:

22 Q. MR. DUDEK, WHERE ARE YOU CURRENTLY EMPLOYED?

23 A. THE SOUTH CAROLINA OFFICE OF APPELLATE DEFENSE WHICH
24 IS NOW A DIVISION OF THE COMMISSION ON INDIGENT DEFENSE.

25 Q. NOW, HOW LONG HAVE YOU BEEN THERE?

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1 A. GOING ON 17 YEARS.

2 Q. SEVENTEEN YEARS? WHAT IS YOUR TITLE?

3 A. TITLE PRESENTLY IS ASSISTANT APPELLATE DEFENDER.

4 Q. ALL RIGHT, SIR. FOLLOWING MR. TERRY'S SEPTEMBER
5 1997 TRIAL AND SENTENCE, DID YOU BECOME HIS APPELLATE
6 ATTORNEY?

7 A. YES, I DID.

8 Q. HOW DID THE CASE GET ASSIGNED TO YOU?

9 A. WELL, AT THAT TIME, AND TO A CERTAIN EXTENT STILL AT
10 THIS TIME, JOSEPH SAVITZ, WHO IS NOW OUR CHIEF ATTORNEY, AND
11 I DID THE DEATH PENALTY CASES OR SORT OF -- THIS IS A
12 SEPARATE DIVISION. THAT'S CHANGED OVER TIME, BUT I BELIEVE
13 WHEN GARY'S CASE CAME ALONG THAT WAS THE CASE.

14 Q. ALL RIGHT. AT THE TIME YOU REPRESENTED MR. TERRY,
15 DO YOU HAVE ANY IDEA ROUGHLY HOW MANY APPEALS A YEAR YOU WERE
16 DOING?

17 A. AT THE TIME I REPRESENTED HIM?

18 Q. YES, SIR.

19 A. MR. SALTER, I COULD ONLY GUESS. IT'S BEEN AROUND,
20 YOU KNOW, A HUNDRED OR SO APPEALS A YEAR.

21 Q. ALL RIGHT. HAD YOU PREVIOUSLY HANDLED ANY DEATH
22 PENALTY CASES?

23 A. THIS WAS I GUESS ABOUT 1998?

24 Q. '97. I'M SORRY.

25 A. '97? YES, I HAD.

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1 Q. ALL RIGHT. DO YOU RECALL WHAT THOSE CASES WOULD
2 HAVE BEEN?

3 A. I HAD HANDLED, I GUESS, STATE V. VON DOHLEN, STATE
4 VERSUS LARRY HALL. I BELIEVE ROBERT LEE NANCE WAS BEFORE
5 THAT. I WOULD HAVE -- IF I WAS PREPARED FOR THAT QUESTION, I
6 WOULD HAVE GOT ON WESTLAW AND GONE BACK AND RECREATED THE
7 RECORD, BUT SEVERAL I GUESS WOULD BE THE ANSWER.

8 Q. ALL RIGHT. THANK YOU. COULD YOU TELL THE COURT HOW
9 YOU WOULD GO ABOUT PREPARING FOR AN APPEAL?

10 A. WELL, THE FIRST THING WE DO IS OBVIOUSLY MAKE SURE
11 THAT YOU HAVE ALL OF THE TRANSCRIPTS. SO SEVERAL LETTERS ARE
12 WRITTEN TO THE TRIAL ATTORNEYS VERIFYING THAT HERE'S ALL THE
13 HEARINGS WE HAVE. ARE THERE ANY MORE? THAT TYPE THING. BE
14 SURE YOU HAVE A COMPLETE RECORD. THE NEXT THING IS IN --
15 WELL, IN A DEATH PENALTY CASE AT SOME POINT I ALWAYS GO TO
16 THE COURTHOUSE AND VIEW ALL EXHIBITS, ORDER ALL THE PAPER
17 EXHIBITS, THEN YOU READ THE ENTIRE RECORD. IF I'M BORING YOU
18 WITH ANY OF THIS, CUT ME OFF. BUT I KEEP TWO SETS OF NOTES,
19 ONE THAT'S A RUNNING RECORD OF WHAT'S TRANSPIRING DURING THE
20 TRIAL, AND I KEEP A SEPARATE LEGAL PAD WITH EVERY OBJECTION
21 THAT IS MADE.

22 Q. AND YOU WOULD HAVE DONE THAT IN THIS CASE?

23 A. YES, I WOULD HAVE. NOW, MY PRACTICE HAS BEEN - AND
24 I DON'T KNOW IF I DID IT IN THIS CASE; I PROBABLY DID - IS I
25 TURN OVER MY FILE, INCLUDING THE TRANSCRIPTS, TO THE P.C.R.

1 ATTORNEYS. AGAIN, I CAN'T SAY I DID THAT IN THIS CASE, BUT
2 THAT'S USUALLY WHAT HAPPENS.

3 Q. THE ALLEGATION IN MR. TERRY'S APPLICATION, AT LEAST
4 INSOFAR AS IT PERTAINS TO YOU, ALLEGES THAT YOU WERE
5 INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL JUDGE'S
6 DENIAL OF THE DIRECTED VERDICT MOTION BECAUSE HE ALLEGES THAT
7 THE STATE DID NOT PROVE SUFFICIENT ABSENCE OF CONSENT BY THE
8 VICTIM TO THE -- TO SEX. DO YOU RECALL THE DIRECTED VERDICT
9 MOTION?

10 A. NOT VERY WELL. I DON'T -- I DO NOT FRANKLY REMEMBER
11 GIVING THAT, YOU KNOW, CONSIDERATION AS AN -- AS AN ISSUE TO
12 RAISE.

13 Q. ALL RIGHT. IF I SHOW YOU THE DIRECTED VERDICT
14 MOTION, IT'S ON PAGE 1537, LINES 10 THROUGH 16.

15 A. ALL RIGHT. (THE WITNESS LOOKS AT THE TRANSCRIPT.)
16 OKAY.

17 Q. WOULD YOU CONSIDER THAT DIRECTED VERDICT MOTION
18 SUFFICIENT TO PRESERVE OR CHALLENGE TO THE STATE'S FAILURE TO
19 PROVE, ADEQUATELY PROVE, CONSENT OR LACK OF CONSENT? EXCUSE
20 ME.

21 A. WELL, CORRECT ME IF I'M WRONG BECAUSE THAT'S -- I'VE
22 ONLY READ THE PORTION -- REREAD THE PORTION OF THE RECORD YOU
23 JUST PUT BEFORE ME, BUT AS I UNDERSTAND IT OR MY MEMORY OF
24 THIS CASE IS THAT THERE WERE SEVERAL OTHER CHARGES: I
25 BELIEVE PROBABLY BURGLARY, CRIMINAL SEXUAL CONDUCT, OBVIOUSLY

1 MURDER. WAS THAT JUST A CATCH-ALL DIRECTED VERDICT? IN
2 OTHER WORDS, JUST WE MOVE ON ALL GROUNDS?

3 Q. THAT WAS -- THAT WAS THE DIRECTED VERDICT MOTION
4 THAT WAS MADE. THAT WAS THE ONLY ONE.

5 A. OKAY. WELL, I MEAN, LOOKING AT THAT AGAIN, I DON'T
6 -- FRANKLY, IN MY HUMBLE OPINION, I DON'T THINK AN APPELLATE
7 COURT WOULD THINK THAT WAS A VERY SERIOUS MOTION.

8 Q. ALL RIGHT. BUT WHAT IS YOUR -- WHAT WAS YOUR
9 RECOLLECTION ABOUT THE EVIDENCE CONCERNING LACK OF CONSENT?

10 A. OKAY. MY UNDERSTANDING IN THE -- IN THE GUILT PHASE
11 WAS THAT A -- LOOKING BACK OVER MY BRIEF, THERE WAS A
12 FOOTNOTE THAT GARY'S FINGERPRINT WAS FOUND ON A BOX OUTSIDE
13 THE HOME THAT WAS -- THAT WAS DAMAGED. THERE WAS ALSO, AS I
14 RECALL, DURING THE PENALTY PHASE D.N.A. EVIDENCE LINKING GARY
15 TO THE CRIME. NOW, OF COURSE, IF IT WAS CONSENT, D.N.A. IS
16 MEANINGLESS, BUT, YOU KNOW, THAT'S KIND OF -- THAT'S REALLY I
17 GUESS A JURY ISSUE. SO IF I REMEMBER CORRECTLY, THE
18 PHOTOGRAPH -- I SAY I ARGUED THE PHOTOGRAPH ISSUE, BUT I
19 BELIEVE IF I'M -- CORRECT ME IF I'M WRONG. THAT CAME IN
20 DURING THE PENALTY PHASE.

21 Q. DO YOU RECALL ANYTHING ABOUT THE MANNER IN WHICH THE
22 VICTIM'S BODY WAS FOUND?

23 A. MY RECOLLECTION AGAIN IS THAT I BELIEVE SHE WAS
24 FOUND ON THE FLOOR AND HER -- HER -- HER LEGS WERE APART.

25 Q. ALL RIGHT. ALL RIGHT, SIR. AND DO YOU RECALL

1 ANYTHING ABOUT THE NATURE OF THE INJURIES SHE HAD RECEIVED IN
2 TERMS OF -- WHICH CAUSED HER DEATH?

3 A. MY RECOLLECTION -- AND HERE'S WHERE IT GETS TRICKY
4 BECAUSE GARY'S STATEMENT DIDN'T COME IN ON IT BEING
5 CONSENSUAL IN THE VOLUNTARY MANSLAUGHTER ASPECT OF IT, BUT MY
6 MEMORY OF IT WAS THAT GARY ACKNOWLEDGED IN HIS STATEMENT TO
7 THE POLICE, WHICH THE JURY DIDN'T HEAR, THAT HE WENT INTO A
8 RAGE AND BEAT THE VICTIM, AND I THINK THE EVIDENCE WAS
9 COMMENSURATE WITH -- WITH THAT.

10 Q. THEY WOULD NOT HAVE HEARD THE STATEMENT UNTIL THE
11 PENALTY PHASE; CORRECT?

12 A. I DON'T -- I DON'T RECALL IF THE STATEMENT CAME IN
13 DURING THE PENALTY PHASE. IF IT DID, I TAKE YOUR WORD FOR
14 IT.

15 MR. SALTER: I DON'T THINK I HAVE ANYTHING FURTHER.

16 CROSS-EXAMINATION

17 BY MR. FLOYD:

18 Q. MR. DUDEK, THE MOTION FOR DIRECTED VERDICT WHICH YOU
19 JUST REVIEWED CERTAINLY DIDN'T ALERT YOU TO THE POSSIBILITY
20 THERE WAS A VIABLE ARGUMENT TO BE MADE ON ANY POINT, DID IT?

21 A. WELL, AGAIN, MR. FLOYD, I GUESS THE ONLY WAY I CAN
22 ANSWER THAT -- AGAIN, IN MY HUMBLE OPINION, WHEN THERE'S
23 SEVERAL CHARGES PENDING INVOLVED AND YOU JUST MAKE A CATCH-
24 ALL DIRECTED VERDICT MOTION RATHER THAN HERE'S OUR ARGUMENT
25 ON C.S.C.; HERE'S OUR ARGUMENT ON BURGLARY OR WHATEVER THE

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1 OTHER CHARGES ARE, I FRANKLY -- I JUST DON'T THINK AN
2 APPELLATE COURT IS GOING TO THINK THAT IS A SERIOUS DIRECTED
3 VERDICT MOTION.

4 Q. NOW, YOU DIDN'T MAKE THE ARGUMENT IN THE APPEAL
5 BRIEF, DID YOU? DID YOU MAKE THAT ARGUMENT -- THE ARGUMENT
6 ABOUT THE C.S.C.? WAS THAT -- WAS THAT ARGUED IN THE BRIEF?

7 A. I'M NOT SURE I FOLLOW YOUR QUESTION.

8 Q. IN THE APPEAL WAS THERE ANY ARGUMENT MADE THAT THE
9 COURT SHOULD HAVE GRANTED A DIRECTED VERDICT ON THE CRIMINAL
10 SEXUAL CONDUCT?

11 A. OH, NO. NO, SIR.

12 Q. OKAY. NOW, IF, IN FACT, THAT WAS A VALID ARGUMENT
13 TO BE MADE, WOULD IT HAVE BEEN INEFFECTIVE NOT TO MAKE IT?

14 MR. SALTER: YOUR HONOR, I'M GOING TO OBJECT.

15 HE'S -- HE'S ASKING FOR AN EXPERT CONCLUSION ON THE PART OF
16 THE WITNESS.

17 THE COURT: WELL, IT'S A LEGAL CONCLUSION AND -- BUT
18 I THINK IF THE QUESTION IS FRAMED A LITTLE DIFFERENTLY, YOU
19 CAN ASK IT, BUT I MEAN YOU'RE -- YOU'RE BASICALLY ASKING HIM
20 IF HE THOUGHT THERE HAD BEEN A VALID BASIS FOR MAKING THE
21 DIRECTED VERDICT MOTION, WOULD HE HAVE RAISED THAT ON APPEAL?
22 BUT ASKING HIM THE SPECIFIC QUESTION OF WHETHER IT IS
23 INEFFECTIVE IS OBJECTIONABLE. I SUSTAIN THE OBJECTION.

24 MR. SALTER: THANK YOU, YOUR HONOR.

25

1 BY MR. FLOYD:

2 Q. IF THE DIRECTED VERDICT MOTION HAD ALERTED YOU TO
3 THE POSSIBILITY OF MAKING THE ARGUMENT THAT THE EVIDENCE
4 FAILED TO ESTABLISH CRIMINAL SEXUAL CONDUCT, WOULD YOU HAVE
5 MADE THAT ARGUMENT?

6 A. THIS ISN'T MUCH OF AN ANSWER, BUT IT'S THE ONLY ONE
7 I CAN GIVE, AND THAT FRANKLY DEPENDS. AGAIN, IN FAIRNESS TO
8 EVERYBODY IN MY ANSWER TO MR. SALTER, ALL I CAN SAY IS I DID
9 NOT -- I DO NOT RECALL CONSIDERING MAKING THE ARGUMENT ON
10 CRIMINAL SEXUAL CONDUCT IN THE APPELLATE BRIEF. NOW, WHETHER
11 THAT WAS BECAUSE OF WHAT MR. SALTER JUST PUT BEFORE ME
12 BECAUSE I THOUGHT IT WASN'T A SERIOUS MOTION OR OTHERWISE...
13 BUT AS YOU KNOW, MR. FLOYD, I MEAN, JONES V. BARNES HOLDS
14 THAT, YOU KNOW, AN APPELLATE LAWYER DOES NOT HAVE TO RAISE
15 EVERY ISSUE THAT'S PRESERVED OR JUST -- OR EVEN THAT YOU FIND
16 MERITORIOUS. SO IN ALL HONESTY, IT'S REALLY IMPOSSIBLE FOR
17 ME TO RECREATE THAT IN MY MIND AT THIS POINT.

18 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

19 MR. SALTER: NOTHING FURTHER, AND WE'D ASK THAT HE
20 BE EXCUSED, YOUR HONOR.

21 THE COURT: THANK YOU FOR COMING.

22 THE WITNESS: THANK YOU, JUDGE.

23 MR. SALTER: YOUR HONOR, OUR NEXT WITNESS WILL BE
24 GERALD THOMAS CHASE.

25 THE COURT: I'M GOING TO STEP OUT ONE SECOND WHILE

1 THEY GET HIM. I'LL BE RIGHT BACK.

2 (PAUSE IN PROCEEDINGS.)

3 THE COURT: BE SEATED.

4 MR. SALTER: I ASSUME MR. CHASE WILL BE HERE IN A
5 SECOND.

6 MS. BROWN: THERE HE IS.

7 THE CLERK: THERE HE IS. MR. CHASE?

8 G. THOMAS CHASE, AFTER BEING DULY SWORN,
9 TESTIFIED AS FOLLOWS:

10 THE CLERK: IF YOU WOULD, STATE YOUR FULL NAME WHEN
11 YOU'RE COMFORTABLY SEATED.

12 THE WITNESS: GOOD MORNING, JUDGE.

13 THE COURT: GOOD MORNING.

14 MR. SALTER: YOUR HONOR, BEFORE I DO MY EXAMINATION,
15 MR. CHASE WAS THE OTHER PROSECUTOR WHO -- WHOSE WORK PRODUCT
16 WAS WITHHELD, AND I DIDN'T KNOW IF YOUR HONOR HAD SOME
17 QUESTIONS ABOUT ANY DOCUMENT OR DOCUMENTS PERTAINING --
18 PERTAINING TO HIS WORK PRODUCT PRIVILEGE.

19 THE COURT: YOU GOT WHAT HE...

20 MR. HUBBARD: YES, SIR, YOUR HONOR. YOUR HONOR, YOU
21 HAD ASKED ME TO HOLD ON TO SOME MATERIAL AND HAVE MR. CHASE
22 REVIEW IT. THERE WERE SOME HANDWRITTEN NOTES AND THEN THERE
23 WERE SEVERAL THINGS, ONE OF WHICH YOU THOUGHT MIGHT BE A
24 REPORT, AND I HAD MR. CHASE LOOK AT THAT AND I'VE HAD HIM
25 PREPARE AN AFFIDAVIT, AND I'LL HAND THIS BACK UP TO YOUR

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1 HONOR.

2 THE COURT: OKAY.

3 MR. HUBBARD: AND I'VE GOT A COPY OF IT FOR THE
4 DEFENSE, YOUR HONOR, AN AFFIDAVIT, AND I'LL GET THE OTHER
5 COPY TO MR. SALTER.

6 THE WITNESS: I'LL STATE: FOR THE PURPOSE OF THE
7 RECORD, MY NAME IS GERALD THOMAS CHASE. JUDGE, IF YOU NEED
8 ANY FURTHER EXPLANATION AS IT RELATES TO THAT AFFIDAVIT,
9 PLEASE LET ME KNOW. I'LL BE MORE THAN HAPPY TO DISCUSS IT.

10 THE COURT: ALL RIGHT. OKAY. I DON'T -- I THINK
11 THIS -- I DON'T HAVE ANY -- I DON'T HAVE ANY FOLLOW-UP
12 QUESTIONS. MY RULING IS THE SAME. I'M GOING TO REVIEW
13 THESE -- NOW THAT I HAVE LEARNED ENOUGH ABOUT THIS CASE TO BE
14 ABLE TO INTELLIGENTLY REVIEW THESE INTERVIEW NOTES, I'M GOING
15 TO REVIEW THOSE AS -- AS HE TESTIFIES TO MAKE SURE THAT I
16 AGREE THAT THERE'S NO -- NOTHING IN THERE THAT NEEDED TO BE
17 PRODUCED PURSUANT TO BRADY.

18 MR. HUBBARD: AND, YOUR HONOR, I DO HAVE THE COPIES
19 YOU DIRECTED ME TO MAKE FOR THE DEFENSE, THE FIVE COPIES OF
20 THE -- OR COPIES OF THE NOTES OF MR. HUMPHRIES ON THE JURORS
21 THAT WERE STRUCK AND ALSO COPIES OF THE AFFIDAVITS, AND I
22 COUNT EIGHT AFFIDAVITS. I'M HANDING THOSE TO THE DEFENSE
23 RIGHT NOW. YOUR HONOR, ALSO I'VE GOT IN MY HAND AN ORDER
24 WHICH YOUR HONOR HAD ASKED ME TO HAVE PREPARED, AND I'LL PASS
25 THAT UP, AND IF IT SUITS YOUR HONOR, YOU CAN SIGN THAT.

1 OTHERWISE, I'LL BE HAPPY TO MAKE WHATEVER CHANGES YOUR HONOR
2 THINKS ARE NECESSARY.

3 THE COURT: OKAY. LET ME -- LET ME ASK TWO
4 QUESTIONS, ONE OF MR. SALTER. SO THAT WE CAN DECIDE A LITTLE
5 BIT MORE PRECISELY WHEN WE'RE GOING TO HAVE THIS HEARING IN
6 THE MERCER CASE, HOW MUCH LONGER DO YOU THINK IT WILL BE
7 BEFORE YOU'RE DONE WITH YOUR PRESENTATION OF EVIDENCE?

8 MR. SALTER: HE'S MY NEXT TO LAST WITNESS AND HE
9 SHOULD BE RELATIVELY SHORT. I'M SORRY, NOT THE NEXT TO THE
10 LAST. THERE ARE TWO MORE WITNESSES AFTER THIS. THE NEXT
11 WITNESS AFTER MR. CHASE WILL ALSO BE SHORT, VERY SHORT.

12 THE COURT: OKAY. SO IT SOUNDS LIKE WE'LL BE DONE
13 WITH YOUR EVIDENCE BY NOON?

14 MR. SALTER: I'M HOPING BY NOON AND NO LATER THAN
15 12:30, YOUR HONOR.

16 THE COURT: ALL RIGHT. WELL, AIM TO COME BACK
17 AROUND NOON.

18 MR. HUBBARD: YES, SIR.

19 THE COURT: BUT NOW THE SECOND QUESTION IS -- I
20 NEGLECTED TO COVER THIS ONE AFFIDAVIT THAT YOU GAVE ME WITH
21 ATTACHED MATERIALS, THE AFFIDAVIT FROM JACK HENSEL.

22 MR. HUBBARD: YES, SIR, YOUR HONOR.

23 THE COURT: WHO IS THAT?

24 MR. HUBBARD: HE USED TO BE AN INVESTIGATOR IN OUR
25 OFFICE FOR MANY, MANY YEARS AND WAS AN INVESTIGATOR AT THE

1 TIME THIS CASE WAS TRIED. HE ALSO SERVED IN OTHER ROLES IN
2 OUR OFFICE, BUT BASICALLY THAT WAS HIS TITLE IN OUR OFFICE
3 AND HE ALSO DREW UP DOCUMENTS. HE DID DIAGRAMS AND BOARDS
4 FOR SORT OF THE COURTROOM USE AND TRIALS. HE SERVED IN A
5 NUMBER OF FUNCTIONS FOR OUR OFFICE, AND HE IS---

6 THE COURT: ALL RIGHT.

7 MR. HUBBARD: ---AVAILABLE, YOUR HONOR. HIS WIFE
8 STILL WORKS IN OUR OFFICE.

9 THE COURT: SO AS FAR AS THESE DOCUMENTS THAT ARE
10 ATTACHED TO HIS AFFIDAVIT, WHAT'S THE EVIDENCE THAT -- THAT
11 SOME LAWYER DIRECTED MR. HENSEL TO PREPARE THESE DOCUMENTS?

12 MR. HUBBARD: I WAS THINKING IN MR. HUMPHRIES'
13 SECOND AFFIDAVIT THAT HE ADDRESSED THAT, YOUR HONOR. HE MAY
14 HAVE LEFT THAT OUT.

15 THE COURT: I'M NOT -- I WOULD HAVE TO -- YOU MAY BE
16 RIGHT.

17 MR. HUBBARD: YOUR HONOR, I COULD -- I DON'T KNOW
18 THAT... MY COPY IS THERE.

19 THE COURT: I'M NOT SURE I SAW MR. HUMPHRIES' SECOND
20 AFFIDAVIT.

21 MR. HUBBARD: I MAY NOT HAVE GIVEN YOU ONE, YOUR
22 HONOR. IF I CAN BORROW THEM FROM THE DEFENSE, I'LL MAKE SOME
23 MORE COPIES---

24 MS. KIMBROUGH: OH, SURE.

25 MR. HUBBARD: ---AND...

1 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN
2 MR. HUBBARD AND MR. SALTER.)

3 MR. HUBBARD: YOUR HONOR, I'LL GO AHEAD AND MAKE
4 COPIES.

5 THE COURT: ALL RIGHT. BEFORE YOU LEAVE---

6 MR. HUBBARD: YES, SIR.

7 THE COURT: ---I'M GOING TO GO AHEAD AND GIVE BACK
8 TO YOU THE THREE DOCUMENTS THAT ARE REFERENCED IN MR. CHASE'S
9 AFFIDAVIT OF -- OF TODAY THAT ARE THE DETOX SUMMARY, THE
10 DEFENDANT'S STATEMENTS, AND THE CHARTER RIVERS MEDICAL
11 TREATMENT.

12 MR. HUBBARD: YES, SIR.

13 THE COURT: AND YOU PRESERVE THEM AS WE DISCUSSED
14 AND AS I SUPPOSE IS ALSO DISCUSSED IN THIS ORDER.

15 MR. HUBBARD: YES, SIR.

16 THE COURT: AND I'LL GIVE YOU THESE -- IF MY RULING
17 CHANGES -- IF MY RULING DOESN'T CHANGE, I'LL GIVE YOU THESE
18 OTHER TWO DOCUMENTS BACK SHORTLY.

19 MR. HUBBARD: YES, SIR, YOUR HONOR. OKAY.

20 THE COURT: NOW, DID YOU HAVE A CHANCE TO LOOK AT
21 THAT AFFIDAVIT?

22 MS. KIMBROUGH: WE GAVE IT BACK.

23 THE COURT: OKAY.

24 MR. HUBBARD: YES, SIR, YOUR HONOR. I'M -- THE ONE
25 MR. CHASE JUST PREPARED, YOUR HONOR?

1 **THE COURT:** NO, THE SECOND FRAN HUMPHRIES'
2 AFFIDAVIT.

3 **MR. HUBBARD:** HE DID NOT INCLUDE THE NAME OF JACK
4 HENSEL, YOUR HONOR, IN THIS SECOND AFFIDAVIT, BUT I KNOW MR.
5 CHASE COULD ALSO REVIEW---

6 **THE COURT:** DO YOU KNOW ANYTHING ABOUT THIS?

7 **THE WITNESS:** YES, SIR.

8 **THE COURT:** TELL US. YOU'VE BEEN SWORN ALREADY?

9 **THE WITNESS:** YES, SIR.

10 **THE CLERK:** YES, SIR.

11 **THE COURT:** OKAY. TELL US ABOUT MR. HENSEL'S WORK
12 IN REGARD TO THOSE DOCUMENTS AND WHY IT WAS DONE.

13 **THE WITNESS:** YES, SIR.

14 **THE COURT:** AND WHAT SUBSTANTIATES THE CLAIM OF WORK
15 PRODUCT.

16 **THE WITNESS:** YOUR HONOR, THIS -- THESE DOCUMENTS
17 THAT -- MR. HENSEL WAS AN INVESTIGATOR WITH THE OFFICE AT THE
18 TIME. HE WOULD BE INTIMATELY INVOLVED WITH THE PREPARATION
19 OF POTENTIAL EXHIBITS IN THE PROSECUTION CASE. THERE WAS
20 A -- A TIME WHEN MR. HENSEL WAS THE ONLY PERSON IN THE
21 OFFICE. HE DID IT BY HAND DRAWING A LOT OF TIMES OUR
22 EXHIBITS. THERE WAS A TIME WHEN HE ALSO GOT A COMPUTER
23 PROGRAM THAT WE WERE TRYING TO ANALYZE WHETHER OR NOT
24 THOSE -- THAT COMPUTER PROGRAM COULD PREPARE AN EXHIBIT THAT
25 WE WOULD BE ABLE TO PRESENT IN THE CASE. SO MR. HENSEL IS

1 THE ONLY PERSON WHO HAD, TO BE HONEST WITH YOU, ANY KNOWLEDGE
2 OF THIS PARTICULAR PROGRAM, AND HE WAS DIRECTED TO TRY TO
3 CREATE DOCUMENTS THAT WE WOULD TRY TO USE -- WE WOULD ANALYZE
4 TO SEE WHETHER OR NOT WE COULD USE THEM AS EXHIBITS IN THE
5 TRIAL.

6 THE DOCUMENTS THAT YOU'RE SEEING HERE ARE
7 ESSENTIALLY THE DRAFTS OF WHAT HE COULD GET FROM THE COMPUTER
8 PROGRAM WHICH WE WOULD THEN LOOK AT -- WHICH WE DID LOOK AT,
9 AND WE WOULD HAVE MADE A DETERMINATION ABOUT WHETHER WE COULD
10 TAKE IT TO THE NEXT STEP AND ACTUALLY USE THEM AT TRIAL.

11 THE COURT: ALL RIGHT. DO Y'ALL -- DO YOU HAVE ANY
12 QUESTIONS YOU WANT TO ASK HIM?

13 MR. FLOYD: ON THAT POINT, NO.

14 THE COURT: OKAY. ALL RIGHT. THEN HAND ME THAT
15 BACK AND I'M GOING TO -- I'M GOING TO -- MY RULING AS TO THE
16 DOCUMENTS ATTACHED TO THE AFFIDAVIT OF JACK HENSEL IS THAT IT
17 IS -- THAT IT IS COVERED BY THE WORK PRODUCT DOCTRINE AND
18 THAT THE DOCUMENTS NEED NOT BE PRODUCED. I'M GOING TO RETURN
19 THEM TO YOU. THANK YOU. ALL RIGHT. MR. SALTER?

20 MR. SALTER: THANK YOU, YOUR HONOR.

21 DIRECT EXAMINATION

22 BY MR. SALTER:

23 Q. MR. CHASE, WHERE AND HOW ARE YOU CURRENTLY EMPLOYED?

24 A. I AM A PARTNER WITH THE LAW FIRM OF MCANGUS,
25 GOUDELOCK, AND COURIE. I'M AN ATTORNEY WITH THAT LAW FIRM.

1 Q. ALL RIGHT. HOW LONG HAVE YOU BEEN THERE?

2 A. APPROXIMATELY SEVEN YEARS.

3 Q. ALL RIGHT. AT SOME POINT IN YOUR PAST DID YOU WORK
4 FOR THE ELEVENTH CIRCUIT SOLICITOR'S OFFICE?

5 A. I DID.

6 Q. AND WHAT WERE YOUR DUTIES IN THE SOLICITOR'S OFFICE?

7 A. I BEGAN IN APPROXIMATELY 1995 AS AN ASSISTANT
8 SOLICITOR, AND WHEN I LEFT IN I BELIEVE 1999 I WAS A DEPUTY
9 SOLICITOR. DURING THAT TIME I WORKED IN VARIOUS STAGES OR
10 POSITIONS RELATED TO THE PROSECUTION OF CRIMES IN THE -- OR
11 CHARGES IN THE ELEVENTH JUDICIAL CIRCUIT.

12 Q. DID THAT INCLUDE WORK ON DEATH PENALTY CASES?

13 A. A NUMBER OF DEATH PENALTY CASES, MORE THAN TEN.

14 Q. MORE THAN TEN? OKAY, SIR. AS PART OF YOUR DUTIES
15 WERE YOU -- WERE YOU INVOLVED IN THE PROSECUTION OF MR.
16 TERRY?

17 A. YES, I WAS. I WAS ONE OF THE TWO PROSECUTORS.
18 THERE WERE THREE PROSECUTORS THAT WERE IDENTIFIED AS
19 PARTICIPATING IN THE CASE. ULTIMATELY THE CASE WAS TRIED BY
20 FRAN HUMPHRIES AND MYSELF.

21 Q. ALL RIGHT, SIR. AND DID YOU -- DO YOU RECALL
22 WHETHER OR NOT YOU HAPPENED TO PARTICIPATE IN VOIR DIRE?

23 A. I DID. I PARTICIPATED IN THE VOIR DIRE OF THE
24 POTENTIAL JURY PANEL.

25 Q. HOW ABOUT JURY SELECTION?

1 A. I PARTICIPATED IN THE JURY SELECTION ALSO.

2 Q. ONE OF THE ISSUES RAISED CONCERNS THE FAILURE OF
3 TRIAL COUNSEL TO MAKE A BATSON MOTION REGARDING THE STATE'S
4 USE OF ITS PEREMPTORY CHALLENGES. I'D LIKE TO ASK YOU A FEW
5 QUESTIONS ABOUT THE STATE'S USE OF THE PEREMPTORY CHALLENGES.
6 NOW, HAVE YOU HAD AN OPPORTUNITY TO GO BACK AND REVIEW ANY
7 NOTES YOU MAY HAVE CONCERNING THE VARIOUS JURORS THAT WERE
8 STRUCK?

9 A. YES.

10 Q. ALL RIGHT, SIR. DO YOU RECALL WHETHER OR NOT THE
11 PROSECUTION HAD ANY REASON FOR STRIKING BLACK JURORS AS A
12 CLASS OR WOMEN AS A CLASS?

13 A. NO. THERE WAS -- THERE WAS NO SUCH AGENDA.

14 Q. ALL RIGHT. COULD YOU EXPLAIN WHY YOU STRUCK SOME OF
15 THE VARIOUS WITNESSES -- I MEAN JURORS? EXCUSE ME. FIRST
16 WITH RESPECT TO GLENDA CLIFTON, JUROR NUMBER 35?

17 A. YES. I RECEIVED THE JURY STRIKE LIST WHICH I
18 REVIEWED. WE STRUCK A TOTAL OF FIVE WHICH WOULD HAVE BEEN
19 THE TOTAL AMOUNT OF JURORS THAT WE WOULD HAVE BEEN ALLOWED TO
20 STRIKE IN THE TRIAL FROM A PROSECUTION STANDPOINT. MS. --
21 PER THE DOCUMENTS, GLENDA CLIFTON WAS THE FIRST PERSON THAT
22 WAS STRUCK FROM THE POTENTIAL PANEL. MS. CLIFTON WAS STRUCK
23 FOR SEVERAL REASONS, PER MY RECOLLECTION HAVING BEEN
24 REFRESHED BY THESE DOCUMENTS.

25 ONE, THERE WAS A QUESTION ABOUT WHETHER OR NOT HER

1 SON WAS INVOLVED IN PRETRIAL INTERVENTION IN THE JUDICIAL
2 CIRCUIT. OBVIOUSLY THAT RAISED A CONCERN ABOUT WHETHER THERE
3 WOULD BE ANY SORT OF ANIMOSITY TOWARDS THE PROSECUTION UNDER
4 THOSE CIRCUMSTANCES. THE SECOND THING IS, AS RELATED TO HER
5 TESTIMONY DURING THE COURSE OF THE VOIR DIRE, SHE HESITATED
6 EARLY ON IN THE QUESTIONING. A LOT OF QUESTIONS OR RESPONSES
7 THAT ARE -- OR AT LEAST ONE RESPONSE WHERE SHE GAVE THE, "I
8 THINK I COULD," AND THAT IS CERTAINLY HESITATION WHICH WOULD
9 GIVE US PAUSE TO SEAT SUCH A JUROR.

10 Q. ALL RIGHT, SIR. TURNING NOW TO JUROR NUMBER 170,
11 KAREN MOORE, WOULD YOU EXPLAIN THE STATE'S STRIKE OF JUROR
12 MOORE?

13 A. AGAIN, AFTER REVIEW OF THE -- OF THE NOTES, WE HAD
14 CONCERNS ABOUT WHERE SHE WORKED, THAT SHE WORKED IN A CARDIAC
15 WARD, SO SHE WAS THE TYPE OF PERSON WHO IS CARING FOR PEOPLE,
16 WHO IS ESSENTIALLY IN THAT SITUATION PREVENTING PEOPLE FROM
17 DYING, TO BE HONEST WITH YOU. SHE IS -- ON A DAILY BASIS
18 THAT'S A BIG CONCERN OF HERS. SO SHE WAS -- DEFINITELY WE
19 FELT LIKE SHE MIGHT BE SOMEONE JUST BECAUSE OF HER PROFESSION
20 WHO WOULD BE PRONE TO HAVING A VERY DIFFICULT TIME
21 ESSENTIALLY SIGNING THE SENTENCE OF DEATH IN A TRIAL. AND
22 ALSO THAT RAISED -- THERE WAS SOME CONCERNS ABOUT WHETHER SHE
23 WOULD HAVE ISSUES RELATED TO MENTAL HEALTH, MENTAL HEALTH -
24 NOT HER PERSONALLY - BUT MENTAL HEALTH OF THE DEFENDANT AND
25 WHETHER OR NOT SHE COULD ASSIGN -- OR SIGN A DEATH SENTENCE

1 UNDER CIRCUMSTANCES WHERE THERE WOULD HAVE BEEN A -- SOME
2 SORT OF A MITIGATING CIRCUMSTANCE INVOLVING MENTAL HEALTH
3 ISSUES.

4 Q. AND DOES THAT DOVETAIL BACK INTO HER EMPLOYMENT?

5 A. YES.

6 Q. OKAY. IS THERE ANYTHING ELSE THAT YOU RECALL WITH
7 RESPECT TO THAT JUROR?

8 A. ALSO IN THE NOTES THAT WE WOULD HAVE DISCUSSED IS
9 THAT WE DEFINITELY HAD THE FEELING THAT SHE WAS NOT
10 DISCLOSING EVERYTHING DURING THE COURSE OF HER EXAMINATION.
11 WE FELT LIKE SHE WAS HOLDING BACK AND NOT GIVING UP MUCH
12 INFORMATION, ESSENTIALLY HOLDING HER CARDS CLOSE TO HER VEST.
13 THAT CERTAINLY RAISES CONCERNS ABOUT A POTENTIAL JUROR, AND
14 WHEN YOU -- WHEN THAT RAISES THAT BIG QUESTION MARK WHEN YOU
15 FEEL LIKE YOU'RE NOT GETTING ALL THE INFORMATION FROM THEM,
16 YOU DON'T WANT THAT TYPE OF JUROR SITTING ON THERE. SO WE
17 MADE THAT DECISION NOT TO -- TO OBVIOUSLY STRIKE HER FROM THE
18 PANEL.

19 Q. ALL RIGHT, SIR. MOVING ON TO JUROR NUMBER 137,
20 CHERYL KIRKPATRICK, DO YOU HAVE ANY RECOLLECTION OF THE
21 REASON SHE WAS STRUCK?

22 A. YES. AS IT RELATES TO MS. KIRKPATRICK, AGAIN WE HAD
23 THE DRAMATIC -- WHAT I WOULD CALL DRAMATIC FROM THE
24 STANDPOINT OF REVIEWING OR QUESTIONING THE JUROR ABOUT THE,
25 "I BELIEVE," AS OPPOSED TO, "I COULD." SHE -- THAT'S

1 HESITATION ON THE PART OF THE JUROR. SHE CERTAINLY GAVE THE
2 IMPRESSION THAT, "I BELIEVE SO," IS VERY DIFFERENT THAN
3 SAYING, "YES, I COULD UNDER THE APPROPRIATE CIRCUMSTANCES."
4 AND IT CAME BACK SHE SAID, I THINK SO. I'M NOT SURE AS IT
5 RELATES TO A DEATH SENTENCE OR IMPOSING THE DEATH PENALTY,"
6 AND UNDER THOSE CIRCUMSTANCES WHEN A PERSON SAYS -- AS SOON
7 AS THAT PERSON SAYS, "I'M NOT SURE," THAT GAVE US HUGE CAUSE
8 OR HUGE PAUSE AND REASON TO STRIKE THAT PARTICULAR JUROR FROM
9 THE PANEL.

10 Q. OKAY. IS THERE ANY OTHER REASON THAT YOU RECALL
11 WITH RESPECT TO THAT JUROR?

12 A. WELL, ACTUALLY, YES, BECAUSE THE BIG QUESTION THAT
13 RELATED TO HER -- ANOTHER BIG QUESTION WAS SHE -- SHE'D
14 CATEGORIZED IT INTO TWO SEPARATE THINGS, INTO TWO SEPARATE
15 IDEAS. ONE WAS ALMOST ON PAPER AND THE OTHER WAS EMOTIONAL,
16 AND SHE SAID, "ON PAPER IF YOU TELL ME -- IF YOU QUESTION ME
17 OR IF THE JUDGE WAS QUESTIONING ME," SHE SAID, "YES, I COULD
18 IMPOSE THE DEATH PENALTY." IN OTHER WORDS, UNDER CERTAIN
19 CIRCUMSTANCES IF YOU FOUND THIS, YOU COULD IMPOSE THE DEATH
20 SENTENCE, AND SHE SAID, "YES."

21 BUT THEN SHE PUT IT INTO A DIFFERENT CATEGORY. SHE
22 SAID, "EMOTIONALLY I DON'T KNOW." WELL, YOU CAN'T -- AS A
23 JUROR YOU CAN'T SEPARATE THE TWO. SO AS SOON AS A JUROR
24 SAYS, "I'M SEPARATING THEM. YES, I CAN, IN THEORY;
25 EMOTIONALLY I DON'T KNOW THAT I COULD," OBVIOUSLY THAT WAS

1 NOT THE TYPE OF JUROR THAT WE WOULD WANT SITTING ON THIS
2 PANEL.

3 Q. ALL RIGHT. THE SAME QUESTION WITH RESPECT TO SANDRA
4 KISER WHO WAS JUROR NUMBER 139.

5 A. YES. AFTER REVIEWING THE RECORDS, MS. KISER HAD
6 PENDING CHARGES IN OUR CIRCUIT, IN FACT, WITH OUR OFFICE.
7 AND SO WE CHOSE TO NOT SEAT HER BECAUSE OF THE POTENTIAL
8 ANIMOSITY THAT SHE WOULD HAVE TOWARD THE PROSECUTION,
9 CERTAINLY CONCERNS ABOUT A HIDDEN AGENDA AND WHEN THAT COULD
10 COME INTO PLAY AT ANY TIME DURING THE COURSE OF THE TRIAL.
11 WE WOULD NOT WANT TO TAKE THE RISK OF SEATING THAT TYPE OF A
12 JUROR.

13 Q. DO YOU RECALL THE NATURE OF THE CHARGES THAT WERE
14 PENDING AGAINST HER?

15 A. I BELIEVE IT RELATED TO -- I BELIEVE IT RELATED TO
16 CRUELTY TO ANIMALS.

17 Q. ALL RIGHT, SIR.

18 A. BUT I -- I CAN'T SAY WITH ABSOLUTE CERTAINTY.

19 Q. ALL RIGHT, SIR.

20 A. IN FACT, BECAUSE IN THE RECORDS WE ACTUALLY -- IT
21 WAS ACTUALLY WITH -- PENDING WITH ONE OF OUR SOLICITORS AT
22 THE TIME.

23 Q. ALL RIGHT, SIR. BUT IT WASN'T YOUR CASE.

24 A. IT WAS NOT MY CASE, NO. NO, SIR, IT WAS NOT.

25 Q. BUT YOU KNEW ABOUT IT.

1 A. YES, SIR.

2 Q. COULD YOU EXPLAIN YOUR REASON FOR STRIKING CASSANDRA
3 LEAPHART, JUROR NUMBER 141?

4 A. YES. MS. LEAPHART, SHE -- THE TWO CONCERNS THAT
5 WERE IMMEDIATELY RAISED AS RELATED TO MS. LEAPHART WAS --
6 WERE, ONE, THAT SHE HAD TO BE BROUGHT IN TO PARTICIPATE IN
7 THE PANEL. SHE WAS LATE, SO WE ALREADY HAVE A QUESTION ABOUT
8 NOT ONLY HER RESPECT FOR THE CIRCUMSTANCES BUT HER
9 UNDERSTANDING OF THE GRAVITY OF THE CIRCUMSTANCES, AND WE
10 DIDN'T FEEL LIKE THAT'S THE TYPE OF JUROR THAT WE'RE GOING TO
11 WANT SEATED.

12 ADDITIONALLY, SHE IMMEDIATELY GOT CONFUSED DURING
13 THE JUDGE'S QUESTIONING. NOW, THE JUDGE, I WILL SAY,
14 PROBABLY GAVE THE MOST CLEAR RECITATION OF ANYBODY AS FAR AS
15 QUESTIONING OF ANY OF THE ATTORNEYS. THE ATTORNEYS WERE
16 TRYING -- WE KIND OF HAD OUR OWN ISSUES THAT WE WERE TRYING
17 TO PRESENT, BUT JUDGE CLARY WAS BEING VERY CLEAR. AND RIGHT
18 OFF THE BAT SHE WAS CONFUSED AND SAYING SOMETHING THAT WOULD
19 HAVE HAD HER STRUCK BY THE COURT, AND SHE HAD -- HE ALMOST
20 HAD TO REHABILITATE HER AND EXPLAIN THE SITUATION AND GET HER
21 TO COME BACK AROUND TO MAKE SURE THAT SHE UNDERSTOOD IT. SO
22 WHEN WE'VE GOT A PERSON WHO IS LATE FOR THE PANEL AND THEN
23 DOESN'T EVEN UNDERSTAND THE JUDGE'S INSTRUCTIONS AND THAT'S
24 THE PERSON THAT THE JUROR IS GOING TO HAVE TO TAKE THE LAW
25 FROM TO APPLY IN THIS CASE, WE CHOSE NOT TO SEAT THAT

1 PARTICULAR JUROR.

2 Q. ALL RIGHT. I BELIEVE THERE WAS ALSO ONE ALTERNATE
3 STRUCK, A PAT BRENTLEY, NUMBER 20?

4 A. I DID NOT REVIEW THE RECORDS RELATED TO THAT
5 PARTICULAR JUROR. IF YOU HAVE THOSE, I CERTAINLY CAN LOOK AT
6 THOSE.

7 Q. I'M SORRY. I DON'T HAVE THEM BECAUSE THEY WERE NOT
8 DISCUSSED, BUT THAT'S FINE. I'LL MOVE ON.

9 A. I DON'T THINK WE USED AN ALTERNATE DURING THE --
10 DURING THE COURSE OF THE TRIAL THOUGH.

11 Q. I'M GOING TO TURN TO THE TRIAL ITSELF. DO YOU
12 RECALL WHETHER OR NOT THERE WAS A JACKSON V. DENNO HEARING?

13 A. YES, THERE WAS A JACKSON VERSUS DENNO HEARING.

14 Q. AND WHEN WAS THAT HELD?

15 A. IT WAS PRETRIAL.

16 Q. WHY WAS IT HELD PRETRIAL?

17 A. THE -- WE NEEDED A DETERMINATION BY THE COURT AS TO
18 WHETHER OR NOT A STATEMENT THAT HAD BEEN PROVIDED BY MR. GARY
19 TERRY WAS ADMISSIBLE DURING ANY PHASE OF THE TRIAL.
20 THEREFORE, WE PRESENTED THAT TO THE -- ISSUE TO THE COURT,
21 AND A DETERMINATION WAS MADE THAT THE STATEMENT WOULD BE
22 ADMISSIBLE.

23 Q. ALL RIGHT. THE STATEMENT YOU'RE MAKING REFERENCE
24 TO, WOULD THAT BE THE MARCH 24, 1995, STATEMENT THAT WAS
25 LATER INTRODUCED IN THE PENALTY PHASE OF THE TRIAL?

1 A. THAT'S CORRECT.

2 Q. ALL RIGHT, SIR. DO YOU RECALL MR. STONE'S OPENING
3 STATEMENT IN THE GUILT PHASE OF THE TRIAL?

4 A. I DO.

5 Q. WAS THERE ANYTHING ABOUT HIS STATEMENT -- HIS
6 OPENING STATEMENT THAT SURPRISED YOU?

7 A. IT SURPRISED -- WELL, I WOULDN'T SAY -- I GUESS IT
8 SURPRISED ME. I CERTAINLY DIDN'T KNOW WHAT MR. STONE WAS
9 GOING TO SAY, SO FROM THE STANDPOINT I DIDN'T KNOW WHAT HE
10 WAS GOING TO SAY, BUT DURING THE COURSE OF HIS OPENING
11 STATEMENT HE MADE REFERENCE TO A STATEMENT THAT HAD BEEN
12 PROVIDED BY MR. TERRY, THE ONE THAT WAS ULTIMATELY INTRODUCED
13 IN THE PENALTY PHASE.

14 Q. ALL RIGHT, SIR. NOW, DO YOU RECALL WHETHER OR NOT
15 THE STATE HAD HAD ANY -- YOU AND MR. HUMPHRIES AND ANY OTHER
16 MEMBER OF THE PROSECUTION TEAM MAY HAVE HAD DISCUSSIONS ABOUT
17 THE INTRODUCTION OF THAT STATEMENT AND WHEN Y'ALL PLANNED TO
18 INTRODUCE IT, IF AT ALL?

19 A. THERE'S NO QUESTION ABOUT THAT MR. HUMPHRIES AND I
20 DISCUSSED PRIOR TO TRIAL THAT WE WOULD NOT INTRODUCE THE
21 STATEMENT DURING THE COURSE OF THE GUILT PHASE UNLESS
22 CERTAIN -- UNLESS, FOR EXAMPLE, HE -- MR. TERRY TOOK THE
23 STAND AND WE MAY NEED TO USE IT AT THAT POINT. I ASSUME YOU
24 WANT TO KNOW WHY WE MADE THAT DECISION?

25 Q. YES, SIR. THAT WAS GOING TO BE MY NEXT QUESTION.

1 A. FROM A STRATEGIC STANDPOINT, WE DID NOT NEED THE
2 STATEMENT TO HAVE MR. TERRY AT THE SCENE. ESSENTIALLY MR.
3 TERRY'S STATEMENT WAS EXCULPATORY TO A LARGE DEGREE AND, YES,
4 IT MAY HAVE PUT HIM THERE AT SOMETIME ON THE EVENT DATE OR
5 WHATEVER, BUT WE HAD OTHER EVIDENCE, VERY SOLID SCIENTIFIC
6 EVIDENCE, THAT HE WAS THERE. SO OUR STRATEGY PRIOR TO TRIAL
7 WAS: IF HE WANTS TO PROVIDE AN EXCULPATORY STATEMENT, HE
8 WILL HAVE TO TAKE THE STAND. AND SO WE FELT THAT IF WE PUT
9 THE STATEMENT IN, WE WOULD ESSENTIALLY BE ALLOWING -- WE
10 WOULD BE PUTTING IN SELF-SERVING HEARSAY THAT COULD BENEFIT
11 HIM POTENTIALLY IN THE CASE AND, THEREFORE, WE SAID WE'RE NOT
12 GOING TO PUT THE STATEMENT IN. WE'RE GOING TO RELY ON OUR
13 SCIENTIFIC OR OTHER EVIDENCE THAT HE WAS THERE ON THE
14 INCIDENT DATE, AND IF WE WANT TO INTRODUCE IT, WE'LL DO IT AT
15 THE TIME THAT HE TAKES THE STAND AND WE CAN CROSS-EXAMINE
16 HIM. WE ALSO DECIDED IF THAT DID NOT TAKE PLACE, IF HE DID
17 NOT TAKE THE STAND AND WE GOT TO THE SENTENCING PHASE, WE
18 WOULD THEN USE THE STATEMENT AT THAT TIME TO SHOW HOW MR.
19 TERRY WAS PORTRAYING THIS TO BE USED AS POTENTIALLY EVIDENCE
20 TOWARDS AGGRAVATION.

21 Q. ALL RIGHT, SIR. NOW, HOW WOULD IT BE POTENTIAL
22 EVIDENCE IN AGGRAVATION?

23 A. BECAUSE IT WAS -- IT WOULD SHOW THAT MR. TERRY WAS
24 ESSENTIALLY DENYING THE ACT THAT HAD BEEN PROVEN BEYOND A
25 REASONABLE DOUBT THAT HE HAD DONE.

1 Q. ALL RIGHT, SIR.

2 A. AND OBVIOUSLY A VERY EGREGIOUS CRIME.

3 Q. ALL RIGHT, SIR. WHAT PART, IF ANY, DID MR. STONE'S
4 OPENING COMMENTS PLAY INTO THE STATE'S DECISION AS TO WHETHER
5 OR NOT TO INTRODUCE THE---

6 A. I'M SORRY. IT PLAYED NO ROLE IN OUR DECISION.

7 Q. ALL RIGHT, SIR. DO YOU RECALL AT ANY TIME PRIOR OR
8 EVEN DURING THE TRIAL WHETHER OR NOT ANYONE EVER CAME TO YOU
9 WITH A PHOTOGRAPH OF MR. TERRY IN THE VICTIM'S HOME?

10 A. I HAVE NO RECOLLECTION OF THAT.

11 MR. SALTER: ALL RIGHT, SIR. NOTHING FURTHER.

12 CROSS-EXAMINATION

13 BY MR. FLOYD:

14 Q. ON THE SAME LINE, DID Y'ALL EVER PROVIDE TO THE
15 DEFENSE ANY PHOTOGRAPH OF MR. TERRY BEING IN THE JACKSON
16 HOME?

17 A. IF THERE WAS ONE, I'M SURE WE WOULD HAVE PROVIDED
18 IT, BUT I DON'T HAVE A RECOLLECTION OF THE PHOTOGRAPH SO I
19 GUESS I CAN'T ANSWER YOUR QUESTION.

20 Q. OKAY. I UNDERSTAND. NOW, THERE WAS NO NEED FOR THE
21 STATE TO GO THROUGH A JACKSON/DENNO HEARING BEFORE THE GUILT
22 PHASE IF THEY DIDN'T INTEND TO USE THE STATEMENT, WAS THERE?

23 A. THERE WAS A NEED FOR THE -- FOR THAT TO HAVE GONE
24 THROUGH. WE NEEDED TO KNOW WHETHER OR NOT IT WAS ADMISSIBLE
25 BEFORE WE COULD MAKE A DETERMINATION OF WHETHER WE COULD --

1 WHETHER WE WERE GOING TO USE IT OR NOT IN THE GUILT PHASE.

2 Q. OKAY.

3 A. IF IT WASN'T ADMISSIBLE, IT WAS A NON ISSUE, BUT WE
4 CERTAINLY NEEDED TO KNOW THAT BEFOREHAND.

5 Q. OKAY. SO YOU WERE CONSIDERING THAT YOU MAY USE IT
6 IN THE GUILT PHASE.

7 A. WE WERE -- YES, WE WERE ALWAYS CONSIDERING IT. I
8 MEAN, IT'S AN -- IT'S AN EVOLVING STRATEGY.

9 Q. OKAY.

10 A. BUT WE DID MAKE A DETERMINATION PRIOR TO TRIAL THAT
11 WE WERE NOT GOING TO USE IT.

12 Q. OF COURSE, YOU DIDN'T NEED IT AFTER THE OPENING
13 STATEMENT, DID YOU?

14 A. ACTUALLY WE DIDN'T NEED IT BECAUSE OF THE EVIDENCE
15 IN THE CASE. I DON'T THINK THE OPENING STATEMENT PLAYED ANY
16 ROLE. THERE WAS NO QUESTION FROM THE EVIDENCE THAT WAS
17 PRESENTED THAT MR. TERRY WAS THERE.

18 Q. I UNDERSTAND. WELL, DID THE STATE HAVE ANY CONCERN
19 WHATEVER THAT THE STATEMENT MIGHT BE TRUE?

20 A. DID WE HAVE ANY CONCERN THAT THE STATEMENT MIGHT BE
21 TRUE?

22 Q. UH-HUH.

23 A. WELL, YOU ALWAYS INVESTIGATE WHETHER OR NOT A
24 STATEMENT IS TRUE. SO IF OUR INVESTIGATING THE STATEMENT
25 WOULD BE TERMED AS CONCERN PER YOUR QUESTION, I WOULD SAY

1 YES, BUT BASED ON THE EVIDENCE I WOULD SAY THAT -- AND THE
2 FINDING OF THE JURY, WE DIDN'T THINK IT WAS CREDIBLE AT ALL.
3 WE FELT -- WE FELT -- IN FACT, WE FELT THAT IT WAS SELF-
4 SERVING HEARSAY, AN ATTEMPT BY MR. TERRY TO ESSENTIALLY SPIN
5 A STORY ABOUT TRYING TO EXCULPATE HIMSELF.

6 Q. WELL, IF THE STATE'S CASE WAS SO STRONG, WHY DID YOU
7 EVEN -- WHY DID IT MATTER TO YOU WHETHER OR NOT THE JURY
8 HEARD THE STATEMENT IN THE GUILT PHASE?

9 A. I DON'T UNDERSTAND THE QUESTION.

10 Q. IF YOU FELT THE STATE'S CASE WAS SO STRONG THAT
11 NOBODY WOULD BELIEVE THAT STATEMENT, WHY DID YOU WITHHOLD IT
12 FROM THE JURY IN THE GUILT PHASE?

13 A. THE REASON THAT WE WITHHELD IT -- I'M NOT SURE -- I
14 DON'T UNDERSTAND THE FIRST PART OF YOUR QUESTION, BUT THE
15 REASON THAT WE WITHHELD THE STATEMENT WAS BECAUSE WE FELT
16 THAT IT WAS LARGELY A SELF-SERVING STATEMENT BY THE DEFENDANT
17 TRYING TO EXCULPATE HIMSELF FROM THE -- FROM THE ACT OR THE
18 CHARGE THAT WAS BEING MADE. AND IF HE WAS GOING TO DO THAT,
19 WE WANTED HIM TO TAKE THE STAND SO THAT WE COULD CROSS-
20 EXAMINE HIM. THAT WAS ULTIMATELY OUR STRATEGY.

21 Q. DID Y'ALL CONSIDER IT WAS THE STATE'S ROLE TO
22 CONVICT HIM OR TO PUT ALL THE EVIDENCE FOR THE JURY TO MAKE
23 THAT DECISION?

24 A. DID WE PUT ALL THE EVIDENCE BEFORE THE JURY?

25 Q. DID YOU FEEL IT WAS THE STATE'S ROLE JUST TO MAKE

1 SURE THAT MR. GARY (SIC) WAS CONVICTED?

2 A. WE FELT IT WAS OUR ROLE TO CONVICT HIM UNDER
3 EVIDENCE BEYOND A REASONABLE DOUBT, YES. AND IT'S -- YOU
4 KNOW, IT'S ULTIMATELY MR. TERRY'S DECISION ABOUT WHETHER OR
5 NOT HE DECIDES TO TAKE THE STAND. I MEAN, HE WAS -- WE KNEW
6 THAT IF HE WANTED TO PUT THAT EVIDENCE IN HE COULD HAVE PUT
7 IT UP.

8 Q. OKAY. BUT IT WAS THE STATE'S JOB TO CONVICT HIM.

9 A. AS THE PROSECUTION, WE WERE BEFORE THE JURY
10 PRESENTING THE STATE'S CASE SAYING THAT WE WERE GOING TO
11 PROVE BEYOND A REASONABLE DOUBT THAT HE WAS GUILTY OF THE
12 CRIMES CHARGED. I DON'T KNOW IF YOU'D SAY IT'S OUR JOB TO
13 CONVICT. IT'S OUR JOB TO PRESENT THAT THEORY, YES.
14 OTHERWISE, WE SHOULDN'T HAVE PRESENTED THE CASE.

15 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS, YOUR
16 HONOR.

17 MR. SALTER: JUST ONE BRIEF QUESTION.

18 REDIRECT EXAMINATION

19 BY MR. SALTER:

20 Q. MR. CHASE, WERE YOU THEN AWARE THEN OR ARE YOU AWARE
21 NOW OF ANY REQUIREMENT THAT A PARTY MUST PRESENT ALL EVIDENCE
22 IN ITS POSSESSION?

23 A. NO.

24 Q. EVEN IF IT HAS THE BURDEN OF PROOF?

25 A. NO.

1 Q. THANK YOU.

2 A. NO.

3 MR. SALTER: NOTHING FURTHER, YOUR HONOR.

4 EXAMINATION BY THE COURT

5 Q. I WANT TO ASK YOU A QUESTION. GOING BACK TO YOUR,
6 AS YOU CALLED IT, EVOLVING---

7 A. YES, SIR.

8 Q. ---STRATEGY REGARDING THE STATEMENT, WERE THERE
9 SEVERAL SCENARIOS I GUESS THAT YOU ANTICIPATED THAT COULD
10 UNFOLD THAT WOULD CAUSE YOU TO CHANGE YOUR DECISION AND
11 ACTUALLY USE THE STATEMENT IN THE GUILT PHASE?

12 A. WELL, ONE OF THE EVOLVING OR CHANGING SITUATIONS
13 WHERE THAT STATEMENT COULD HAVE BEEN USED IS IF HE TOOK THE
14 STAND.

15 Q. RIGHT. OKAY. SO IF DEFENSE COUNSEL HAD COME TO YOU
16 BEFORE OPENING STATEMENTS AND SAID, "CAN YOU TELL ME WHETHER
17 OR NOT YOU PLAN TO INTRODUCE THE STATEMENT DURING THE GUILT
18 PHASE OF THE TRIAL?" WHAT WOULD -- WHAT WOULD HAVE BEEN YOUR
19 ANSWER? WHAT WOULD YOU HAVE ANSWERED?

20 A. IF -- IF THEY HAD COME -- IF THEY HAD COME TO US AND
21 ASKED THAT?

22 Q. INFORMALLY.

23 A. INFORMALLY, I PERSONALLY PROBABLY WOULD NOT HAVE
24 INFORMED THEM WHAT I WAS GOING TO DO BECAUSE, AS I SAID,
25 THAT'S OUR STRATEGY IN THE PRESENTATION OF THE CASE. WE HAD

1 PROVIDED ALL THE EVIDENCE.

2 Q. OKAY.

3 A. BUT AS TO OUR STRATEGY, I WOULD NOT HAVE DISCLOSED
4 THAT.

5 THE COURT: ALL RIGHT. EITHER OF Y'ALL CAN ASK A
6 FOLLOW-UP QUESTION TO THAT IF YOU WOULD LIKE.

7 MR. SALTER: NOTHING FROM THE STATE, YOUR HONOR.

8 RECROSS EXAMINATION

9 BY MR. FLOYD:

10 Q. ARE YOU AWARE OF RULE 3.8 THAT A PROSECUTOR HAS THE
11 RESPONSIBILITY OF A MINISTER OF JUSTICE AND NOT SIMPLY THAT
12 OF AN ADVOCATE?

13 A. IF THAT'S WHAT 3.8 SAYS. I MEAN, I'LL REVIEW IT.

14 MR. FLOYD: THANK YOU. NO FURTHER QUESTIONS.

15 THE COURT: THANK YOU FOR COMING.

16 THE WITNESS: YES, SIR. THANK YOU, JUDGE. SEE YOU
17 BACK IN GREENVILLE.

18 MR. SALTER: WE WOULD ASK THAT HE BE EXCUSED, YOUR
19 HONOR.

20 THE COURT: HE'S EXCUSED.

21 THE WITNESS: DID YOU WANT AN ADDITIONAL AFFIDAVIT
22 AS RELATED TO THE HENSEL DOCUMENT?

23 THE COURT: NO. I THINK YOUR TESTIMONY TAKES CARE
24 OF THAT.

25 THE WITNESS: THANK YOU, SIR.

1 **MR. SALTER:** YOUR HONOR, WE'D CALL TOMMY DAVIS.

2 THOMAS J. DAVIS, AFTER BEING DULY SWORN,
3 TESTIFIED AS FOLLOWS:

4 **THE CLERK:** WHEN YOU'RE COMFORTABLY SEATED, WOULD
5 YOU STATE YOUR FULL NAME?

6 **THE WITNESS:** MY NAME IS THOMAS J. DAVIS.

7 DIRECT EXAMINATION

8 BY MR. SALTER:

9 Q. ALL RIGHT, SIR. MR. DAVIS, WHERE AND HOW ARE YOU
10 CURRENTLY EMPLOYED?

11 A. I'M A PRIVATE INVESTIGATOR. MY OFFICE IS IN IRMO,
12 SOUTH CAROLINA.

13 Q. AND HOW LONG HAVE YOU BEEN EMPLOYED IN THAT
14 CAPACITY?

15 A. SINCE APPROXIMATELY 1993 WITH THE EXCEPTION OF TWO
16 AND A HALF YEARS WHEN I WENT WITH THE SOUTH CAROLINA LOTTERY
17 IN THE SECURITY DIVISION.

18 Q. ALL RIGHT, SIR. AND AS A PRIVATE---

19 **MR. FLOYD:** YOUR HONOR -- YOUR HONOR, IF WE MIGHT
20 MAKE AN OBJECTION AT THIS POINT. MR. DAVIS, I THINK THE
21 TESTIMONY WOULD SHOW, THE EVIDENCE WOULD SHOW, WAS AN
22 INVESTIGATOR FOR THE COUNSEL FOR THE DEFENDANTS IN THIS --
23 THE DEFENDANT'S ATTORNEYS AT THE TRIAL. SO WE WOULD -- WE
24 WOULD ARGUE THAT ANY EVIDENCE HE GATHERED AT THE DIRECTION OF
25 THOSE ATTORNEYS WOULD BE WORK PRODUCT AND, THEREFORE, WOULD

1 NOT BE ADMISSIBLE.

2 THE COURT: WELL, THAT -- THAT MAY BE TRUE, BUT THE
3 WORK PRODUCT PRIVILEGE IS OWNED BY THE ATTORNEYS WHO -- WHO
4 CREATED THE WORK PRODUCT AND NOT BY YOU. SO I DON'T THINK
5 YOU HAVE STANDING TO RAISE THEIR OBJECTION.

6 MR. FLOYD: WELL, YOUR HONOR, I WOULD THINK ON
7 BEHALF OF MR. TERRY SINCE THEY WERE HIS ATTORNEYS AND HE CAN
8 NOW HAVE HIS CURRENT ATTORNEY RAISE THAT ISSUE ON HIS BEHALF
9 -- BECAUSE IF THE ATTORNEYS WERE RAISING IT, IT WOULD BE ON
10 HIS BEHALF, AND SO WE WOULD RAISE IT NOW ON HIS BEHALF.

11 THE COURT: I OVERRULE THE OBJECTION.

12 MR. SALTER: THANK YOU, YOUR HONOR.

13 BY MR. SALTER:

14 Q. AS A PRIVATE INVESTIGATOR, WHAT TYPES OF CASES DID
15 YOU INVESTIGATE?

16 A. WE DO SOME CRIMINAL DEFENSE. WE DO QUITE A BIT OF
17 CIVIL MATTERS IN ANTICIPATION OF LITIGATION, WORKING WITH
18 ATTORNEYS. WE HAVE SOME COMPANIES AND CORPORATIONS WE WORK
19 FOR.

20 Q. ALL RIGHT, SIR. PRIOR TO BECOMING A PRIVATE
21 INVESTIGATOR, WHERE WERE YOU EMPLOYED?

22 A. I WAS WITH THE F.B.I. FOR 28 YEARS, RETIRED IN 1993.
23 ACTUALLY I RETIRED IN COLUMBIA.

24 Q. ALL RIGHT, SIR. AND YOU WERE AN INVESTIGATOR WITH
25 THEM?

1 A. I WAS A SPECIAL AGENT FOR 28 YEARS.

2 Q. ALL RIGHT, SIR. COULD YOU TELL THE COURT WHETHER OR
3 NOT AT SOME POINT YOU WERE REQUESTED BY DEFENSE COUNSEL TO
4 ASSIST THEM IN THE TRIAL OF THE CASE OF STATE VERSUS TERRY?

5 A. THIS WOULD HAVE BEEN BACK, IF MY RECOLLECTION IS
6 RIGHT, MID 1994. I WAS CONTACTED BY DUFFIE STONE.

7 Q. MID 1994? COULD IT HAVE POSSIBLY BEEN LATER THAN
8 THAT?

9 A. I APOLOGIZE. IT WAS -- IT WAS DURING THE LATTER
10 PART OF 1996, I BELIEVE.

11 Q. ALL RIGHT, SIR. HAD YOU PREVIOUSLY WORKED WITH MR.
12 STONE IN ANY CAPACITY BEFORE?

13 A. YOU KNOW, I SAW HIM TESTIFY THE OTHER DAY, AND I DO
14 RECALL ONE MATTER AND IT WAS A -- IT WAS A HOMICIDE MATTER
15 THAT I'D WORKED WITH DUFFIE STONE. I HAD NEVER WORKED WITH
16 BETH FULLWOOD BEFORE.

17 Q. ALL RIGHT, SIR. AND COULD YOU BRIEFLY DESCRIBE YOUR
18 DUTIES WITH RESPECT TO THIS CASE?

19 A. IF I REMEMBER CORRECTLY -- AND I HAVE LOOKED AT SOME
20 NOTES THAT I HAVE. I THINK MR. STONE TOLD ME THAT -- THAT WE
21 WERE WORKING UP AGAINST A STATEMENT FROM MR. TERRY, THAT
22 THERE WAS SOME PHYSICAL EVIDENCE, A FINGERPRINT, D.N.A., AND
23 AMONG OTHER THINGS I THINK THERE WAS SOME INDICATION THAT
24 THERE WAS AN ALIBI, TOO, THAT HE WANTED US TO CHECK INTO TO
25 SEE IF -- IF WE COULD SUBSTANTIATE THAT GARY TERRY MIGHT HAVE

1 BEEN SOMEWHERE ELSE DURING THE TIME THIS -- THIS MURDER WAS
2 COMMITTED.

3 Q. ALL RIGHT, SIR. AND TO THAT END DID YOU GO TALK TO
4 VARIOUS INDIVIDUALS?

5 A. I DID.

6 MR. FLOYD: YOUR HONOR, WE OBJECT TO ANY TYPE OF
7 HEARSAY TESTIMONY.

8 THE COURT: OKAY. WELL, YOU'LL HAVE TO MAKE A
9 SPECIFIC OBJECTION WHENEVER A QUESTION IS ASKED THAT YOU
10 THINK WILL ELICIT HEARSAY.

11 MR. FLOYD: THANK YOU, YOUR HONOR.

12 MR. SALTER: WERE YOU ABLE TO ELICIT ANY INFORMATION
13 THAT WOULD SUPPORT AN ALIBI?

14 MR. FLOYD: YOUR HONOR, OBJECTION ON THAT. THAT'S
15 JUST A DIFFERENT WAY OF ASKING HEARSAY. THE ONLY WAY TO GET
16 INFORMATION WOULD BE THROUGH TALKING.

17 THE COURT: WELL, IT WOULDN'T -- IT'S NOT -- NONE OF
18 THAT'S GOING TO BE HEARSAY BECAUSE HE'S NOT ASKING MR. DAVIS
19 THIS QUESTION IN ORDER TO PROVE THE TRUTH OF THE ALIBI
20 WITNESSES' STATEMENTS TO HIM. HE IS OFFERING IT TO PROVE THE
21 CONTENT OF THE SUPPOSED ALIBI WITNESSES' STATEMENTS TO HIM SO
22 THAT HE CAN THEN RESPOND TO YOUR CLAIM THAT DEFENSE COUNSEL
23 SHOULD HAVE BEEN MORE -- SHOULD HAVE DONE SOMETHING DIFFERENT
24 IN PRESENTING THE ALIBI DEFENSE. SO NONE OF THIS IS EVER
25 GOING TO BE HEARSAY, BUT NOW YOU KEEP OBJECTING IF YOU WANT.

1 BUT ANYTHING THAT -- ANYTHING THAT ANYBODY TOLD HIM IN THE
2 COURSE OF HIS INVESTIGATION I BELIEVE IS BEING ELICITED FROM
3 HIM NOT TO PROVE THE TRUTH OF WHAT WAS TOLD BUT TO PROVE THE
4 FACT OF WHAT WAS TOLD SO THAT -- SO THAT I CAN THEN ANALYZE
5 WHETHER OR NOT THE DEFENSE COUNSEL AT TRIAL WAS EFFECTIVE IN
6 USING THE INFORMATION THAT MR. DAVIS HAD GOTTEN FOR THEM.
7 PROCEED.

8 MR. SALTER: THANK YOU, YOUR HONOR.

9 BY MR. SALTER:

10 Q. WERE YOU ABLE TO ELICIT ANY INFORMATION TO
11 SUBSTANTIATE AN ALIBI FOR MR. TERRY?

12 A. NO.

13 Q. WERE YOU EVER ABLE TO ELICIT ANY INFORMATION THAT
14 WOULD HAVE ESTABLISHED THAT HE WAS HAVING A CONSENSUAL AFFAIR
15 WITH THE VICTIM?

16 A. NO.

17 Q. ALL RIGHT, SIR. I WANT TO ASK YOU ABOUT SOME OF THE
18 PEOPLE YOU MAY HAVE SPOKEN TO. DID YOU SPEAK TO A MR.
19 BOOZER?

20 A. I DID. I SPOKE TO MR. BOOZER AND HIS WIFE.

21 Q. ALL RIGHT. DO YOU RECALL ANYTHING ABOUT MR. BOOZER,
22 NOT WHAT HE SAID, BUT WHO -- WHO ELSE...

23 A. MR. BOOZER AND HIS WIFE WERE ELDERLY. THEY LIVED AT
24 THE LAKE, LAKE MURRAY, AND ACTUALLY THEY LIVED NEXT DOOR TO A
25 LOCATION WHERE MR. TERRY HAD LIVED FOR, I BELIEVE,

1 APPROXIMATELY A YEAR.

2 Q. ALL RIGHT, SIR. DID YOU SPEAK TO A TERESA DEBERRY?

3 A. I DID.

4 Q. AND WHO IS MS. DEBERRY?

5 A. MS. DEBERRY IS -- AT THAT TIME A YOUNG WOMAN WHO WAS
6 PARALYZED WHO WAS BEFRIENDED BY MR. TERRY WHO ALLOWED HIM TO
7 HOOK UP HIS WHATEVER -- HIS WHATEVER HE LIVED IN ON HER
8 PROPERTY ON THE LAKE, ALLOWED HE, MR. TERRY, TO HOOK UP HIS
9 UNIT TO HER HOUSE FOR ELECTRICITY AND SO FORTH.

10 Q. OKAY. DID YOU SPEAK TO A MICHELLE GIBSON?

11 A. I DID.

12 Q. WHO IS SHE?

13 A. I'M ASSUMING THAT'S DIANE GIBSON.

14 Q. NO. I WAS GOING TO ASK YOU ABOUT DIANE GIBSON. DID
15 YOU SPEAK WITH DIANE GIBSON?

16 A. YES, I DID.

17 Q. ALL RIGHT, SIR. AND DO YOU RECALL ANYONE ELSE YOU
18 MAY HAVE SPOKEN TO?

19 A. WE SPOKE TO QUITE A FEW PEOPLE. WE TALKED TO --
20 ACTUALLY WE TALKED TO I BELIEVE THE SON OF THE DECEASED. WE
21 TALKED TO SOME PEOPLE IN THE NEIGHBORHOOD WHERE THE INCIDENT
22 OCCURRED. WE TALKED TO SOME PEOPLE AT THE LAKE. WE TALKED
23 TO A NUMBER OF JAIL OFFICIALS AND POLICE OFFICERS.

24 Q. ALL RIGHT, SIR. DO YOU RECALL WHETHER OR NOT YOU
25 HAD A COLLEAGUE FROM YOUR AGENCY TO ASSIST YOU AT ALL?

1 A. YES, I DID.

2 Q. AND WHO WOULD THAT HAVE BEEN?

3 A. HIS NAME WAS CARROLL L. WINGARD, W-I-N-G-A-R-D.

4 Q. SO HE ASSISTED YOU IN TRYING TO GO OUT AND LOCATE
5 SOME OF THESE PEOPLE AND TALK TO THEM?

6 A. YES, SIR. YES, SIR.

7 Q. AND Y'ALL REPORTED ALL YOUR INFORMATION YOU GATHERED
8 BACK TO MR. STONE AND MS. FULLWOOD?

9 A. CORRECT.

10 MR. SALTER: ALL RIGHT, SIR. I DON'T BELIEVE I HAVE
11 ANYTHING FURTHER.

12 MR. FLOYD: NO QUESTIONS, YOUR HONOR.

13 THE COURT: ALL RIGHT, SIR. THANK YOU FOR COMING.

14 MS. BROWN: YOUR HONOR, THE RESPONDENTS CALL
15 LIEUTENANT SCOTT FRIER, PLEASE.

16 SCOTTIE R. FRIER, AFTER BEING DULY SWORN,
17 TESTIFIED AS FOLLOWS:

18 THE CLERK: WHEN YOU'RE COMFORTABLY SEATED, STATE
19 YOUR FULL NAME.

20 THE WITNESS: MY NAME IS SCOTTIE RICE, R-I-C-E,
21 FRIER, F-R-I-E-R.

22 DIRECT EXAMINATION

23 BY MS. BROWN:

24 Q. OKAY. LIEUTENANT FRIER, WHERE ARE YOU CURRENTLY
25 EMPLOYED?

1 A. I AM CURRENTLY EMPLOYED AS A DEPUTY COMMANDER OF THE
2 INVESTIGATIVE UNIT AT THE LEXINGTON COUNTY SHERIFF'S
3 DEPARTMENT.

4 Q. OKAY. AND WHAT ARE YOUR DUTIES AT THE SHERIFF'S
5 DEPARTMENT?

6 A. I OVERSEE THE VIOLENT CRIMES UNIT, THE CRIME SCENE
7 INVESTIGATIVE UNIT, THE FORENSIC DRUG LAB, THE AFIS
8 FINGERPRINT COMPUTER, AND THE VICTIMS' ADVOCATES THAT WORK
9 WITHIN OUR AGENCY.

10 Q. AND YOU WERE AT THE DEPARTMENT AT THE TIME OF THE
11 INVESTIGATION OF THE JACKSON MURDER?

12 A. YES, MA'AM. I WAS SERVING IN THE ROLE AS A
13 DETECTIVE THEN.

14 Q. OKAY. NOW, WERE YOU INVOLVED SPECIFICALLY IN THIS
15 INVESTIGATION?

16 A. I WAS WHAT WOULD HAVE BEEN TERMED THE LEAD
17 INVESTIGATOR IN THE CASE. THE CASE WAS ASSIGNED TO ME FOR
18 INVESTIGATION.

19 Q. AND YOUR DUTIES WOULD BE WHAT AS LEAD INVESTIGATOR?

20 A. THE FOLLOW-UP INVESTIGATION INTO THE HOMICIDE OF MS.
21 JACKSON AND HOPEFULLY THE SUBSEQUENT IDENTIFICATION AND
22 APPREHENSION OF A SUSPECT.

23 Q. SO YOU WOULD BE FAMILIAR WITH ALL ELEMENTS OF THE
24 INVESTIGATION BECAUSE OF THAT POSITION?

25 A. YES, MA'AM.

1 Q. OKAY. OKAY. DID YOU ACTUALLY VIEW AND STUDY THE
2 CRIME SCENE?

3 A. YES, MA'AM. I WAS ONE OF THE FIRST RESPONDING
4 OFFICERS TO THE CRIME SCENE AND WAS PRESENT FOR MULTIPLE
5 WALK-THROUGHS TO THE CRIME SCENE WHILE THE BODY WAS STILL
6 THERE AND THEN SUBSEQUENT WALK-THROUGHS WHEN THE BODY HAD
7 BEEN REMOVED.

8 Q. AND THIS WAS THE DAY OF DISCOVERY?

9 A. ABSOLUTELY. YES, MA'AM.

10 Q. OKAY. DURING THE COURSE OF THE INVESTIGATION, DID
11 YOU SPEAK TO GARY TERRY?

12 A. YES, MA'AM, WE DID. DURING THE COURSE OF THE
13 INVESTIGATION WE, THROUGH SOME ASSISTANCE WITH S.L.E.D.,
14 DEVELOPED SOME INFORMATION THAT LED US TO SEE A NEED TO
15 INTERVIEW GARY TERRY. AT THE POINT IN TIME THAT WAS DONE,
16 THERE WAS A BRIEF STATEMENT ELICITED FROM HIM CONCERNING HIS
17 KNOWLEDGE OF MS. JACKSON AND THE HOMICIDE THAT HAD TAKEN
18 PLACE, AND A CONSENT WAS PRESENTED -- THE OFFER OF A CONSENT
19 WAS PRESENTED TO MR. TERRY WHEREUPON WE ASKED HIM FOR A BLOOD
20 SAMPLE BE TAKEN BY HIS VOLUNTEERING TO DO SO SO THAT HIS
21 D.N.A. COULD BE COMPARED AGAINST D.N.A. THAT WE HAD RECOVERED
22 FROM THE CRIME SCENE.

23 Q. OKAY. LET ME SHOW YOU TWO DOCUMENTS TO SEE IF YOU
24 CAN IDENTIFY THEM FOR US.

25 A. YES, MA'AM, I CAN IDENTIFY BOTH OF THESE. THE FIRST

1 ONE IS A HANDWRITTEN SET OF INFORMATION ON A PIECE OF
2 NOTEBOOK PAPER THAT WAS PRODUCED ON THE 17TH DAY OF JANUARY,
3 1995, AND THIS IS A BRIEF STATEMENT -- THIS SIGNIFIES SOME
4 INFORMATION I GOT IN A BRIEF STATEMENT FROM GARY TERRY AT
5 SIMS AND CHERRY ROAD IN WINNSBORO, SOUTH CAROLINA, ON THAT
6 DATE.

7 Q. AND THAT REFLECTS THAT YOU GAVE HIM HIS MIRANDA
8 RIGHTS.

9 A. YES, MA'AM. AT THE TIME I DIDN'T HAVE A FORM WITH
10 ME. I ACTUALLY HANDWROTE SOME MIRANDA WARNINGS ON THAT FORM
11 AND HAD HIM PUT HIS INITIALS BESIDE THOSE AS SOME INDICATION
12 THAT I ADVISED HIM OF THOSE RIGHTS.

13 Q. WAS THAT THE FIRST STATEMENT YOU HAD TAKEN FROM MR.
14 TERRY?

15 A. YES, MA'AM, IT WAS. RELATING TO THIS CASE, YES,
16 MA'AM.

17 Q. DO YOU RECALL IF YOU READ THAT STATEMENT INTO THE
18 PENALTY PHASE?

19 A. YOU KNOW, I DON'T REMEMBER.

20 Q. OKAY.

21 A. I DO NOT REMEMBER IF WE BROACHED INTO THAT FIRST
22 STATEMENT IN THE PENALTY PHASE.

23 MS. BROWN: OKAY. I'D ASK THE COURT IF THE COURT
24 WOULD TAKE JUDICIAL NOTICE THAT THE STATEMENT WAS READ. IT'S
25 ON PAGE 1812 THROUGH 1816. BOTH STATEMENTS WERE READ INTO

1 THE RECORD IN THE PENALTY PHASE, SO WE ARE REFERENCING
2 STATE'S EXHIBIT 67 AND STATE'S 53.

3 THE COURT: WELL, IT'S NOT NECESSARY FOR ME TO TAKE
4 JUDICIAL NOTICE OF IT BECAUSE THE TRANSCRIPT FROM THE PRIOR
5 TRIAL IS OBVIOUSLY OFFERED INTO THE EVIDENCE IN THIS CASE.

6 MS. BROWN: IT HAS BEEN ATTACHED TO THE RECORD AND
7 UNDER STATUTE WOULD BE PART OF THE PROCEEDINGS IN THIS CASE.

8 THE COURT: ALL RIGHT. SO THE RECORD WILL REFLECT
9 WHEN THE STATEMENT WAS OFFERED.

10 MS. BROWN: OKAY.

11 BY MS. BROWN:

12 Q. PRIOR TO TAKING THE STATEMENT, THE FIRST STATEMENT
13 FROM MR. TERRY---

14 A. YES, MA'AM.

15 Q. ---HAD YOUR INVESTIGATION OF THE EVIDENCE SHOWN THAT
16 ANY SEXUAL ACTIVITY ON THE -- FROM THE EVIDENCE LEFT AT THE
17 CRIME SCENE INDICATE SEXUAL ACTIVITY WAS AFTER THE ASSAULT?

18 A. FROM THE ONSET WE WERE WORKING THE CASE AS A
19 SEXUALLY-MOTIVATED HOMICIDE. IT WAS OBVIOUS THAT MS. JACKSON
20 HAD SUFFERED TRAUMATIC INJURY IN HER HOME. OBVIOUSLY THE
21 AUTOPSY CONFIRMED FOR US THAT SHE HAD BEEN BEATEN. THE
22 EVIDENCE SUGGESTED TO US AND WE WORKED THE CASE UNDER THE
23 PRETEXT THAT A VIOLENT ASSAULT TOOK PLACE AGAINST MS.
24 JACKSON. HER POSITIONING WAS NOTED AS IT RELATED TO EVIDENCE
25 AND BLOOD SPATTER EVIDENCE AT THE SCENE.

1 THE EVIDENCE SUGGESTED TO US THAT FOLLOWING THE
2 ASSAULT ON MS. JACKSON HER BODY WAS MOVED TO A POSITION
3 SECONDARY TO THE ASSAULT, AND EVIDENCE SUGGESTED TO US THAT
4 SOME TYPE OF SEXUAL ACTIVITY HAD TAKEN PLACE IN THIS
5 SECONDARY POSITION TO WHERE THE ASSAULT HAD TAKEN PLACE AND
6 THAT HER CLOTHING HAD BEEN DISTURBED. HER BLOUSE HAD
7 ACTUALLY -- I SAY BLOUSE. IT WAS LIKE A ONE-PIECE -- I CALL
8 IT A PAJAMA TOP FOR LACK OF A BETTER TERM - HAD BEEN PUSHED
9 UP EXPOSING HER BREASTS. HER LEGS WERE SPREAD APART, AND
10 THERE WAS VERY OBVIOUS TO US AT THE CRIME SCENE A DISCHARGE
11 FROM HER VAGINAL VAULT OF A LIGHT CLEAR LIQUID THAT WE
12 BELIEVED AT THE TIME WAS SEMINAL FLUID, WHICH WAS LATER
13 CONFIRMED THROUGH TESTING, THAT WAS DRAINING STRAIGHT DOWN
14 FROM THE VAGINAL AREA ACROSS THE ANAL REGION STRAIGHT DOWN TO
15 THE FLOOR, SUGGESTING TO US AT THAT TIME THAT THE SEXUAL
16 ACTIVITY HAD TAKEN PLACE THERE WITH NO MOVEMENT SUBSEQUENT TO
17 THAT, AND THE EVIDENCE SUGGESTED TO US THAT THAT POSITIONING
18 WAS SECONDARY TO THE ASSAULT.

19 Q. OKAY. AND WHEN YOU SPOKE TO MR. TERRY THE FIRST
20 TIME, YOU ASKED FOR SAMPLES TO COMPARE TO THE EVIDENCE THAT
21 YOU HAD TAKEN FROM THAT SCENE.

22 A. YES, MA'AM. WE -- WE EXPLAINED IN SPECIFIC DETAIL
23 THAT WE NEEDED A SAMPLE FROM HIM, EXPLAINED TO HIM THAT WE
24 WERE GOING TO HAVE BLOOD DRAWN SO THAT WE COULD COMPARE HIS
25 D.N.A. TO D.N.A. SAMPLES OR SAMPLES OF EVIDENCE THAT HAD BEEN

1 COLLECTED AT THE CRIME SCENE. YES, MA'AM, THAT WAS EXPLAINED
2 TO HIM AT THE TIME WE RECEIVED THE CONSENT.

3 Q. IN THAT FIRST STATEMENT DOES MR. TERRY TELL YOU
4 ANYTHING ABOUT A SEXUAL RELATIONSHIP WITH THE VICTIM?

5 A. NO, MA'AM. HE NEVER GAVE US ANY INDICATION THAT HE
6 HAD BEEN SEXUALLY ACTIVE OR HAD HAD SEXUAL RELATIONS PRIOR
7 WITH MS. JACKSON.

8 Q. OKAY. AND AFTER YOU RECEIVED THE RESULTS OF THE
9 D.N.A. TESTING, DID YOU MAKE AN ARREST?

10 A. YES, MA'AM, WE DID. GARY DUBOSE TERRY WAS ARRESTED
11 IN THE MURDER OF MS. JACKSON.

12 Q. DID YOU TAKE A SUBSEQUENT STATEMENT FROM HIM?

13 A. YES, MA'AM. ON THE 24TH DAY OF MARCH IN 1995 AT THE
14 LEXINGTON COUNTY SHERIFF'S DEPARTMENT, PURSUANT TO HIS
15 ARREST, WE RE-INTERVIEWED AND TOOK A STATEMENT FROM GARY
16 TERRY.

17 Q. AND IN THAT STATEMENT DOES HE ASSERT THAT THERE WAS
18 A RELATIONSHIP?

19 A. YES, MA'AM. HE -- HE ADMITS TO BEING AT THE HOME ON
20 THE NIGHT OF THE MURDER, ADMITS TO -- BASICALLY GIVES AN
21 OCCASIONS THAT HE HAD GONE TO THE HOME, HAD GONE IN BECAUSE
22 OF PRIOR RELATIONS WITH MS. JACKSON, HAD WHAT HE TERMED TO BE
23 A CONSENSUAL SEXUAL ENCOUNTER IN HER BEDROOM, AND THAT UPON
24 GOING TO LEAVE THIS HAD ANGERED MS. JACKSON. SHE CONFRONTS
25 HIM, FOR LACK OF A BETTER TERM, IN THE HALLWAY. THERE'S A

1 SCUFFLE THAT CAUSES HIM TO LOSE CONTROL OR LOSE HIS TEMPER
2 AND THAT HE ATTACKS HER AS A RESULT OF THAT. BUT AT THAT
3 POINT IN TIME WAS THE FIRST INDICATION I HAD EVER RECEIVED
4 FROM MR. TERRY THAT, YES, HE WAS IN THE HOUSE AND, SECONDARY
5 TO THAT, HE WAS THERE TO HAVE CONSENSUAL SEXUAL RELATIONS
6 WITH MS. JACKSON.

7 Q. DID YOU -- LET ME MAKE SURE THAT I GET THIS ON THE
8 RECORD. DID YOU TELL HIM ABOUT THE RESULTS BEFORE YOU TOOK
9 THE STATEMENT?

10 A. OH, YES, MA'AM. UPON HIS ARREST IT WAS EXPLAINED TO
11 HIM THAT THAT D.N.A. SAMPLE HAD COME BACK AS A PROBLEM; YES,
12 MA'AM.

13 Q. OKAY. DID YOU EVER SPEAK WITH MR. TERRY'S THEN
14 WIFE, LOUANNE TERRY, ANY TIME DURING THE INVESTIGATION?

15 A. SUBSEQUENT TO GARY'S ARREST, YES, MA'AM, I HAD AN
16 OCCASION TO SPEAK WITH MS. TERRY.

17 Q. DO YOU HAVE ANY PERSONAL KNOWLEDGE WHETHER SHE WAS
18 AWARE OF THE PENDING C.S.C. CHARGE AT THAT TIME?

19 A. MY CONVERSATION THAT TOOK PLACE WITH MS. TERRY HAD
20 TO CONCERN -- HAD TO DO BASICALLY WITH A CONCERN ON HER PART
21 OF EXACTLY WHAT -- WHERE THIS WAS GOING AND, LACK OF A BETTER
22 TERM, HOW MUCH TROUBLE WAS HE AND HOW BAD WAS IT AND WHAT
23 MIGHT HIS ULTIMATE FATE BE AS A RESULT OF WHAT HE HAD BEEN
24 ACCUSED OF. SO, YES, MA'AM, SHE WOULD HAVE HAD -- SHE WOULD
25 HAVE HAD NO REASON NOT TO UNDERSTAND EXACTLY WHAT HE WAS

1 CHARGED WITH AND THE ALLEGATION AS IT PERTAINS TO EACH
2 OFFENSE THAT HE HAD BEEN ACCUSED OF.

3 Q. DID YOU EVER RECEIVE ANY INFORMATION CONCERNING ANY
4 KIND OF A SEXUAL RELATIONSHIP BETWEEN MR. TERRY AND THE
5 VICTIM FROM ANY SOURCE?

6 A. SHORT OF THAT 24 MARCH 1995 STATEMENT, NO, MA'AM.
7 GARY TERRY TELLS ME THAT HE HAD SEXUAL RELATIONS THAT DAY.
8 PRIOR TO THAT, NO, MA'AM, FROM NO SOURCE WHATSOEVER OR
9 SUBSEQUENT TO THAT.

10 MS. BROWN: COURT'S INDULGENCE FOR JUST A MOMENT,
11 PLEASE. NO FURTHER QUESTIONS, YOUR HONOR.

12 CROSS-EXAMINATION

13 BY MR. FLOYD:

14 Q. DETECTIVE FRIER, WHEN YOU TOOK THIS STATEMENT AND
15 I'M TALKING ABOUT THE---

16 A. SECOND ONE.

17 Q. ---SECOND STATEMENT---

18 A. YES, SIR.

19 Q. ---FROM MR. TERRY---

20 A. UH-HUH.

21 Q. ---DID YOU ADVISE HIM OF HIS RIGHTS?

22 A. YES, SIR. THEY WERE -- I HAVE A PRETTY -- AND NOT
23 TO BORE THE COURT WITH THIS. I HAVE A PRETTY DETAILED
24 PROCESS I GO THROUGH WHEN I ADVISE MIRANDA. THERE'S SEVERAL
25 NOTATIONS ON THIS FORM THAT FOLLOW THE PROCESS THAT I TAKE

1 PLACE WITH AND IT'S ALL -- WHAT I SEE THERE IS VERY
2 INDICATIVE TO ME THAT I WENT OVER THAT WHOLE PROCESS WITH
3 HIM.

4 Q. AND YOU FEEL COMFORTABLE THAT HE UNDERSTOOD THEM AND
5 THAT HE FREELY AND VOLUNTARILY GAVE YOU THAT STATEMENT?

6 A. ABSOLUTELY, AND THESE ISSUES---

7 MS. BROWN: YOUR HONOR, I'M GOING TO OBJECT BECAUSE
8 THERE WAS A HEARING, A JACKSON V. DENNO HEARING, AND THIS WAS
9 RULED ADMISS -- IT WAS VOLUNTARILY INADMISSIBLE AT THAT TIME.

10 THE COURT: WELL, I STILL -- I'M GOING TO LET HIM
11 ASK THE QUESTION. I OVERRULE THE OBJECTION.

12 MS. BROWN: THANK YOU.

13 BY MR. FLOYD:

14 Q. WAS THERE ANYTHING ABOUT HIS DEMEANOR, HEALTH,
15 ACTIONS THAT IN ANY WAY LED YOU TO BELIEVE THAT THAT
16 STATEMENT WAS NOT FREELY, KNOWINGLY, AND INTELLIGENTLY MADE
17 TO YOU?

18 A. ABSOLUTELY NOT. AS MY RECOLLECTION SERVES ME AS HAS
19 BEEN THE CASE IN CAPITAL CASES, I DON'T KNOW IF VIGOROUS IS
20 THE APPROPRIATE WORD, BUT I ASSURE YOU I ENDURED SOME
21 EXAMINATION ON THE PART OF THE DEFENSE CONCERNING MY BELIEF
22 OF THE VOLUNTARINESS OF THAT STATEMENT.

23 Q. NOW, IN THE STATEMENT DOES MR. TERRY INFORM YOU THAT
24 HE HAD HAD A SEXUAL RELATIONSHIP ON THAT EVENING WITH URAI
25 JACKSON?

1 A. YES. YES, SIR. ON THE 24TH OF MARCH HE GIVES ME A
2 STATEMENT CLAIMING THAT HE HAD HAD CONSENSUAL SEXUAL
3 RELATIONS WITH HER ON THAT NIGHT.

4 Q. AND WAS THAT, IN FACT, CORROBORATED BY THE D.N.A.?

5 A. HIS SEMINAL FLUID WAS FOUND IN AND DISCHARGING FROM
6 HER VAGINAL VAULT.

7 Q. OKAY. SO THAT PART OF THE STATEMENT CERTAINLY WAS
8 TRUE, WAS IT NOT?

9 A. THAT THEY HAD SEX?

10 Q. UH-HUH.

11 A. HIS SEMINAL FLUID WAS IN HER VAGINAL VAULT. THERE'S
12 -- THERE'S SOME OBVIOUS EXPLANATION FOR HOW THAT GOT THERE.

13 Q. OKAY. AND ALSO IN THAT STATEMENT THERE WAS SOME
14 INFORMATION GIVEN YOU THAT SHE WAS STRUCK OR BLUDGEONED WITH
15 SOME TYPE OF OBJECT.

16 A. FROM HIS STATEMENT HE MAKES AN ADMISSION THAT, YES,
17 HE STRUCK HER IN -- STRUCK HER WITH AN OBJECT, YES, SIR.

18 Q. AND WOULD YOU AGREE WITH ME THAT THAT PORTION OF HIS
19 STATEMENT WAS LIKEWISE CORROBORATED BY THE SCIENTIFIC
20 EVIDENCE?

21 A. YES, SIR. SHE HAD SUFFERED MULTIPLE BLOWS FROM A
22 BLUNT OBJECT.

23 Q. NOW, YOU DON'T REALLY KNOW -- I MEAN, YOU COME ON
24 THE SCENE AND YOU SEE A SCENE, BUT YOU DON'T REALLY KNOW
25 WHETHER OR NOT MS. JACKSON, FOR EXAMPLE, ON HER OWN MOVED AT

1 SOME POINT IN TIME WITHOUT -- AFTER WHOEVER THE ASSAILANT WAS
2 LEFT.

3 A. THERE -- SOMETIMES THERE'S EVIDENTIARY ASPECTS OF
4 THE CRIME SCENE THAT CAN SHOW US MOVEMENT. SOMETIMES WE CAN
5 SHOW THAT THAT MOVEMENT IS PERPETRATED BY SOMEONE ELSE OR
6 THAT PERSON. THAT'S DIFFICULT TO SAY, BUT IF YOU'RE ASKING
7 ME DOES THE POSSIBILITY EXIST THAT MS. JACKSON COULD HAVE
8 ROLLED OVER ON HER OWN---

9 Q. YES.

10 A. ---NOT LIKELY BASED ON THE INJURIES SHE SUSTAINED,
11 BUT I'M ASSUMING YOU COULD ARGUE IT WAS POSSIBLE.

12 Q. IT WAS POSSIBLE, WASN'T IT?

13 A. RIGHT. NOT LIKELY, NOT PROBABLE, BUT POSSIBLE.

14 Q. AND, IN FACT, THE DOCTOR CERTAINLY DOESN'T SAY IT'S
15 NOT POSSIBLE, DOES HE?

16 A. IF I REMEMBER THE DOCTOR'S RULING WAS THAT UPON THE
17 INFLECTION OF THE INJURIES THAT MS. JACKSON HAD SUFFERED, HER
18 UNCONSCIOUSNESS AND DEATH WOULD HAVE BEEN PRETTY RAPID AND
19 I -- THAT WAS CONSISTENT WITH SOME FINDINGS THAT WE HAD IN
20 THAT CRIME SCENE.

21 Q. BUT YOU DON'T KNOW AT WHAT POINT -- THAT DOESN'T
22 MEAN SHE COULD NOT HAVE MOVE AFTERWARDS, DOES IT?

23 A. AGAIN, NOT PROBABLE BUT POSSIBLE.

24 Q. AND YOU HAVE NO WAY OF KNOWING WHEN ANY SEXUAL
25 CONDUCT OCCURRED, DO YOU?

1 A. THERE'S SOME EVIDENTIARY SUGGESTION -- AND I'M NOT
2 SURE HOW THE COURT WILL LET ME GO WITH THIS, BUT WITH THE
3 MATTER IN -- THE MANNER IN WHICH WHAT WE BELIEVED AT THE TIME
4 AND LATER CONFIRMED TO BE THE MANNER IN WHICH THAT SEMINAL
5 FLUID WAS DISCHARGING AS WAS EVIDENT AT THE CRIME SCENE
6 SUGGESTED TO US THAT EVERYTHING HAPPENED THERE. IT WAS MOST
7 CONSISTENT WITH IT HAPPENING THERE AND NOT HAVING HAPPENED IN
8 THE BEDROOM.

9 Q. OKAY. THE DOCTOR DOESN'T SUPPORT YOU ON THAT, DOES
10 HE?

11 A. I'M SORRY?

12 Q. THE FORENSIC PATHOLOGIST DOESN'T SUPPORT YOU ON
13 THAT, DOES HE?

14 A. I DON'T KNOW IF I AGREE WITH THAT, SIR.

15 Q. IN FACT, HE -- DIDN'T HE TESTIFY THAT ACTUALLY THAT
16 SEMEN COULD HAVE BEEN IN THAT BODY FOR SEVEN DAYS OR MORE?

17 A. THE STRUCTURAL BREAKDOWN OR INTEGRITY OF IT COULD
18 LAST THAT LONG. I'M NOT SURE THAT I'M NOT -- I THINK YOU'RE
19 COMPARING APPLES TO ORANGES FROM DR. CARTER'S STATEMENT. I
20 DON'T KNOW THAT I -- IF I WOULD AGREE WITH THAT IN THAT TEXT.

21 Q. IN FACT, IF THE SEMEN WAS COMING OUT OF THE BODY,
22 THAT WOULD SEEM TO INDICATE THAT SHE WAS UPRIGHT AT SOMETIME
23 BETWEEN THE SEXUAL ACT AND THE TIME YOU SAW HER BECAUSE IT
24 WOULD TAKE GRAVITY TO -- TO MOVE IT FROM HER BODY, WOULDN'T
25 IT?

1 A. NO, SIR. AND, AGAIN, I'M NOT SURE HOW MUCH LEEWAY
2 THE COURT IS GOING TO GIVE ME, BUT NOW IF YOU WANT TO SUGGEST
3 THAT SHE WAS STANDING IN AN UPRIGHT POSITION AFTER THE SEXUAL
4 ACTIVITY, I WOULD LOOK FOR THAT SEMINAL DISCHARGE TO BE VERY
5 DIFFERENT THAN THE DISCHARGE THAT WE SAW ON THE SCENE. THE
6 DISCHARGE THAT WE SAW -- AND I'M NOT -- I HAVE THE
7 QUALIFICATIONS AS AN EXPERT IN BLOODSTAIN ANALYSIS, BUT
8 LIQUIDS FOLLOW TWO PRINCIPLES: THEY FOLLOW THE LAWS OF
9 GRAVITY AND THEY FOLLOW THE PATH OF LEAST RESISTANCE. THAT
10 DISCHARGE OF THAT SEMINAL FLUID WAS MOST CONSISTENT WITH HER
11 LYING ON HER BACK AND IT SIMPLY DRAINING BY GRAVITY FROM THE
12 VAGINAL VAULT BASICALLY BETWEEN HER BUTT CHEEKS, FOR LACK OF
13 A BETTER TERM, ACROSS THE ANAL AREA AND ON TO THE FLOOR, NOT
14 AT ALL CONSISTENT WITH HER STANDING AFTER THE ACTIVITY.

15 Q. AND YOU -- YOU HAVE SOME KIND OF DEGREE IN FLUID
16 MOVEMENT?

17 A. I HAVE BEEN QUALIFIED AS AN EXPERT IN THE AREA OF
18 BLOODSTAIN ANALYSIS WHICH HAS SPECIFICALLY TO DO WITH
19 PRINCIPLES OF FLUIDS IN MOTION.

20 Q. AND YOU HAVE ANY TRAINING IN SEMEN ANALYSIS?

21 A. NOT OF SEMEN ANALYSIS, NO, SIR.

22 MR. FLOYD: OKAY. AND -- NO FURTHER QUESTIONS, YOUR
23 HONOR.

24

25

2799

REDIRECT EXAMINATION

BY MS. BROWN:

Q. LIEUTENANT, DID YOU FIND ANY TYPE OF SOLUTION, FLUID, THAT LOOKED LIKE SEMEN IN THE BEDROOM?

A. AGAIN, I DID NOT COMPLETELY PROCESS THE CRIME SCENE. I HAVE NOT BEEN MADE AWARE OF ANY SEMINAL FLUID THAT WAS EVER LOCATED, COLLECTED, OR IDENTIFIED FROM ANY OTHER PART OF THE HOME, NOT THAT I'M AWARE OF. AND TO ANSWER YOUR QUESTION, I DO NOT BELIEVE THERE WAS ANY EVER SEEN OR FOUND.

Q. COURT'S INDULGENCE. JUST BRIEFLY, LIEUTENANT. AS I UNDERSTAND YOUR TESTIMONY BEFORE, YOU WENT TO THE CRIME SCENE AND YOU DEVELOPED YOUR FACTS, BUT THERE WAS SOME AMOUNT OF TIME BETWEEN THE TIME OF THE MURDER AND THE TIME THAT YOU FIRST CONTACTED MR. TERRY. CAN YOU BRIEFLY DESCRIBE WHY YOU CONTACTED MR. TERRY SOME MONTHS AFTER THIS MURDER?

A. YES, MA'AM. OUR INVESTIGATION, FOR LACK OF A BETTER TERM, HAD GROWN SOMEWHAT COLD. WE HAD NOT IDENTIFIED MR. TERRY AS A SUSPECT. WE HAD GOTTEN TO A POINT WHERE THE INVESTIGATORS HAD GOTTEN TOGETHER AND SAID, "ALL RIGHT. WHAT ARE WE MISSING?" AND HAD GONE BACK AND STARTED -- FOR LACK OF A BETTER TERM, WE BASICALLY CORNERED OFF THAT NEIGHBORHOOD WHERE SHE -- WHERE MS. JACKSON LIVED AND WE JUST STARTED PULLING POLICE REPORTS OFF OF THESE RESPECTIVE STREETS, TRYING TO SEE WHO LIVES THERE AND WHO DOES WHAT AND WHO HAS BEEN IN TROUBLE.

1 AS A DIRECT RESULT OF THAT, A COUPLE OF INCIDENT
2 REPORTS POP UP WITH GARY TERRY ON THEM, AND THE INVESTIGATION
3 IN THOSE REPORTS SHOWED THAT HE LIVED AT THE RESIDENCE WITH A
4 DIANE GIBSON WHOM WE KNEW TO BE A NEIGHBOR AND A CLOSE
5 ACQUAINTANCE WITH SAMANTHA JACKSON WHO WAS THE VICTIM'S
6 DAUGHTER AND A SOMEWHAT RELATED -- RELATION WITH THE SON OF
7 THE VICTIM. AND THE INTERESTING THING THAT THAT POSED TO US
8 WAS, THOUGH HE DIDN'T LIVE THERE THEN, HE HAD LIVED THERE
9 BEFORE AND PROBABLY HAD KNOWLEDGE OF MS. JACKSON AND THE
10 NEIGHBORHOOD WHICH PROMPTED US TO LOCATE A FINGERPRINT CARD
11 OF GARY TERRY AND SUBMIT THAT TO S.L.E.D. FOR ANALYSIS AND
12 COMPARISON AGAINST SOME EVIDENCE THAT WE HAD BEEN MADE AWARE
13 OF THAT HAD BEEN COLLECTED FROM THE CRIME SCENE. AN ANALYSIS
14 OF THAT LED US TO SEE THE NECESSITY TO FURTHER INTERVIEW GARY
15 TERRY.

16 Q. SO IT WAS A STEP-BY-STEP PROCESS. BUT YOU NEVER
17 IGNORED ANY INDICATION THAT THERE MIGHT HAVE BEEN A PERSONAL
18 RELATIONSHIP; CORRECT?

19 A. HAD WE BEEN GIVEN ANY SPECIFIC INFORMATION THAT HE
20 HAD HAD PRIOR RELATIONS WITH MS. JACKSON OR ANYTHING LIKE
21 THAT, WE -- TO TELL YOU WE WOULD HAVE JUMPED ON THAT
22 CERTAINLY WOULD HAVE BEEN AN UNDERSTATEMENT BECAUSE THAT
23 WOULD BE SOMETHING WE WOULD PROBABLY HAVE TO ADDRESS OR
24 EXPLAIN OR ANSWER FOR AT A SUBSEQUENT TIME IF WE MADE A
25 CHARGE.

1 I CAN TELL YOU THAT THERE WERE MULTIPLE CONTACTS AND
2 INTERVIEWS WITH THE FAMILY MEMBERS THAT SURVIVED MS. JACKSON,
3 SPECIFICALLY MS. SAMANTHA JACKSON AND HER BROTHER. AND FOR
4 THE LACK OF A BETTER TERM, THERE WAS SOME VERY DIRECT,
5 IMPOSING QUESTIONS TO THEM ON MULTIPLE OCCASIONS AS TO HER
6 PERSONAL LIFE AND ANY RELATIONS OR ACQUAINTANCES SHE HAD. SO
7 TO GET BACK TO YOUR QUESTION, HAD WE KNOWN THAT OR SUSPECTED
8 THAT OR HAD REASON TO BELIEVE THAT, OH, YES, MA'AM, WE WOULD
9 HAVE BEEN ALL OVER THAT.

10 MS. BROWN: THANK YOU, DETECTIVE. NO FURTHER
11 QUESTIONS, YOUR HONOR.

12 MR. FLOYD: JUST A COUPLE.

13 RECROSS EXAMINATION

14 BY MR. FLOYD:

15 Q. DID YOUR INVESTIGATION REVEAL THAT THE DAUGHTER,
16 SAMANTHA, HAD NOT LIVED WITH HER MOTHER FOR OVER THREE YEARS?

17 A. I DON'T REMEMBER A TIME FRAME, BUT, YES, SIR, I
18 BELIEVE THAT IS CORRECT. SHE WAS NOT LIVING IN THE HOME AT
19 THE TIME. I BELIEVE MS. JACKSON -- I DON'T EVEN KNOW IF THE
20 SON WAS LIVING THERE AT THE TIME SHE---

21 Q. IN FACT, HE HAD BEEN OVER GONE FOR OVER A YEAR
22 HIMSELF, HADN'T HE?

23 A. I BELIEVE THAT'S GOING TO BE CORRECT, MR. FLOYD.

24 Q. SO SHE HAD LIVED ALONE.

25 A. I BELIEVE THAT'S CORRECT.

1 MR. FLOYD: THANK YOU. I HAVE NO FURTHER QUESTIONS.

2 THE COURT: THANK YOU, SIR.

3 THE WITNESS: THANK YOU, YOUR HONOR.

4 MR. SALTER: YOUR HONOR, THAT WOULD CONCLUDE THE
5 RESPONDENT'S CASE.

6 THE COURT: ALL RIGHT. DO YOU ANTICIPATE PUTTING UP
7 ANY REPLY EVIDENCE?

8 MR. FLOYD: NO, YOUR HONOR.

9 THE COURT: ALL RIGHT THEN. ALL RIGHT. LET'S TAKE
10 A SHORT BREAK. I'LL BE BACK IN ABOUT FIVE MINUTES AND WE'LL
11 DISCUSS WHAT WE'RE GOING TO -- WHETHER WE'RE GOING TO DO
12 ARGUMENT NOW OR AFTER LUNCH AND WHEN WE'RE GOING TO DO THE
13 MERCER THING.

14 (WHEREUPON, A SHORT BREAK WAS TAKEN. COURT REPORTER
15 CAROL THUEME WAS THE COURT REPORTER WHO WAS PRESENT FOR THE
16 REMAINDER OF THE HEARING.)

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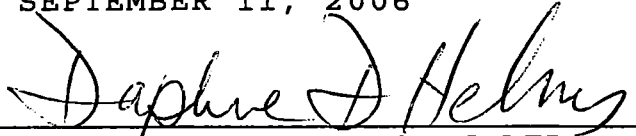
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I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 10TH THROUGH 12TH DAYS OF JULY, 2006.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 11, 2006


DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA

IN THE LEXINGTON COUNTY COURT OF COMMON PLEAS

GARY DUBOSE TERRY,	)	2000-CP-32-3470
	)	
Applicant,	)	
	)	
v.	)	
	)	
WILLIAM D CATOE,	)	
COMMISSIONER,	)	
South Carolina Department of Corrections,	)	
and CHARLES M. CONDON,	)	
ATTORNEY GENERAL,	)	
State of South Carolina,	)	
Respondents.	)	
	)	

APPLICANT'S POST HEARING
MEMORANDUM OF LAW IN SUPPORT
OF HIS APPLICATION
FOR POST CONVICTION RELIEF

MELISSA JANE REED KIMBROUGH
1811 Pickens Street
Columbia, S.C. 29202

WAYNE FLOYD
P.O. Box 3972
West Columbia, S.C. 29171

ATTORNEYS FOR APPLICANT

I. INTRODUCTION

Applicant, Gary Dubose Terry, files this post-hearing memorandum of law in support of his Second Amended Application for Post-Conviction Relief.

II. PROCEDURAL HISTORY

Gary Terry was convicted of murder, criminal sexual conduct in the first degree, burglary in the first degree, and malicious injury to a telephone system. The South Carolina Supreme Court affirmed the convictions, and sentences and the United States Supreme Court denied review. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert. denied*, *Terry v. South Carolina*, 531 U.S. 882 (2000).

Mr. Terry filed an Application for Post-Conviction Relief on January 29, 2001. An evidentiary hearing was held July 10-12, 2006, in Lexington County.

III. STATEMENT OF FACTS

Prior to trial, Mr. Terry gave a statement indicating that he had entered the victim's house, had consensual sex with her, and killed her when he flew into a rage after she tried to physically prevent him from leaving. Tr. 1816. Despite the indications pointing to manslaughter in this statement, counsel opted to pursue a reasonable doubt defense. This defense required them to undermine evidence of DNA found in the victim, Ms. Jackson's, vagina, and Mr. Terry's fingerprint on a telephone box on the exterior of Ms. Jackson's home, where the wires had been pulled or cut.

While Mr. Terry had been in prison, prior to his arrest in Ms. Jackson's murder, Mr. Terry had been incarcerated on another matter. He and another inmate hatched a plan by which Mr. Terry was going to confess to the other inmate's crime in order to free

the other inmate, who would come and bust Mr. Terry out of prison with a bulldozer. Tr. 1728 *et. seq.* Counsel decided that in order to undermine Mr. Terry's statement in Ms. Jackson's case, they would tell the jury in opening argument that, though he had confessed in this case, he had also confessed in another case, for which he would not be tried. Tr. 1283-1284.

After counsel offered the jury this information in opening, the prosecution rested without having introduced the statement. Mr. Terry's counsel put on no case, and limited their representation of Mr. Terry to eightyseven pages of cross-examination. During that time, they repeatedly elicited damaging information that had not been presented by the State, failed to argue theories consistent with their stated theory of defense, and failed to object to erroneous comments and instructions by the court.

As sentencing, the defense presented evidence regarding Mr. Terry's background - that he had grown up in an impoverished family, Tr. 1915-1916, beset with bad luck of accidents and illness. Tr. 1869, 1871, 1914, Mr. Terry was the youngest, Tr. 1868, and smallest of the children in his family, Tr. 1876, and was routinely beaten by his brothers, Tr. 1876, but was a good kid. Tr. 1919. When he started to change, and his temper started to flare uncontrollably, nobody took any action, so his problems went unchecked. Tr. 1959. These problems included beginning to huff gasoline at age 8, Tr. 1973, and almost dying from inhalant at age 13. Tr. 1881.

Mr. Terry dropped out of school, Tr. 1881, and got married and had a son at age 16. Id. His life went downhill from there. Following one of his run-ins with the law, however, Mr. Terry did receive psychiatric treatment. He was diagnosed with organic explosive disorder and prescribed a medication which could calm his outbursts. Tr. 2061.

Tests done in preparation for trial demonstrated that Mr. Terry does indeed have a physical impairment in his brain that is consistent with the temper problems he has exhibited since adolescence. Tr. 2033

Yet in the face of all of this evidence, counsel still failed to present an effective cogent defense in the sentencing phase. They failed to object while the State elicited inadmissible and extremely prejudicial evidence and counsel elicited or opened the door to harmful evidence that otherwise would not have been before the jury. Counsel failed to pursue a potentially persuasive argument - the mitigating factor of provocation. At closing argument counsel used his opportunity to speak to the jury, not to plead for Mr. Terry's life, but to call him a "murderer, rapist, and invader of homes;" Tr. 2099. Counsel failed to argue to the jury that Mr. Terry's organic explosive disorder caused him to react to the victims attempt to restrain him from leaving with rage thereby establishing the mitigating factor of provocation. Tr. 2093

IV. GROUNDS FOR RELIEF

A. Mr. Terry Was Deprived of the Effective Assistance of Counsel at the Guilt/Innocence Phase of His Trial in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina Law

Each of the specific grounds for relief addressed herein involves a claim of ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. Thus, prior to addressing the specific grounds for relief, Mr. Terry will first address the general legal principles that apply to the claims.

The United States Supreme Court has repeatedly emphasized the fundamental role of counsel in ensuring a defendant a fair trial. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Counsel, the Court has stated, is the means through which all other

rights of the person on trial are secured. *United States v. Cronin*, 466 U.S. 648, 653 (1984); *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a “guide through complex legal technicalities”). Thus, the Court has held that the right to counsel necessarily encompasses “the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). This core component of our adversary system is meaningless, however, if counsel performs incompetently. If counsel fails to provide adequate representation, no assurance exists that the adversarial process has produced a just result. *Strickland v. Washington*, 466 U.S. 668 (1984).

A claim of ineffective assistance of counsel must be examined under the standard established in *Strickland*, 466 U.S. at 668. The *Strickland* standard is satisfied if Mr. Terry establishes both that his attorney's representation “fell below an objective standard of reasonableness,” 466 U.S. at 688, and that he was “prejudiced” by his attorney's substandard performance, *id.* at 692. *See also Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998).

In assessing whether counsel's conduct was reasonable under the *Strickland* standard, “a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance” and “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689.

A finding of prejudice under *Strickland* requires that an applicant “must show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. *Strickland* defined “reasonable probability” as a “probability sufficient to undermine confidence in the outcome” of the proceeding. *Id.* at 692. This test is not, however, an outcome determinative inquiry. In

other words, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome,” *id.* at 694. Thus, “a defendant need *not* show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693 (emphasis added). In other words, as the Court reiterated in *Kyles v. Whitley*, 514 U.S. 419 (1995),¹ the “touchstone” of the prejudice test in ineffective assistance of counsel claims is “a ‘reasonable probability’ of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict . . . , but whether . . . he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 434.

Likewise, the prejudice test of *Strickland* “is not a sufficiency of evidence test.” *Kyles*, 514 U.S. at 434. Thus, in this context, the question is not whether if counsel had performed adequately the jury would have found reasonable doubt or imposed a life sentence. The appropriate question is whether counsel’s conduct so undermined the proper functioning of the adversarial process that this Court cannot be confident that the outcome of the trial would have been the same.

_____1. Mr. Terry’s counsel provided ineffective assistance of counsel during opening argument.

a. Relevant Facts

Following his arrest, Mr. Terry made two oral statements to Lieutenant Scottie

Frier. The first statement was summarized as follows:

¹In *Kyles*, the Court reviewed a claim that the state did not disclose evidence favorable to the defense in violation of the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), and refined in *United States v. Bagley*, 473 U.S. 667 (1985). In *Bagley*, the Court adopted the standard of *Strickland* for determining “materiality.” Thus, the Court’s discussion in *Kyles* is equally applicable to the analysis of prejudice in resolving claims of ineffectiveness of counsel under *Strickland*.

I have been inside Ms. Jackson's home before to visit with her son. I have never been over there inside the house alone with Ms. Jackson. Diane and I were not living on Buckeye Drive when Ms. Jackson was killed. We were living in Ballentine. Me and Diane were back over on Buckeye drive the weekend she was killed. We had gone to the brother's house. I was not over there by myself that weekend.

Tr. 1813.

The second statement, taken approximately two months later was reduced to the following written statement:

At the time this happened, I was living at the lake with Diane Gibson. While I was coming back from Tennessee, I went over to Ms. Jackson's house on Buckeye Drive. I used to live across the street.

When I got over there, it was between midnight and the sun was coming up. It was either Friday or Saturday morning. I knocked on the front door first. I didn't get an answer. I went to the back door and I knocked on it. I didn't get an answer. I knocked on the window by John's room. I still didn't get an answer. I got into the house at the backdoor. I don't remember if I had to move a chain or a lock. I had to push the door open kind of hard. I went inside and called her. She answered me on about the third time. She was in her bedroom. I went in her bedroom after she got me a glass of ice water. We were just talking. We went to bed. I had sex with her. I got ready to leave. We started having words about me leaving. She wanted me to stay. The argument got pretty heated. I went to go out of the room and she grabbed me by the hair. I turned around and swung to get her off of me. I think I hit her and she went down to her knees.

I, again, tried to walk out of the room. I got almost to the end of the hallway. She grabbed me from behind again. I then lost my temper. I swung back at her again. I then got something into my hand. It was just there in the hall. She could have brought it with her. I started hitting her with it. I lost my temper and I hit her several times. I have a bad temper.

I then remembered leaving out the of the same back door. I could have dusted a pane of glass on the door when I busted the door open. I don't remember pulling the phone lines. I don't remember what I did with the object I used to hit Ms. Jackson. I can't remember what it was. I remember that I could hold it in one hand and it wasn't as big as a baseball bat.

Tr. 1816.

Prior to trial, the defense moved to suppress the statement on the grounds that it was involuntary. The court held a hearing and found that the statement was admissible. When the trial commenced, the State opened first. Solicitor Humphries did not mention the statement. When the defense opened, counsel Stone argued in pertinent part,

Ladies and Gentlemen, Gary Terry over here told the police he did it. He told the police that he had sexual intercourse with Urai Jackson. He told the police that he killed her, okay. It's called a confession and he made one. He told the police he did it. So what in the world are we doing here? Why are we even having one of these guilt phases?

Tr. 1281.

I would submit to you ladies and gentlemen, by time you end up listening to everything that you will hear in this case whether that last twenty-four or forty-eight or seventy-two hours [sic], I will submit to you, ladies and gentlemen, that you will know two things.

One is that Gary Terry told the police he did it. Also, you will know that Gary Terry tried to tell the police he committed another murder. Another murder that he's not charged with and he never will be prosecuted for.

I would submit to you, ladies and gentlemen, that for whatever reason, if you ask Gary right, he will admit to just about anything. They have a confession. They have that statement. Parts of which they don't even believe. They're going to ask you to believe it. You may understand by the end of this case that Gary is different. That he is somebody who will confess to a crime that he didn't commit. But because somebody is different, ladies and gentlemen, doesn't make him guilty.

Tr. 1283-1284. The balance of counsel's argument was primarily spent discussing reasonable doubt.

Just before the State called Mr. Frier, the police officer who took the statement, Solicitor Humphries moved for a ruling *in limine* that the defense could not elicit the statement from the witness. Tr. 1373. The State argued that it did not intend to bring the statement in, and if the defense tried to do so, it would constitute inadmissible hearsay. The court granted the State's motion. Tr. 1388.

The defense was thus precluded from offering any testimony regarding the statement. Although the defense made oblique reference to the fact that his was a false confession, they did not consult with, retain, or present the testimony of an expert in false confession. They offered no testimony regarding the confession to a second crime they had referred to in opening.

At the PCR hearing, counsel confirmed that they had simply "assumed" that the State would introduce the statement at trial. PCR 40, 188. Both counsel agreed that if they had known of the State's plans, they would not have referenced the statement. PCR 41, 188. Counsel Stone testified that referring to the statement in his opening argument was "something he slipped on." PCR 84. He also admitted that his decision to do so prejudiced Mr. Terry, at least to some extent. *Id.* Counsel Fullwood considered the decision to refer to the statement as "regrettable," PCR 218, but could not specifically recall if she had discussed it with counsel. PCR 187. Informing the jury that Defendant "confessed" gave the jury the distinct impression that he confessed to murder, burglary and rape which was not the case at all.

- b. Counsel erred when he made reference to Mr. Terry's admissions based on nothing more than an assumption that the State would introduce the statement.

- 1. Deficient Performance

The Supreme Court has held that in order for a strategy to be reasonable it must be supported by reasonable investigation. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). An obvious corollary is that a reasonable strategy must be supported by more than a baseless assumption. “[A]ny decision to forgo a defense on the basis of unreasonable assumptions is not a reasonable decision or a strategic or tactical decision entitled to deference.” *Rios v. Rocha*, 299 F.3d 796, 806 (9th Cir. 2002). There were numerous reasons available to counsel that would point to some likelihood that the State would not introduce the statement. In this case, the statement is, by counsel’s own admission, exculpatory of burglary and criminal sexual conduct, as well as murder with malice aforethought. PCR. 39, 49, 50, 191. Under these circumstances, it would be reasonable for counsel to consider the distinct possibility that the State might choose to proceed without the statement.

The fact that the State participated in the suppression hearing should not have been the sole basis for counsel’s poor assumption. The trial judge himself said, “ I think that, you know, the fact that we have *Denno* hearings and things like this, I’ve held them numerous times when the statements did not come in and the reason they are held is in the event a statement is going to come in.” Tr. 1388. If the judge knew that statements were often found voluntary and then not admitted, appropriately experienced capital trial counsel should have known this as well.

Compounding counsel’s deficiency in this matter is the fact that the State opened first and said nothing about the fact that Mr. Terry had confessed. This fact ought to have confirmed what should have been counsel’s nagging doubts about the State’s intentions to introduce the statement. Counsel offered no strategy for making such an enormous

decision based on an assumption. In fact, counsel Fullwood, the more experienced of the two lawyers, does not even remember discussing it with counsel Stone. PCR 187.

2. Prejudice

As a result of counsel's assumption, the jury was exposed to evidence that the defense was ultimately unable to deny or explain. They were told the defendant confessed. They were told this was a false confession, then heard no evidence to support this claim. They were told that, in fact, Mr. Terry confessed to another crime. Counsel suggested, half-heartedly, that these confessions were false, but the jury heard nothing further about that.

The trial judge himself commented on the tendency of juries to be bothered by the mention of evidence they are supposed to hear, and then do not. Although the judge made this statement with regard to another piece of evidence he said, "[O]nce I allow it to come in finally – if I don't, the jury is going to – there are two things and it happens in almost every case, you know, where is the report that was talked about and so forth that didn't come into evidence...[.] Tr. 1327. Had counsel thought more carefully about the likelihood that the State would introduce the statement and more seriously considered the ramifications of mentioning it in opening argument in the event the State did not offer it, there is a reasonable probability that Mr. Terry would have been found not guilty and/or would not have been sentenced to death.

c. Counsel erred when he referred to Mr. Terry's statement as a "confession"

1. Deficient Performance

Mr. Terry's statement indicated that he entered Ms. Jackson's house and called for her, that she got him a glass of water and they had sex. Tr. 1815-16. This portion of the statement is not a confession to burglary or criminal sexual conduct. It is utterly exculpatory of these two charges. It indicates that Mr. Terry did not have felonious intent when he entered Ms. Jackson's house, that he did not employ force to have sex with her, and that in fact she consented. He then said, after an argument, Ms. Jackson attempted to physically restrain him from leaving, he flew into a rage, and beat her with an object he found at the home. This portion of the statement is an admission to voluntary manslaughter. It is not an admission of murder. Yet in his opening, counsel opted to tell the jury twice that, Mr. Terry had said, "he did it," and that he had "confessed." Tr. 1281. At the PCR hearing, counsel offered no strategy for characterizing the statements that way.

Counsel's remarks amount to an unreasonable concession of guilt. This concession cannot possibly be said to be supported by a reasonable strategy, because the strategy would have had to involve turning exculpatory statements into inculpatory ones.

2. Prejudice

From defense counsel's own mouth, the jury was provided inaccurate and extremely prejudicial information. The impact of confessions on jurors is well established. It is among the most, if not *the* most, powerful evidence that can be adduced against a criminal defendant. According to the United States Supreme Court, confessions are "probably the most probative and damaging evidence that can be admitted." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), *citing*, *Bruton v. United States*, 391 U.S. 123, 139-140 (1968) (White, J., dissenting); *see also*, Kassir, Saul M. and Katherine Neuman,

On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis, 21 J. L. and Human Beh. 464 (1997) (confession evidence is most potent to jurors). In this case, the evidence is even more prejudicial because it came from the defense, whom the jury would intuitively expect to avoid, deny, or explain the confession unless they absolutely could not do so. There is a reasonable probability that had counsel not chosen to characterize Mr. Terry's statement as a confession that the jury would have found reasonable doubt.

c. Counsel erred by choosing to reference Mr. Terry's statement in opening argument at all.

_____ 1. Deficient Performance

Mr. Stone contends he had several reasons for mentioning Mr. Terry's admissions in his opening statement. First, he wanted to be "the first one to say it." PCR 41. Second, he wanted to "buy credibility with the jury." *Id.* Finally, he wanted to dovetail this statement with Mr. Terry's confession in another matter, which had been determined to be false. *Id.* An examination of counsel's preparation for and subsequent presentation of the case reveals, however, that Mr. Stone's stated reasons simply do not support the choices that he made

First, if Mr. Stone was indeed attempting to gain a leg up by being the first to mention the admissions, to "pull the sting" as it were, he would have used the opportunity to explain that Mr. Terry's statements were in fact not confessions to the crimes charged. Mr. Terry's statement constitutes an admission only to manslaughter, and absolves him of criminal sexual conduct and burglary. If Mr. Stone truly wanted to be the first one to mention the statement, there would have been no reason not to repeat exactly what the statement was. Instead, he erroneously referred to the statement as a

“confession,” thereby actually augmenting the actual evidence against Mr. Terry, rather than minimizing it. *Nance v. Ozmint*, 367 S.C. 547, 558, 626 S.E.2d 878, 883 (2006) (finding counsel ineffective where his opening and closing statements helped “reinforce” the prosecution’s case).

Second, Mr. Stone’s statement that he was attempting to “buy credibility” with the jury defies credulity when considering the subsequent defense. After erroneously informing the jury that Mr. Terry had confessed, counsel followed a theory of “trying to punch holes” in the State’s case by attempting to negate fingerprint and DNA evidence indicating that Mr. Terry was present at the scene. It is nonsensical to attempt to curry credibility with the jury by at once saying that Mr. Terry has confessed to the crime, and then to challenge the State’s evidence putting him at the scene.

Finally, Mr. Stone’s claim that he wanted to imply that the confession was false is totally undermined by counsel’s decision not to introduce any evidence that this particular statement was false. He introduced, and indeed had obtained and prepared, no testimony regarding false confessions.² The jury was likely unaware that this phenomenon occurred and was unlikely to believe it without expert testimony. *See, United States v. Belyea*, 2005 U.S. App. LEXIS 28835 at *10-11 (4th Cir. December 28, 2005) (“Jurors may not know, however, that people lie on occasion to their own detriment by falsely confessing to crimes that they did not commit. The phenomenon of false confessions is counter-intuitive.”); *State v. Miller*, 1997 Wash. App. LEXIS 960 at *20 (Wash. App. June 17, 1997) (“Common understanding conforms to the notion that a

²Moreover, counsel’s plan shows very little understanding of why false confessions occur. The circumstances of Mr. Terry’s case, nor his particular type of brain impairment make him particularly likely to render a false confession. Giving a false confession as a part of an ill conceived ruse does not mean one is more likely to give such confessions.

person ordinarily does not make untruthful inculpatory statements." *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995) (citing Fed. R. Evid. 804(b)(3) (statement against interest) would not have been within the common understanding of the jurors, and thus would have been helpful.").

Counsel's attempt to bolster his one unsupported assertion of false confession by alluding to another incident in which Mr. Terry had allegedly falsely confessed was totally ineffective. Counsel should have known that the State would not be able to use the second, allegedly false, statement during the guilt phase and that they would not be able to introduce it either. Thus, it was predetermined from counsel's "strategy" that the jury would be told that "Gary Terry tried to tell the police he committed another murder. Another murder that he's not charged with and he never will be prosecuted for" without *any* further explanation.

Errors of this magnitude are often borne of inexperience, and this one is no different. At the time Mr. Stone was appointed to represent Mr. Terry, he had been an Assistant Solicitor handling primarily drug cases for four years, PCR 69, and had been in private practice in which he handled both civil and criminal matters for three years. PCR 35. He had never tried a murder case. PCR 71. To his recollection he had conducted one jury trial as a defense attorney in a criminal matter. PCR 36. Co-Counsel, the more experienced member of the defense team does not remember if she discussed the decision to include Mr. Terry's admissions in the opening statement with him. PCR 187. According to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (1989) in effect at the time, co-counsel should have at least three years of experience in criminal defense; no fewer than three jury trials of serious

and complex cases which were tried to completion, at least two of which trials in which the charge was murder or aggravated murder, or alternatively, of the three jury trials at least one was a murder or aggravated murder trial and one was a felony jury trial. ABA Guidelines Section 3.1. Mr. Stone fell woefully short of what should be the baseline of experience.

2. Prejudice

Mr. Stone's choice to alert the jury to the fact that Mr. Terry had confessed to not one, but two murders, with no reasonable or workable plan in place to contextualize the confessions as false, unnecessarily left the jury with powerful, uncontradicted, unexplained evidence of Mr. Terry's guilt. As discussed supra, Ground A.1, evidence of confessions is uniquely prejudicial to jurors. There is a reasonable probability that had counsel not made this unreasonable decision, the jury would have found reasonable doubt.

2. Counsel Erred When They Failed to Object to Prosecutorial Misconduct on the basis of the Due Process Clause to the Fourteenth Amendment

a. Relevant Facts

Mr. Terry gave a statement to police indicating that on the night of the crime, he had consensual sex with the victim. When she attempted to physically restrain her from leaving, he flew into a rage and beat her with an object he found at the scene. Prior to trial, Mr. Terry's counsel moved to exclude the statement on the grounds that it was not voluntary. The trial court held a hearing to determine whether the statement was voluntary. The court found that it was, and that the statement was admissible. The

prosecution was aware the entire time that it had no intention of introducing the statement into evidence, but hid this fact from the court and the defense. Following the court's ruling, defense counsel assumed that the State would introduce the statement. In attempt to limit the damage from the statement, counsel told the jury in his opening statement that Mr. Terry had confessed. It was not until the State was about to call the witness who took the statement did it make its intentions known. It did so by asking the court to preclude the defense from eliciting the statement on the grounds of hearsay. Tr. 1373. Counsel attempted unsuccessfully to introduce the statement themselves. As a result, of the defense's having mentioned the statement in opening, but never being permitted to introduce it, the jury was told that Mr. Terry confessed, but never heard the text of the confession, never heard why defense counsel mentioned it but it was never presented, never heard another thing about it.

At the PCR hearing, Solicitor Humphries and Chase claim they were "surprised" that counsel mentioned the statement, yet they sat silent prior to and during trial about their firmly established plan not to introduce the statement. PCR 108-9, 289.

b. Deficient Performance

Counsel was clearly caught off guard when the State announced its intention not to introduce Mr. Terry's statement and prevent Mr. Terry from introducing it himself. They acknowledged as much to the judge. Tr. 1377. They were sent scrambling for a response to the State's hearsay argument, to which they responded and unsuccessfully appealed. Counsel failed, however, to raise to the judge the fundamental unfairness of the Solicitors' conduct. Counsel had opened the door to this statement in opening argument. They knew that if this statement did not come in, the jury would be left with

unexplained evidence of the most prejudicial nature. They had an obligation to attempt every possible objection to the State's little trick.

2. Prejudice

There is at least a reasonable probability that the court would have granted counsel's objection had they made it. The Supreme Court of the United States has repeatedly stressed the "special role played by the American prosecutor in the search for truth." *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The oft repeated maxim of the professional expectations for prosecutors is "[T]he role of the prosecutor is not merely to pursue convictions but to pursue justice... [prosecutors may] prosecute with earnestness and vigor... may strike hard blows.. [but] is not at liberty to strike foul ones. *United States v. Berger*, quoted in, *State v. Dawkins*, 297 S.C. 386, 388, 377 S.E.2d 298, 299 (1989).

These expectations are mirrored in the ABA Model Code of Professional Conduct and in the South Carolina Code of Professional Conduct. Comment 1 to Rule 3:8 of the South Carolina Rules states that "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

Clearly, courts expect more from prosecutors than dirty pool. In his dissent from the South Carolina Supreme Court's denial of relief on direct appeal, Judge Finney believed the prosecution's conduct amounted to unfair "sandbagging." He noted that the South Carolina Supreme Court frowned upon such tactics when undertaken by defense counsel and the need to fashion rules to prevent it. *State v. Terry*, 339 S.C. at 362, 529 S.E.2d at 280, quoting, *State v. Torrence*, 305 SC 45, 406 S.E.2d 315 (1991) (Toal, A.,

concurring). *See also, Wainwright v. Sykes*, 433 U.S. 72, 89 (1971) (certain procedural rules intended to discourage defensive sandbagging)

The court in *Ramchair v. Conway*, 2005 U.S. Dist. LEXIS 25852, confronted a somewhat similar scenario. At Ramchair's first two trials, the State had called a police officer to testify that a lawyer was present at Ramchair's lineup. The witness, however, claimed not to remember who it was. At Ramchair's third trial, however, the State called the same witness, but the witness now remember who the lawyer was: Ramchair's current lawyer. The witness went on to say that the lawyer must have considered the lineup fair, because he did not object at the time. Ramchair's lawyer was obviously unable to counter these assertions. The court found that the State's conduct was unfair and prejudicial. *37. Moreover, the court found that as a result of the State's conduct in the first two trials, counsel had "no reason to suspect" the testimony was coming.

The Second Circuit also objected to prosecutorial game playing in *United States v. Malpiedi*, 62 F.3d 465 (2nd Cir. 1995). In that case the court found that the petitioner's counsel suffered from a fatal conflict of interest. In reversing, the court noted the state's partial responsibility for the reversal because they were aware of the conflict prior to trial and said nothing in order to maintain a tactical advantage.

In this case, one can almost see the grins of "gotcha" spreading over the faces of the Solicitors when counsel gave up the statement in opening. Moreover, it is clear that the State had intended to ambush the defense when they called the witness who was competent to introduce the statement. Their argument to prevent the defense from eliciting the statement was carefully pre-prepared. Tr. 1373.

The Supreme Court has made clear the system is not supposed to work this way. "The adversary system is hardly an end in itself; it is not a poker game in which players enjoy an absolute right to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970). Due Process and fundamental fairness require more. Plain and simple, Mr. Terry "got sandbagged and that ain't cricket." *United States v. Gilberton* 2005 U.S. Dist. Lexis 4254 at *19.

The prejudice emanating from the Solicitor's flagrant and unseemly misconduct is paramount. The United States Supreme Court requires that counsel make strategic decisions based on informed choices. *Wiggins*, 539 U.S. at 521, *Strickland*, 466 U.S. at 687. Informed decisions are to be made from counsel's knowledge of the law, investigation, and discovery. *Strickland*, 466 U.S. at 687 (law and investigation), *Williams*, 399 U.S. at 82 (discovery). Federal rules of criminal discovery, after which the South Carolina rules are modeled were created "in the view that broad discovery contributes to the fair and efficient administration of criminal justice ... by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Fed. R. Crim. P. 16(advisory committee's note (1974 Amendment); *United States v. Fort*, 472 F.3d 1106, 1123 (9th Cir. 2007). Thus, the primary problem with the Solicitor's decision to hide the ball is that the defense is deprived of the ability to make an informed decision regarding defense strategy, something required of them by the United States Supreme Court. *See People v. Gonzales*, 135 P.3d 649, 667 (Cal. 2006) (counsel cannot make an informed decision regarding mitigation strategy without notice of rebuttal witnesses). *See also, Ledesma v. Virgin Islands*, 159 F.Supp.2d 863, 872 (D.C. Crim. App. 2001) (Moore, J., concurring in

the result) (allowing prosecutor to sandbag defense by admitting expert testimony as rebuttal evidence amounted to “trial by ambush”).

Had counsel been aware that the statement was not coming in, they clearly would not have poisoned the jury’s mind with damaging information that the defendant subsequently had no opportunity to deny or explain. (See discussion, Ground A(1), *supra*). People are not meant to be convicted and sentenced to death because the State simply outfoxed the defense, particularly in a capital case *Woodson v. North Carolina*, 428 U.S. 815, 856 (1988) (capital cases call for heightened standards of reliability); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988 (death is different).

3. Mr. Terry’s Counsel Provided Ineffective Assistance of Counsel When They Unreasonably Failed to Investigate Defenses

a. Relevant Facts

Defense counsel was faced with the following evidence. Mr. Terry made a statement indicating that he entered Ms. Jackson’s house when he could not rouse her and that they had consensual sex. She then attempted to physically restrain him from leaving and he flew into a rage and killed her with an object he found at the scene. Mr. Terry said that he could not remember pulling the phone wires out. Mr. Terry’s fingerprint was found on Ms. Jackson’s exterior telephone box. Mr. Terry’s DNA was found in Ms. Jackson’s vagina. Mr. Terry’s estranged wife had told them that Mr. Terry borrowed a telephone crimping tool to fix Ms. Jackson’s phone just weeks before the trial. Based on their investigation, counsel was also aware that Mr. Terry suffered from brain damage which would make him react explosively to stressful situations.

Given this evidence, counsel had two basic choices. One, they could prepare a defense in accordance with the statement, a manslaughter approach. This approach would allow them to

- *concede that Mr. Terry broke the glass to get into the house, but argue that he had no felonious intent.

- *demonstrate that Mr. Terry's DNA got in Ms. Jackson's body with consent;

- *argue that Mr. Terry's fingerprint got on the phone box when he went there to fix the phone;

- *argue for manslaughter instead of murder;

- *capitalize on the fact that a pool cue was missing from the scene, corroborating Mr. Terry's story indicating that Mr. Terry did not bring a weapon with him;

- *dovetail into a sentencing phase during which Mr. Terry's brain damage would explain his explosive rage;

- *avoid having to argue that Mr. Terry did not do the crime, and then having to ask for mercy at sentencing.

The potential downside of this strategy was that it would require Mr. Terry to testify in the event that the statement was not going to come in.

The other option they had was to pursue alibi or otherwise attempt to suggest that Mr. Terry was not there. Once their alibi investigation was fruitless, counsel's other option was a reasonable doubt defense, which would require counsel to:

- *argue that Mr. Terry's confession was false;

- *argue that DNA science is unreliable and/or the experienced SLED examiner got it wrong;

- *argue that fingerprint identification is unreliable and/or the experienced SLED fingerprint examiner got it wrong;

- *argue that a print on a beer can in the sink did not match Mr. Terry's or Ms. Jackson's;

*argue that there was some physical evidence from the scene that was not tested.

The potential downsides to this argument were more numerous:

*that the jury would resist disbelieving scientific evidence and dismiss fingerprint and DNA evidence;

*that the jury would resist the notion that false confessions occur;

*that expert witnesses would be required to rebut fingerprint and DNA evidence, and to explain the phenomenon of false confessions.

*that counsel would have to implicitly suggest that Mr. Terry did not commit the crime and then turn around and ask for mercy in sentencing.

Although counsel recognized that the statement offered them evidence of manslaughter, and negated the other charges, 39, 50, 95, 191, they chose the reasonable doubt option and presented their case via eighty six pages of cross examination. They did not present they testimony of any expert witnesses.

a. Deficient Performance

Counsel unreasonably failed to consider the manslaughter option before they settled on a reasonable doubt defense which they would try to achieve by “punching holes” in the State’s case through cross-examination alone. PCR 205.

When counsel was asked at the PCR hearing to provide their reasons for pursuing the reasonable doubt defense, an interesting paradox emerged: the reasons they offer support the manslaughter option rather than the defense they actually chose³. For example, counsel explained the following consideration in selecting the defense:

³Notably, one of counsel’s assertions of why he chose not to pursue manslaughter was based on an incorrect recollection of the facts. Mr. Stone stated that he could not see pursuing manslaughter because Mr. Terry had brought a weapon to the scene. That was, in fact, not the case. PCR 95.

The hard part about trying a case like this is — is that you go to the jury on the — on the guilt phase and you say, ‘He didn’t do it. He didn’t do it. He didn’t do it.’ And then the jury comes back and says, ‘Yes, he did it,’ and then you have to go back and try to say, ‘Okay. Well he did it, but don’t kill him.’ You lose credibility and it’s very difficult to do.

PCR 82. “The issue became: how do we buy credibility in the first part of this case and then move it to the sentencing?” PCR 38. “We had always to be mindful of the need to stay credible to the jurors when we reached the second phase of trial.” PCR 207. This is a laudable goal, but not one that is furthered by counsel’s chosen route. It was the *manslaughter* option that would have allowed counsel to avoid arguing that Mr. Terry “didn’t do it,” and thereby maintain credibility with the jury. Suggesting that the confession is false and the fingerprint is bad and the DNA is wrong, as the reasonable doubt approach required, is tantamount to saying, “they’ve got the wrong guy.” “First phase defenses that seek to reduce the client’s culpability for the crime (e.g. by negating intent,) rather than to deny the involvement altogether, are more likely to be consistent with mitigating evidence such as mental illness...[.]” Commentary to the ABA Guidelines on The Defense Case Concerning Penalty 10.11 (2003)

The possible downside of option one was that the client might have to testify. Yet this cannot be considered the reason counsel abandoned option one as they “assumed” the State was going to introduce the statement anyway. PCR 40. Had counsel carefully considered their options, they would have prepared the Mr. Terry to testify, given the relative strengths of the manslaughter option, and Ms. Fullwood’s own acknowledgment that a lawyer “has to have some flexibility when litigating.” PCR 208.

Mr. Stone’s objection to having Mr. Terry testify because he would not appear brain damaged, PCR 86, is unavailing, because the experts who testified at sentencing

could have easily explained that people with Mr. Terry's kind of impairments do not always appear impaired to the lay person.

In order for a defense attorney to resist being deemed ineffective on the grounds that his decision was strategic, the strategy must have been a reasonable choice among options. In this case it was not. Counsel picked a theory of defense, reasonable doubt, which was less likely than the other clear option to achieve their primary stated objective of maintaining credibility with the jury at the sentencing phase. *See Benjamin v. Morton*, 100 F.3d 1089, 1095 (3d Cir. 1996). In other words, counsel offer a sound strategy in their post conviction testimony, but their conduct of the trial reveals it was not the one they actually followed, making their assertions more of a "post hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to [trial]." *Wiggins v. Smith*, 539 U.S. 510, 526 (1993).

3. Prejudice

As a result of counsel's failure to carefully consider the option of a defense which would embrace Mr. Terry's statement, Mr. Terry's lawyers put on a defense that was almost by definition unwinnable. The jury was asked to disregard fingerprint evidence, DNA evidence, and find Mr. Terry's confession to be false, based on no evidence. Had they more carefully considered their options, they could have presented the jury with a defense that exonerated Mr. Terry of the most serious charge and both of the aggravating circumstances used against him, and explained away the State's most damaging evidence. Because they did not, the jury rendered a verdict that is not worthy of confidence.

4. **Counsel provided ineffective assistance of counsel when they failed to object to the court's violation of *Morgan v. Illinois*, 504 U.S. 719 (1992)**

a. Relevant Facts

During *voir dire* at Mr. Terry's trial, counsel for Mr. Terry questioned Venireperson Georgia Miller. In response to one of counsel's questions, Ms. Miller said, "If he was – if he intentionally murdered somebody and knew that he did it and he knew it was wrong, I don't want to give him death, *but that's what would happen*. But I can't say now because I don't know."

TR. 374 (emphasis added).

Counsel for the State went to great pains in an attempt to rehabilitate this juror, questioning her for seven pages as opposed to their average 3.1 pages for women.

Mr. Terry's counsel did not move to strike the juror for cause.

b. Deficient Performance

A criminal defendant is entitled to be tried by an impartial jury under the Sixth Amendment, *Duncan v. Louisiana*, 391 U.S. 145 (1968) and the Fourteenth Amendment, *Turner v. Louisiana*, 379 U.S. 466 (1965). The jury selection process is intended to ensure that no biased jurors are seated. *Morgan v. Illinois*, 504 U.S. 719, 740 (1992). If a juror indicates that she will, under no circumstances, sentence the defendant to life if he is convicted, she is essentially saying she will not consider mitigating evidence as she is required to by law, and she will not follow the court's instructions. *Morgan*, 504 U.S. at 740 (1992).

Ms. Miller's statement that "that's what would happen," indicates that by choice or misunderstanding that she would automatically vote for death if the State proved that

Mr. Terry “murdered somebody and knew that he did it and he knew it was wrong.” Tr. 374. Inexplicably, counsel attempted to rehabilitate this juror by eliciting more equivocal acknowledgments from her, but these do not repair her express statement of bias. *See State v. Bennett*, 328 S.C. 251, 257, 493 S.E.2d 845 (1997), *cert. denied*, *Bennett v. South Carolina*, 127 S.Ct. 681 (2006) (earlier generalized responses about being fair and impartial did not cure later statements).

There was no reasonable strategy for failing to move to strike this juror. Counsel claimed at the PCR hearing that “Ms. Miller actually seemed to be soft on the death penalty.” PCR 216. This assertion is not, however, supported by the record. Ms. Miller answers with “yes” or “okay” to almost every question. At one point she indicates she would have to “listen” to all of evidence, Tr. 376, yet nowhere does she indicate that she would be particularly hesitant to impose death.

No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state. Any strategy that would place someone with such a predisposition on the jury is wholly unreasonable.

Anderson v. State, 196 S.W.3d 28, 41 (Mo. 2006), *cert. denied*, *Anderson v. Missouri*, 537 U.S. 898 (2002).

c. Prejudice

There can be no reasonable strategy for acquiescing in the seating of a biased juror. *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004) (“the decision whether to seat a biased juror cannot be a discretionary or strategic decision because it amounts to a waiver of a defendant’s basic Sixth Amendment right to trial by an impartial jury.”). Counsel’s failure to move to strike Ms. Miller resulted in Mr. Terry’s being sentenced to death in

violation of Sixth Amendment right to be tried and sentenced by an impartial jury. A trial by a biased fact finder is structural error. Prejudice is presumed. *Arizona v. Fulmanante*, 499 U.S. 279, 290 (1991).

5 Mr. Terry's Counsel Provided Ineffective Assistance When They Failed to Object to Solicitor's Peremptory Strikes based on *J.E.B. v. Alabama*, 511 U.S. 127 (1994)

a. Relevant Facts

During jury selection at Mr. Terry's trial, the State used all of its five peremptory strikes to challenge women. In addition, the State challenged one alternate, also a woman. Despite the clear pattern of strikes, counsel did not object.

At the post-conviction evidentiary hearing, Solicitor Humphries and Solicitor Chase were presented with their notes from jury selection and asked to provide race neutral reasons for these strikes. Their proffered reasons are as follows:

Venireperson Clifton was allegedly struck because:

- she may have had a son in pre-trial intervention, PCR 123;
- She appeared to equivocate on the death penalty because she said, "I think I could. That's a hard thing. I feel like I could. Depends on the facts and circumstances, PCR 283;
- she may have been "influenced" by DNA or mental health testimony" PCR 130.

Venireperson Moore was struck because

- she smiled at the defense attorney and appeared to have a "rapport" with her;
- her ability to impose death was substantially impaired;
- she may have been sympathetic to mental health evidence;
- she worked in a cardiac unit, and was thus interested in keeping people alive as opposed to helping to kill them;

PCR 133, 283.

Venireperson Kirkpatrick was allegedly struck because:

- she said “I think so. I’m not sure.” regarding her ability to impose death;
- she would not automatically give the death penalty where there was a rape;

Juror Kyzer was allegedly struck because:

- she had pending animal cruelty charges against her;

PCR 134, 286.

Venireperson Leaphart was allegedly struck because:

- she had to be brought to the courthouse and she was late;
- she was confused about the proceedings;
- she had a prior conviction for assault and battery;
- she said she would consider all the evidence before imposing death.

PCR 184, 287.

At PCR proceedings, counsel claimed that they did not object to the State’s pattern of strikes because they “liked” the jury as empaneled, and thought it was the best 12 they could get.” PCR 44, 211.

b. Deficient Performance

Counsel claims that their decision not to object to the State’s pattern of strikes was based on a reasonable trial strategy. They are incorrect. First, their purported strategy, that they “liked” the jury too much to object to it reflects a misunderstanding of *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny. *Batson* is intended to protect not only the rights of the defendant, but the rights of the venirepersons not to be denied their opportunity to serve as jurors based on an invidious characteristic. *J.E.B. v. Alabama*, 511 U.S. 127 (1994). As the United States Supreme Court has made clear,

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law -- that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. *Powers v. Ohio*, 499 U.S. at 407 ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process").

Id. at 145-146 (1994) The community as a whole is also harmed when juries are empaneled in a discriminatory fashion, because the public's confidence in the fairness of the justice system is damaged. *Id.* at 142 n. 13

Second, their purported strategy is not supported by the record. At least three of the jurors that were removed by the State were allegedly removed because they were "soft on death" -- just the kind of jurors the defense should want on the jury. The court should not accept this *post hoc* explanation for counsel's failure.

c. Prejudice

It is not clear what standard of prejudice is required to demonstrate that counsel has been constitutionally ineffective by failing to make appropriate objections based on *Batson*, 476 U.S. 79 and *J.E.B.*, 511 U.S. 127. One court found that prejudice was to be presumed. *Ex Parte Yelder*, 575 So.2d 137, 139 (Ark. 1991). Others have held the applicant must show that the claim would have been successful on appeal. Gov't of *Virgin Islands v. Forte*, 865 F.2d 59 (3rd Cir. 1989); *State v. Robertson*, 630 N.E.2d 422 (Ohio App. 1992). Mr. Terry prevails under either standard.

Litigants, potential jurors, the community, and the constitution are offended when jurors are selected based on stereotypes and invidious characteristics such as race, *Batson*, and gender, *J.E.B.*. The United States Supreme Court has repeatedly articulated

the three-part test for demonstrating an Equal Protection violation resulting from discrimination in jury selection.

□ The defendant must make out a *prima facie* case of discriminatory jury selection by showing that the totality of the circumstances raises an inference of discriminatory purpose.

Johnson v. California, 545 U.S. 162, 168 (2005), citing *Batson*, 476 U.S. at 94, 96).

Circumstances supporting a *prima facie* case can include, among other things, a pattern of strikes ... or the prosecutor's questions and statements during *voir dire*. *Batson*, 476 U.S. at 97. This burden is not meant to be "onerous." *Johnson*, 545 U.S. at 168.

If the defendant demonstrates a *prima facie* case of discrimination,

□ [t]he burden shifts to the prosecutor to provide a ... neutral explanation for challenging jurors 'within an arguably targeted class.' The prosecutor must give a 'clear and reasonably specific explanation of his reasons for exercising the challenge.

Miller-El v. Dretke, 545 U.S. 231, 239 (2005), quoting *Batson*, 476 U.S. at 97-98). This is an enormously easy burden for the State to shoulder, as the Supreme Court has held that the reasons offered need not be persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*). The reason given by the state need only be race neutral on its face. *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (O'Connor, J., concurring).

Finally,

□ the trial court must then determine if the defendant has established purposeful discrimination.

Miller-El, 545 U.S. at 241 (quoting *Batson*, 476 U.S. at 96-97). In other words, the court must decide if the reasons offered by the prosecutor were mere pretexts for

discrimination. *Purkett*, 514 U.S. at 768, because, as the Supreme Court recently noted, “some stated reasons are false.” *Miller-El*, 545 U.S. at 240. At this point in the inquiry, “implausible or fantastic justifications may (and probably will) be exposed.” *Miller-El v. Cockrell*, 537 U.S. 322, 329 (2004) (quoting *Purkett* 514 U.S. at 768).

The Supreme Court has directed lower courts investigating the presence of purposeful discrimination to consider, among other things, the prosecutor's demeanor, the reasonableness of his explanations, and whether the proffered rationale has some basis in accepted trial strategy. *Id.* at 339.

A criminal defendant may satisfy the first step of the *Batson* inquiry by pointing to a pattern of strikes and the prosecutor's conduct at trial. *Batson*, 476 U.S. at 97. In Mr. Terry's case, both factors raise an inference of discrimination.

First, the Solicitor exercised 100% of his peremptory challenges against women. This alone is enough to demonstrate a *prima facie* case. See, e.g., *Cleveland v. State*, 888 S.W.2d 629 (Ark. 1994) (prosecutor's use of 90% of his strikes against women constitutes *prima facie* case); *United States ex. rel. Pruitt v. Page*, 2002 U.S. Dist. LEXIS 26572 at *6 (prosecution's use of all strikes against women is *prima facie* case), *aff'd.*, *Pruett v. McAdory*, 337 F.3d 921 (7th Cir. 2003), *cert. denied*, 540 U.S. 1122 (2004).

Although the State did accept some women, this fact cannot be relied on to excuse the subsequent use of peremptory challenges exclusively against women. “The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.” *J.E.B.*, 511 U.S. at 142 n.13 *Holloway v. Horn*, 355 F.3d 707 (3rd Cir. 2004), *cert. denied*, *Beard v. Holloway*, 543 U.S. 976 (2004), *citing*, *Harrison v. Ryan*, 909 F.2d 84, 88 (3rd Cir. 1990) (holding that relief must

be granted under *Batson* “when even one black person is excluded for racially motivated reasons”); *see also United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir.1994), *cert. denied*, *Vasquez-Lopez*, 513 U.S. 891 (1994) (recognizing that “the Constitution forbids striking even a single prospective juror for a discriminatory purpose”); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir.1987) (“[W]e emphasize that under *Batson*, the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.”). In addition to the numbers, the conduct of the Solicitor’s conduct suggests a *prima facie* case. The State appeared to question female jurors more extensively. The State questions female jurors longer, an average of 3.1 pages to 2.3 for men. Thus, Mr. Terry could have shown a *prima facie* case at trial.

At the PCR hearing, the Solicitors offered race neutral reasons for their strikes, and thus the Solicitor’s counsel have carried their burden at step two.

Mr. Terry counsel have, nonetheless, demonstrated that these “reasons” were insufficient to overcome Petitioner’s *prima facie* case and were pretexts for discrimination. First, while certain jurors, such as Juror Kirkpatrick were struck for being “soft on death,” Tr. 233, her responses were similar to those of Jerry Jumper who also vacillated about death. For example, when asked if he could sign his name to the death verdict, he answered “if I felt it was sufficient enough, I would probably do that, yes.” Tr. 823. When Ms. Kirkpatrick was asked if having to sign her name to the death verdict would hinder her ability to enter a death sentence, she replied, “No, Sir.” Tr. 520. These discrepancies indicate that the reasons offered by the Solicitors for their strikes were, in fact, pretextual. *Miller-El*, 545 U.S. at 241 (“[i]f a prosecutor’s proffered reason for

striking a black panelist applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove discrimination to be considered at *Batson's* third step.”). Moreover, the record reflects distinctive differences in the State’s approaches to questioning male and female jurors. The Solicitor’s asked women about their religious affiliations. In fact, they asked ten of the twenty four qualified women about this, including four of the six they struck. They asked one man. Tr. 420-1. The Supreme Court has found this kind of evidence indicative of purposeful discrimination. The United States Supreme Court has found that questioning different categories of jurors with different types of questions is evidence of purposeful discrimination. *Miller-El*, 545 U.S. at 257 *et. seq.* (non-black jurors were much more likely to receive a “graphic script” in the course of their *voir dire* by the State).

Had counsel made the proper objections, Mr. Terry would not have been tried and sentenced by an unconstitutionally empaneled jury.

**6. Mr. Terry’s Counsel Provided Ineffective Assistance of
Counsel When They Repeatedly Elicited Damaging
Information**

a. Insect Larvae

1. Relevant Facts

During her cross examination of State pathologist John Carter, counsel Fullwood attempted to elicit from him that he could not pinpoint the time of death beyond a 72 hour period. In response to this question, Dr. Carter testified, “Well, probably it wasn’t recent because the wound had decayed. There were insect larvae in it.” Tr. 1473. Then she asked again whether a test could have been used to better pinpoint the time of death

more. Again, Dr. Carter responds, “With that time span and with that amount of decay of the body – well, the insect larvae. I’m told that an entomologist can time and date those creatures fairly accurately...[.]” Id.

2. Deficient Performance

Time of death was not at issue in this case. While counsel’s purported strategy was to “punch holes” in the defense’s case, there is no point in punching a hole in an irrelevant fact. Counsel made no suggestion at any time in the case that Mr. Terry had an alibi at any time during the range of time of death offered by the State. The State’s case in no way hinged on what time Ms. Jackson was killed. By asking this irrelevant question, counsel put before the jury highly prejudicial and stomach-turning evidence that had not been introduced by the state. *See People v. Trait*, 527 N.Y.S.2d 920 (N.Y. App. Div. 1988) (counsel ineffective in murder case for excessively and purposelessly cross-examining prosecution witnesses, one of whom gave testimony on cross that was clearly damaging to the defendant).

3.. Prejudice

The images of what happens to a body after death are doubtless new to a jury and create even more disgust in their minds regarding the nature of the crime. There is a reasonable likelihood had counsel not elicited this information that Mr. Terry would not have been found guilty or sentenced to death.

b. Blood Alcohol Content

The defense elicited evidence at trial that there were five beer cans draining in the sink at the crime scene. The defense hammered on the point that there was a fingerprint

on one of the cans that did not match Mr. Terry or Ms. Jackson. Tr. 1402, 1442, 1556, 1557. The implication was clearly that Ms. Jackson had been entertaining and drinking on the evening of her death, with someone other than Mr. Terry.

In his cross-examination of Dr. Carter, counsel Stone elicited previously unrepresented information that Dr. Carter had tested Ms. Jackson's blood alcohol content and had found it to be half the legal limit. Tr. 1482.

1. Deficient Performance

Counsel's decision to elicit this information is inexplicable. This information reinforced the notion that Ms. Jackson likely drank these beers by herself and gave credence to the State's argument that the print had been left by an uninvolved third party, such as "the bag boy." Tr. 1641. Counsel did nothing to explain how many beers would have to be consumed to achieve such a limit or how the blood alcohol level would be affected by being dead for several days.

2. Prejudice

Had counsel not elicited this information, the jury would have only had the testimony of Ms. Jackson's daughter that she had a "beer or two on occasion," Tr. 1534, which would have supported the implication that the presence of five beer cans pointed to the presence of a guest. Instead, the jury was told that the victim had a fairly high blood alcohol content, even after having been dead for several days, pointing to the greater likelihood that she consumed the beers by herself and undermining counsel's own strategy. When counsel undermines his own strategy, he undermines not only the defense itself, but his credibility in the jury's eyes. There is a reasonable likelihood that

but for counsel's irresponsible elicitation of this evidence that the outcome of Mr. Terry's case would have been different.

c. Upended Chair in Bedroom

There was absolutely no evidence adduced by the State that any struggle had taken place in Ms. Jackson's bedroom or indeed at anyplace other than the location where she was killed. During cross-examination of officer H.E. Phillips, however, Mr. Terry's counsel elicited that a recliner in Ms. Jackson's bedroom had been tipped over onto its back. Tr. 1369

1. Deficient Performance

Once again, there can be no possible strategy for eliciting this information. It is utterly unclear from the record where counsel was going here.

2. Prejudice

As a result of counsel's unreasonable decision to elicit this evidence, the jury was left with an image that Mr. Terry snuck into the house, accosted Ms. Jackson in her bedroom, and the struggle between Ms Jackson and Mr. Terry began there. This image only reinforces the State's theory of events. There is a reasonable likelihood that had counsel not been given this impression that they would have found reasonable doubt.

d. Ransacking and Presence of Jewelry

At several points during his cross-examination of the State's witnesses, counsel elicited testimony that Ms. Jackson's house had not been ransacked and her jewelry had not been taken. Tr. 1346, 1368, 1401, 1402.

1. Deficient Performance

The State's theory of the case was that Mr. Terry broke into Ms. Jackson's house with the sole intention of raping and killing her. The defense's plan was to suggest that there was reasonable doubt that Mr. Terry did that. It is therefore mystifying why counsel would elicit evidence which makes the scene square up with the State's version of events. A ransacked house with stolen jewelry would lend more credence to the defense's theory that the State had it all wrong.

2. Prejudice

Counsel's unreasonable choice to elicit this information bolstered the State's case that robbery was not the motive here, rape was. The Solicitor, at least, was able to recognize the favor defense counsel had done for them: he argued in closing,

You may hear this. You may hear the house wasn't ransacked, none of the jewelry wasn't taken [sic]. Well, just how diabolical is it that Gary Dubose Terry's intent and purpose in entering the home that night was not to steal, was not to plunder. It was to rape and kill a 47- year-old-woman whom he knew lived there and lived alone.

Tr. 1552.

There is a reasonable probability that had counsel not elicited this incriminating evidence and reinforced the State's case against Mr. Terry, that the jury would have found reasonable doubt.

6. Mr. Terry's Counsel Provided Ineffective Assistance of Counsel When they Failed to Present Evidence Regarding Mr. Terry's Previous Involvement with Ms. Jackson's Phone Box

a. Relevant Facts

Louanne Smith, Mr. Terry's estranged wife, testified that approximately two weeks before Ms. Jackson's murder, Mr. Terry came to her house and asked to borrow a telephone crimping tool in order to fix Ms. Jackson's telephone line. PCR 232. This

was not unusual, as Mr. Terry occasionally did odd jobs for Ms. Jackson. PCR 232.⁴

According to Ms. Smith, however, defense counsel, “didn’t care what [she] had to say.” PCR 241.

b. Deficient Performance

Counsel unreasonably failed to pursue this key piece of information. This fact could have been extremely useful to the defense in two respects: first, it could have explained why Mr. Terry’s fingerprint was on the phone box., thereby obviating the need to call into question the fingerprint examiner’s work - an uphill battle to say the least. Second, it could have led to an inference that Ms. Jackson’s phone lines were damaged sometime prior to the crime.

Counsel could have introduced Ms. Smith’s testimony that Mr. Terry borrowed the tool. While her statement regarding what he planned to do with the tool was inadmissible hearsay, with some investigation, they could have potentially found a witness that saw Mr. Terry doing work at Ms. Jackson’s, or maybe somebody who accompanied him to do so. Also this testimony when coupled with other testimony of Defendant’s social relationship with the Defendant suggests the conclusion that counsel should have had Defendant testify to get his defense in front of the jury.

c. Prejudice

As a result of counsel’s unreasonable choice to ignore this critical piece of information, counsel was forced to challenge the expertise and credibility of a fingerprint

⁴During the PCR hearing, this Court refused to hear the evidence on the grounds of hearsay. PCR 232. Mr. Terry respectfully submits that the evidence should be considered on the grounds that it is not offered for the truth of the matter asserted, but as evidence of what counsel knew and how they should have behaved as a result of knowing it. This same reasoning was relied on by this Court in allowing the admission of a similar piece of evidence later in the hearing. PCR 239.

examiner who was the Senior Agent assigned to latent prints at the South Carolina Law Enforcement Division, had numerous years of experience, and had been qualified as an expert 65 times, Tr. 1412-13, in order to explain away the fingerprint. The cutting of the phone lines was the State's most powerful evidence that Mr. Terry had criminal intent when he entered Ms. Jackson's house. Counsel repeatedly referenced the fact that the phone lines were cut..Tr. 1548, 1550, 1552, 1553. At sentencing, the Solicitor also referred to the horror Ms. Jackson must have felt when she found her phone lines were dead. Tr. 2084. By counsel's own admission, the cutting or ripping of the phone lines was the most aggravating information in the case. PCR 79. Had counsel worked harder to make a more reasonable, credible challenge to the fingerprint on the box, there is a reasonable likelihood that Mr. Terry would not have been convicted or sentenced to death.

7. Mr. Terry's Counsel Provided Ineffective Assistance of Counsel When They Failed to Present Evidence that Mr. Terry is Left Handed

a. Relevant Facts

At trial, pathologist John Carter testified that the blows that killed Ms. Jackson were most likely administered by a right handed person. Tr. 1479. Counsel offered no witnesses indicating that Mr. Terry was left handed. At PCR, counsel revealed that they instead had Mr. Terry write something during closing argument in the hope that the jury would make the observation and deduction on their own. PCR 54.

b. Deficient Performance

Counsel's stated strategy at trial was to "punch holes" in the State's case to create reasonable doubt. Demonstrating to the jury that it would have been physically highly

unlikely for Mr. Terry to delivered these blows would have been a significant hole. Mr. Stone testified at the PCR hearing that he chose not to call a witness for fear that would open the door to his character. It is difficult to see how a witness called for their observations of Mr. Terry's writing habits could be crossed on his character. PCR 54. Mr. Stone's decision was thus not based on a reasonable interpretation of the law and was inconsistent with his own stated defense strategy.

c. Prejudice

Because no evidence had been introduced of Mr. Terry's left-handedness, counsel could not argue the "hole" in the prosecution's case created by the fact that Mr. Terry would have had to strike these lethal blows with his non-dominant hand. There is a reasonable probability that had the jury had this information, it would have found reasonable doubt.

**8. Mr. Terry's Counsel Provided Ineffective Assistance of
Counsel When they Failed to Move for a Directed Verdict on
Criminal Sexual Conduct**

a. Relevant Facts

Apparently, the State believed if it had enough witnesses repeat gory, but legally innocuous, information enough times, it would morph into evidence of criminal sexual conduct.

Lexington County Sheriff's Deputy Edward Rivers testified that when he saw the body at the scene it had "a shirt draped kind of diagonal ways across her chest" and her "genital area and breast area" were exposed. Tr. 1297. Lexington County Sheriff's employee Charles Cato testified that when he saw the body it had on "a shirt or a gown

up top, but no underwear. The victim's legs, the left like was up at an angle like almost with the bottom of the foot on the floor where the leg would be up. The right leg would be just laying straight and the legs were apart." Tr. 1335. Lieutenant H.E. Phillips added that when he saw the body, it had on "a t-shirt or a nightgown on and her legs were spread apart and one of her legs was bent up in like a prone position and her hands were just laying down towards the side." She did not have underclothing on. Tr. 1536. When SLED agent Steven M. Derrick saw the body, it was "nude laying on her back... *both* knees on each leg had been bent where the legs were in a curve position." Tr. 1422 (emphasis added). State pathologist John Carter testified that the body he saw at the scene was "on their back with *one or both* legs lifted up, cocked back, there was also a small trace of fluid externally on the public hairs that appeared very similar to semen." Tr. 1473 (emphasis added). Dr. Carter concluded that these factors were "very characteristic of sexual activity or sexual assault at the time." Tr. 1473⁵

Mr. Carter acknowledged on cross examination that "he did not find any evidence or bruises, scrapes, tears, or cuts in Ms. Jackson's vaginal or anal areas. Tr. 1479.

b. Deficient Performance

Contrary to Dr. Carter's testimony, there actually is a critical difference between sexual activity and sexual assault. According to South Carolina Law,

(1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:

- (a) The actor uses aggravated force to accomplish sexual battery.
- (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping,

⁵Although counsel's stated theory of defense was to "punch holes" in the State's case, they did not draw attention to these inconsistencies through cross-examination or argument.

robbery, extortion, burglary, housebreaking, or any other similar offense or act.

© The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.

S.C. Code Ann. §16-3-652.

Counsel unreasonably failed to argue that the position of the body alone was not evidence that Ms. Jackson did not consent to sex, as they knew Mr. Terry had said she did. Ultimately, the State's effort was essentially to argue that because Ms. Jackson and Mr. Terry had sex and Ms. Jackson was ultimately killed, that the sex was by definition without consent. The statute does not say that. It does not say the criminal sexual conduct in the first degree is any sex after which the victim is killed. The statute requires more. The statute requires that penetration occur as a result of the force applied. Even the State's pathologist agrees that in this case there was no "evidence or way of knowing that those things occurred at the same time." PCR 148. Indeed, no person in South Carolina has ever been executed with aggravation of criminal sexual conduct on such evidence.⁶

⁶ FN. 6 *State v. Shaw*, 276 S.C. 190, 277 S.E.2d 140 (1991) (eyewitness testimony of co-defendant, includes James Terry Roach),

State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of rape by co-defendant admitted and included bite marks, bruises, and abrasions)

State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987) (not charged with criminal sexual conduct, despite the fact he admitted to it),

State v. Middleton, 295 S.C. 318, 386 S.E.2d 457 (1988) (confession)

State v. Plath, 277 S.C. 126, 284 S.E.2d 496 (1981) (testimony of co-participant)

State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984) (confession)

State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004) (confession to CSC with minor)

The fact that the victim's legs were spread apart is of no moment. Rarely does a dead body land with its legs perfectly together. Moreover, with regard to Ms. Jackson's clothing, it is undisputed that it was night when Mr. Terry went to her house and that she was in bed at the time. This explains why she would not have been wearing any underwear. There was no underwear found at the scene, and no indication that Mr. Terry had forcibly removed it from the victim. And, of utmost importance, was that there was no evidence of injury to Ms. Jackson's genitals. *See, State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) (directed verdict upheld where child said defendant touch her lu-lu, fondled her over and under her clothes, and touched the bottom part of her body in a way that "made her feel bad," but exam did not show evidence of penetration).

Even if the State was to be believed as to the timing of the sex, Mr. Terry was still entitled to a directed verdict on the grounds that Ms. Jackson was deceased at the time of the intercourse. The State claimed that Mr. Terry beat the victim in the head, at which point she experienced massive exsanguination, then rolled her over "and as she breathed her last breath" Tr. 2086, and had intercourse with her. In fact, there was no evidence to support this assertion. According to the State's pathologist, at the time of the blows administered to Ms. Jackson, "unconsciousness and death would have been very short, if not instantaneous." PCR 149⁷. In order to be guilty of criminal sexual conduct, penetration must be achieved by force. A dead person cannot be overcome by force. *State v. Richardson*, 358 S.C. 586, 593, 595 S.E. 2d 858, 892 (S.C. App. 2004); *State v. Gathers*, 295 S.C. 476, 481-2, 369 S.E.2d 140, 143 (1998); *aff'd. South Carolina v.*

⁷Although this exact fact was not expressed at trial, it was clearly Dr. Carter's opinion and was thus available to counsel, who were ineffective for failing to clarify it.

Gathers, 490 U.S. 805 (1999); *overruled in part on other grnds, Payne v. Tennessee*, 501 U.S. 808 (1991) (implying that post mortem conduct is not criminal sexual conduct).

c. Prejudice

“A defendant is entitled to a directed verdict when the State fails to produce evidence on the offense charged.” *State v. Parris*, 363 S.C. 477, 481, 611 S.E.2d 503 (2005). As discussed, *supra*, the State failed to produce evidence of the lack of consent necessary to prove criminal sexual conduct. Had counsel made the appropriately clear and detailed motion to bring these factors to the court’s attention, there is a reasonable probability that the court would have granted the motion and Mr. Terry would not have been found guilty of either the substantive offense or the aggravating circumstance of criminal sexual conduct.⁸

9. **Counsel Erred When They Failed to Argue that the State’s Case Was Based Solely on Circumstantial Evidence**

a. Relevant Facts

The evidence against Mr. Terry at trial included the DNA in Ms. Jackson and the fingerprint on the telephone box. There was no direct evidence against him. During his charge to the jury, the judge gave extensive instructions to the jury on the meaning of

⁸If this court concludes that the general directed verdict motion made by counsel was sufficient to preserve the issue for presentation to the South Carolina Supreme Court, Mr. Terry contends that he suffered ineffective assistance of appellate counsel for failure to raise the claim on direct appeal. Appellate counsel’s deficiency in failing to raise the claim is demonstrated by the same available record evidence as discussed *supra*. To demonstrate prejudice, Mr. Terry must show that, taken in the light most favorable to the State, there was not direct or substantive circumstantial evidence reasonably tending to prove the guilt of the accused. *Parris*, 363 S.C. at 502, 611 S.E.2d at 481. As discussed, *supra*, the evidence here was merely that Ms. Jackson was killed, at some point Mr. Terry had sex with her, and her clothes were askew. That does not constitute evidence of criminal sexual conduct. Thus, there is a reasonable probability that had appellate counsel appealed the issue, Mr. Terry would have been granted a new trial.

direct and circumstantial evidence. He explained that direct evidence must have come from the first hand knowledge of a person. Tr. 1564. He explained that circumstantial evidence can give rise to logical inferences, but could not directly prove the facts. Tr. 1565. He added that “it is not enough that the circumstances create a suspicion or probability” of guilt. Tr. 1566. Counsel, had not, however, argued that the State’s case was based entirely on circumstantial evidence.

b. Deficient Performance

Counsel’s claimed during the PCR hearing that their underlying justification for the decisions they made regarding Mr. Terry’s defense was their intent to “punch holes” in the State’s case. Yet they did not point out that the State’s entire case was circumstantial. Certainly this was one of the most gaping holes in the State’s case. Counsel offer no justification for their failure to do so.

c. Prejudice

The State presented no direct evidence. The defense’s stated strategy was to punch holes in their case and raise reasonable doubt. Yet they failed to argue that the State’s case was based entirely on circumstantial evidence. The jury was unlikely to see the evidence in this light without assistance by counsel. Had counsel made this argument there is a reasonable probability that the jury would have found reasonable doubt.

10. Mr. Terry’s Counsel Provided Ineffective Assistance of Counsel when they Failed to Object to the Judge’s Comments on the Evidence

a. Relevant Facts

At the conclusion of the guilt phase of Mr. Terry’s trial, the court instructed the jury. In the course of the instructions he said that, “If the evidence should show under

what circumstances a blow was delivered which took the life of another, then, you, the jury, would have to determine whether under such circumstances, the act was malicious.” Tr. 1574-5.

b. Deficient Performance

The South Carolina Supreme Court has held that a judge violates Article V, Sec. 26 of the Constitution of South Carolina when “he expresses his own opinion upon the force and effect of the testimony or intimates his view of the sufficiency or insufficiency of the evidence in whole or in part.” *Norris v. Clinkscales*, 47 S.C. 488, 25 SE 797 (1986).

By making the comment that he did, the judge essentially indicated that he believed that the cause of death was as it was asserted by the State: the result of blows to the head. This was an impermissible comment on the evidence. There can be no reasonable strategy for failing to object to a clear error such as this, and indeed counsel offers none. PCR 59, 194.

c. Prejudice

As a result of counsel’s unreasonable failure to object to the judge’s comment, the jury was exposed to the judge’s opinion about the credibility of a critical part of the State’s evidence: the cause of death. The judge’s imprimatur on this evidence was a clear signal to the jury that the State had proven its case. *See United States v Godwin*, 272 F.3d 659, 678 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002) (“The judge, by his office, carries an imprimatur of impartiality and credibility in the eyes of the jury.”). There is a reasonable probability that has counsel objected to the judge’s improper comment, that Mr. Terry would have been sentenced to life.

11. Cumulative Prejudice From Counsel's Errors Deprived Mr. Terry of a Fair Trial⁹

Mr. Terry has set forth the numerous deficiencies in counsel's conduct, which, when taken together, utterly undermine the confidence in the verdict at his trial. The resulting prejudice from counsel's errors must be "considered collectively, not item-by-item." *Id.* at 436. While the South Carolina Supreme Court has not specifically addressed the application of a cumulative prejudice analysis, *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002), in *Frett v. State*, 298 S.C. 54, 57, 378 S.E.2d 249, 251 (1988), the court found that "counsel's ineffectiveness [was] so pervasive as to render a particularized prejudice inquiry unnecessary." Likewise, in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), the Supreme Court considered "the entire post conviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. Clearly then a cumulative prejudice analysis is appropriate.

At the end of Mr. Terry's trial, in addition to the evidence introduced against him by the State, Mr. Terry's jury had been told by defense counsel the highly prejudicial information that Mr. Terry had confessed to this crime. They had been told that Mr. Terry confessed to another crime for which he was not going to be prosecuted. They had been teased with the notion that Mr. Terry was going to claim he made these confessions up, a notion juries do not usually buy. They were told by the defense that insects had infested the victim's wounds and that she had been drinking alcohol before she was killed, which went far to explaining the presence of beer cans in the sink. They

⁹Counsel is not raising cumulative prejudice as a freestanding, independent claim, but has formatted it in this matter for ease of reading.

were told that the house was not ransacked and property was not stolen – lending credence to the theory that the killer came in with the intent to rape. They were offered the opportunity to convict Mr. Terry on criminal sexual conduct, despite the fact that no evidence was offered that made Mr. Terry technically guilty of that crime. They were essentially told by the judge that he believed the State’s proffered cause of death. Had counsel performed effectively, none of this would have occurred. Taken together defense counsel’s deficient performance utterly undermines confidence in the outcome of this case.

C. Mr. Terry Was Deprived of the Effective Assistance of Counsel at the Penalty Phase of His Trial in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina Law

As a practical matter, most defendants who are convicted of capital murder have “little or no chance of avoiding the death sentence unless the defense counsel gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant.” *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001) (quoting Jonathon P. Tomes, *Damned If You Do, Damned If You Don’t: The Use of Mitigation Experts in Death Penalty Litigation*, 24 Am. J. Crim. L. 359, 364 (1997)). In Mr. Terry’s case, counsel failed to do this. In favor of a mechanistic rehearsal of statutory mitigating circumstances, they failed to tell a story in defense of Mr. Terry’s life. On top of that, they elicited enormously damaging information from their own witnesses, failed to object to damaging and inadmissible evidence presented by the State and gave a closing argument more worthy of the State than the defense. Counsel’s performance was objectively unreasonable, and their performance resulted in a unreliable verdict in violation of Sixth, Eighth, and Fourteenth Amendments.

**1. Counsel Provided Ineffective Assistance of Counsel
When They Failed to Object to Irrelevant and
Prejudicial Evidence in Violation of the Sixth, Eighth,
and Fourteenth Amendments and South Carolina law.**

a. Relevant Facts

At sentencing, the State sought to prove the aggravating circumstances of criminal sexual conduct first degree and burglary first degree. In addition to witnesses relevant to those circumstances, the State put on copious evidence of Mr. Terry's bad character. Diane Gibson, a bitter ex-girlfriend of Mr. Terry's, was the source of much of this information. She testified, for example that,

*She cooked for Mr. Terry and "waited on him hand and foot" while he didn't work. Tr. 1745;

*Mr. Terry "controlled her emotionally and mentally," "she had no friends," and "she lost contact with her family," although Ms. Gibson does not explain what Mr. Terry had to do with this, Tr. 1745;

*Mr. Terry allegedly stole boats and trailers, although sometimes she "did not know it was going on,": Tr. 1745

*She gave Mr. Terry money and he spent it on crack. Tr. 1748;

*Mr. Terry got in a fight with a neighbor, Tr. 1749.

*Mr. Terry was married when they got involved.

Tr. 1765.

Mr. Terry's friend, Jeffrey Ford, also contributed. He stated that,

*Mr. Terry stole an old model Corvette, Tr. 1673;

*While working as a bouncer at a bar, Mr. Terry hit a man with a beer mug, but nothing happened; Id.

*During another fight, which he did not start, Mr. Terry hit a man with a rock; Tr. 1676.

Mr. Terry's first wife testified that Mr. Terry did not pay child support. Tr. 1773. Another witness testified that Mr. Terry damaged his car and never paid for it. Tr. 1688. A detention officer testified he knocked a hole in the wall with a fire extinguisher. Tr. 1695. Other examples are too numerous to mention.

b. Deficient Performance

In order for evidence to be admissible in a criminal proceeding, it must be relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." S.C. Rule Evid. 401.

According to South Carolina law, at a capital sentencing proceeding, the evidence a jury may consider is "mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence." 16-3-20 (C). The statute refers to allowing statutory mitigating and aggravating evidence and other mitigating evidence otherwise authorized or allowed by law. It does not refer to the consideration of *other aggravating* evidence otherwise allowed by law.¹⁰

¹⁰The South Carolina Supreme Court has noted an exception to this limitation allowing, as axiomatic, evidence of a defendant's prior criminal record regardless of its relevance to particular aggravating circumstance. The court noted that criminal records are routinely considered in non-capital cases as well. *State v. Plath*, 281 S.C. 8, 313 S.E.2d 619, 623 (1984), *cert. denied*, *Plath v. South Carolina*, 467 U.S. 1265 (1984); *overruled on other grounds*, *State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999); *State v. Collins*, 329 S.C.23, 495 S.E.2d 202 (1998).

In order to be relevant, then, evidence introduced by the State in aggravation must be relevant to a statutory aggravating circumstance, or must be introduced in rebuttal to evidence offered by the defendant in mitigation.¹¹ *Dawson v. Delaware*, 503 U.S. 159 (1992). Neither is the case here.

The South Carolina Supreme Court is clear, that other crimes evidence introduced at sentencing must be a “similar crime or crimes,” to the one for which the defendant is being sentenced. *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 163 (1990), *cert. denied*, *Green v. South Carolina*, 498 U.S. 881 (1990). Importantly, if such evidence is introduced, “the judge must properly limit the jury’s consideration to evidence as they bear logical relevance to the crime.” The court has repeatedly required evidence introduced at sentencing to have a such a nexus. *State v. Atkins*, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990) (defendant’s flying of the confederate flag and racial tensions with victim went to motive); *State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) (911 call admissible because it describes crime scene immediately after incident); *State v. Kornharens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986), *cert. denied*, *Kornharens v. South Carolina*, 480 U.S. 940 (1987) (photographs admissible to show state of bodies in the state which defendant left them).

The evidence introduced in this case offered just such a pernicious distraction. While these cases do indicate that the evidence is admissible to show the circumstances of the offense and the character of the defendant, they are clearly limited to showing the character of the defendant who committed the crime at hand and who is being sentenced.

¹¹The State did not offer any rebuttal, so the information cannot come in on those grounds.

This language does not open the door to introducing every bad thing the defendant may have ever done.

None of this information about Mr. Terry's drug use, laziness, and child support compliance is even loosely related to the aggravating circumstances asserted. Cases construing the federal death penalty system, which is closely analogous to South Carolina's explain:

[A] recognition that evidence of uncharged criminal conduct may be offered does not mean that any criminal act may be considered by the jury as an aggravating factor. As noted above, such crimes must be relevant to the decision of who should live and who should die. On the question of what crimes are so relevant, the court is guided by the statutory aggravating factors Congress has listed in 18 U.S.C. § 3592, which provide "a ready framework for determining Congressional intent" on this matter. The statutory aggravating factors list only very serious or repetitive felony offenses, such as child molestation, previous conviction of a capital crime, or prior conviction of a felony involving a firearm. From these factors, it is clear that to be a relevant aggravating factor in favor of the death penalty, prior misconduct must at least be a crime, and a grave one at that. Consideration of relatively minor misbehavior, however disturbing, would undermine the seriousness of the death penalty decision. Rather than helping the jury's decision, the previous misconduct would be a "pernicious distraction[]" . . . in considering whether a defendant shall live or die.

United States v. Gilbert, 120 F. Supp. 2d 147, 152-153 (D. Mass. 2000) (internal citations omitted). Another federal court echoed this analysis,

An assessment of the factors prescribed by Congress as essential to qualifying a particular homicide as a death-eligible one teach that, as to relevance, an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die. The concept of reliability is reflected in the statutory aggravating factors because those factors represent the quality of conduct or the kind of personal characteristics of the defendant which, over time and through judicial testing, have found a widespread acceptance in society as matters genuinely probative -- both logically and within the parameters of the death penalty jurisprudence -- of who, from among the eligible, should be selected for a sentence of death.

United States v. Friend, 92 F. Supp. 2d 534, 544 (D. Va. 2000). For example, one court found that an allegation that the defendant assaulted her husband ten years earlier with a knife was inadmissible, as it lacked "sufficient gravity and reliability." *United States v. Gilbert*, 120 F. Supp. 2d 147, 153 (D. Mass. 2000).

Even if it was determined to be relevant, however, in order for evidence to be admissible, the evidence must be more probative than it is prejudicial. S.C. Rule Evid. 403. While the court has held that the scope of probity in a capital sentencing proceeding is "broader," *Kornharens*, 290 S.C. at 289, 350 S.E.2d at 186, it has certainly never said that Rule 403 does not apply. The South Carolina Supreme Court confirmed this point recently when it said that,

Appellant did not couch these objections in terms of relevance or a Rule 403 analysis....When asked to do so, we will consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding. However, we feel that the delicate task of balancing the duty to conduct a sentencing inquiry "broad in scope," *Dawson*, 503 U.S. at 164, against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes is only properly performed when that case is presented.

State v. Bennett, 369 S.C. 219, 229-30, *cert. denied*, *Bennett v. South Carolina*, 127 S.Ct. 681 (2006). In this case, the prejudicial value of this evidence was tremendous. It went on and on and drew a horrible picture of the defendant. This kind of presentation is extremely damaging and is not probative in any way of his character in any way that relates to the crime.

Counsel offered no reasonable strategy for failing to object to this evidence. On the contrary, both suggested that they thought the evidence was permissible. PCR 62, 213. They were wrong, and their failure to object constitutes deficient performance.

3. Prejudice

The evidence introduced by the State was irrelevant, inflammatory, and highly prejudicial. It was admitted in violation of S.C. Stat. Ann. §16-3-20 and Rules of Evidence and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.. Had counsel objected, there is a reasonable probability that this evidence would not have been put before the jury and that defendant would have been sentenced to life.

1. **Mr. Terry's Counsel Provided Ineffective Assistance of Counsel When They Failed to Argue or Seek a Jury Instruction on the Mitigating Circumstance of Provocation**

a. Relevant Facts

In its case in chief at the penalty phase, the State finally introduced Mr. Terry's statement. The statement read, in part,

I went in her bedroom after she got me a glass of ice water. We were just talking. We went to bed. I had sex with her. I got ready to leave. We started having words about me leaving. She wanted me to stay. The argument got pretty heated, I went to go out of the room and she grabbed me by the hair. I turned around and swung to get her off me. I think I hit her and she went down to her knees. I again tried to walk out of the room. I got almost to the end of the hallway. She grabbed me from behind again. I then lost my temper. I swung back at her again. I then got something into my hand. It was just there in the hall. She could have brought it with her. I started hitting her with it. I lost my temper and I hit her several times. I have a bad temper.

Tr. 1816

During the defense's penalty phase case, counsel offered expert testimony indicating that Mr. Terry's brain is damaged in such a way that he has tremendous

difficulty controlling his impulses. Yet counsel did not argue the obvious link between the two – that this crime occurred because the victim angered Mr. Terry, and his brain impairment prevented him from controlling his anger in response to her. Counsel did not request that the jury be instructed on the statutory mitigating circumstance of provocation.

b. Deficient Performance

“South Carolina law holds that slight physical aggression is sufficient provocation to reduce a homicide to manslaughter.” *State v. Gallman*, 79 S.C. 229, 240, 60 S.E.2d 682, 687 (1908); *see also, Sheppard v. State*, 357 S.C. 646, 664, 594 S.E.2d 462 (unprovoked assault is example of sufficient provocation). The State presented evidence that the victim pulled Mr. Terry’s hair and otherwise physically attempted to prevent him from leaving her house. Her conduct thus amounts to slight physical aggression. Despite this clear evidence of provocation, however, counsel failed to argue to the jury that the mitigating circumstance of provocation was present or request that they be instructed on this mitigating circumstance. Such a decision not argue for or request an instruction on an available mitigating circumstance in a death penalty must be justified by a convincing strategy.

In this case, it was not. Counsel agree that there was evidence of provocation, sufficient to support manslaughter, Tr. 39, 49, 50, 191, but attempt two justifications for their supposed “choice” to abandon this clearly available line of mitigation. Neither holds water.

The first excuse is basically that they could not pursue the mitigating circumstance because the jury had already found Mr. Terry guilty. PCR 192. This is

simply nonsensical. Provocation has been listed as an available statutory mitigating circumstance by the South Carolina legislature. §16-3-20 (c)(b)(8). As such, it will always be the case that when it is offered, the jury will have already found the defendant guilty. If this fact were to operate as a legitimate excuse for counsel not to pursue it, it would be entirely superfluous. Clearly, the legislature thought that there were some cases in which, despite conviction, the crime would be mitigated by evidence of provocation.

Moreover, while it is true that the jury had convicted Mr. Terry of murder, it had done so without hearing the evidence contained in the statement. The State introduced it. The attempt by the defense to rely on it is hardly inconsistent with the existing verdict.

The second purported “strategy” for ignoring evidence of provocation (which counsel concede is present) is to avoid offending the jury. Counsel Fullwood testified that “to try to come in at the penalty phase and basically say this woman asked for it would probably be very offensive to the jury and would not be the type of argument that would persuade them to recommend a life sentence.” PCR 192. This much is true, but “she asked for it” need not have been the argument. Counsel had at its disposal evidence that the victim accosted Mr. Terry by pulling his hair, and that Mr. Terry had trouble controlling his impulses. Rather than offending the jury, Mr. Terry’s organic brain impairment and his statement dovetail into a realistic explanation of what occurred at the crime scene (an explanation which was not available at the trial at which the jurors convicted him). Rather than going with this theory, counsel went with essentially no theory at all. Counsel’s performance was deficient. *See* ABA Guidelines for The Defense Case Concerning Penalty 10.11 (J) (2003) (“Trial counsel should request jury

instructions and verdict forms that ensure jurors will be able to consider and give effect to all relevant mitigating evidence.”).

c. Prejudice

Counsel’s failure to argue and request a mitigating instruction of provocation denied the jury a meaningful and extremely plausible theory of mitigation, which could have tied together all the evidence. Provocation, combined with the evidence of brain damage presented by the defense explain why this crime happened – that an altercation between Mr. Terry and Ms. Jackson resulted in her provoking him, and as result of his brain impairment – the one involved in the other three mitigating circumstances they offered – he snapped. Without this critical link, the mitigation they offered is meaningless. There is a reasonable probability that had counsel pursued this readily available and strategically sound course at trial, Mr. Terry would have been sentenced to life.

3. Mr. Terry’s counsel provided ineffective assistance regarding witness’ statement about parole eligibility

a. Relevant Facts

At the penalty phase, counsel called Mr. Terry’s estranged wife, Louanne Smith. During

the course of her direct examination, the following exchange took place

- A. ... I tried my best to explain to them that it might be a very long time before daddy got to come home. We were told at first that it may be three to five years before his case came to trial. Thankfully, it’s only been two and a half. But still, that’s the time that the children have missed with their father.
- Q. Did you have to tell the children something real hard –

A. Yes —

Q. — this week —

A. — Thursday night. The hardest thing I have ever had to do in my life is to go home and tell those four children that the jury had rendered guilty verdicts on all four counts and that at best, daddy would not get to come home for thirty years.

Tr. 1930. Following this elicitation of testimony about parole eligibility, counsel requested no curative instruction.

At post-conviction proceedings, Ms. Smith testified that prior to trial, counsel's preparation of her for her testimony was limited to a wide ranging meeting, involving a lot of people, the week before trial. PCR 233. This meeting lasted no more than forty five minutes. *Id.* Ms. Smith indicated that she was never told not to mention the issue of parole, and that if she had been so instructed she would not have done so. *Id.* Ms. Fullwood claimed that she prepared the witness for "hours," the day before trial, and was surprised that Smith's testimony was "all over the place" and not of the "certain type" that she had anticipated. PCR 214. Fullwood did admit that she did not discuss parole with Ms. Smith. *Id.*

b. Mr. Terry's Counsel Unreasonably Failed to Prepare the Witness

1. Deficient Performance

It defies credulity that Ms. Fullwood spent "hours" with Ms. Smith and the topic of parole did not come up. If there is any thing that the mother of a defendant's children would wonder about the trial is if there is any chance that the defendant will ever come home. Even if by some amazing turn this topic did not come up, suitably experienced

counsel should have known it was percolating in the witness' mind. *See Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002) (finding counsel ineffective in part based on conducted direct examination with no idea what answers he would get, and eliciting damaging information not produced by the State), *Ex parte Guzman*, 730 S.W.2d 724 (Tex. Crim. App. 1987) (has held that trial counsel's duties include adequately preparing witnesses to testify at trial).

There is not a great deal of preparation that would have been required in order to prevent Ms. Smith from saying what she did. Counsel could simply have told all of their witnesses not to offer any information, about any topic, that was not asked of them. At the time of this trial, however, more could have been expected. The issue of juror's knowledge and consideration of parole eligibility in a capital case was the forefront of the capital litigation landscape, particularly in South Carolina. *See, Simmons v. South Carolina*, 512 U.S. 154 (1994).

Counsel attempts to characterize the witness' remarks as "gratuitous," and "not in response to any question I had asked." PCR 212. This contention is unworthy of belief. Counsel had just asked the witness to talk about telling her children about Mr. Terry's convictions. It should be clear, even to the layman, that that discussion would likely include some reference to how long it would be before Mr. Terry got out. Moreover, in response to the previous question, the witness had referred to the length of time it might take before Mr. Terry came home. If it had occurred to Ms. Fullwood before trial that this information might come out, it certainly should have once the witness was clearly headed in that direction.

2. Prejudice

There is no indication that Ms. Smith was an unintelligent or uncooperative witness. Had she been instructed not to offer the offending information, she would not have. As a result of counsel's failure to properly prepare her, the jury was exposed to information indicating that Mr. Terry could be released on parole if not sentenced to death. This is extremely relevant information to jurors. (See discussion, *infra*, Pt. 2 of this Ground).

c. Mr. Terry's Counsel Unreasonably Failed to Request a Curative Instruction

1. Deficient Performance

Counsel's failure to request a curative instruction on parole eligibility was deficient in two respects. First, counsel should have been aware that parole eligibility was fertile ground for litigation in capital cases. Not long before Mr. Terry's trial, the United States Supreme Court had decided *Simmons v. South Carolina*, 512 U.S. 154, on just such an issue. Second, counsel should have been aware of the demonstrably ill effects of leaving a jury with improper information about parole. In *Simmons*, the Court referenced a statewide public-opinion survey conducted by the University of South Carolina's Institute for Public Affairs. The study concluded that

only 7.1 percent of all jury-eligible adults who were questioned firmly believed that an inmate sentenced to life imprisonment in South Carolina actually would be required to spend the rest of his life in prison. Almost half of those surveyed believed that a convicted murderer might be paroled within 20 years; nearly three-quarters thought that release certainly would occur in less than 30 years. More than 75 percent of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an "extremely important" or a "very important" factor in choosing between life and death.

Simmons, 512 U.S. at 159.

Counsel stated that despite all of this information, she opted not to request an instruction because she did not want to “draw anymore attention to the issue.” Ms. Fullwood’s strategy should not be credited. *See, Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (counsel’s failure to object because he did not want to ‘confuse or upset the jury’ was not valid strategy). As the aforementioned study indicates, and as the Supreme Court recognized, jurors come into the courtroom with misinformation about parole. Thus, it was likely that counsel would not have been able to draw more attention to it if she tried. The jurors almost certainly had these preconceptions and then they heard them repeated from the witness stand. Her strategy was unreasonable.

Moreover the testimony was improper as a matter of law. Under South Carolina law, “a jury should not be invited nor permitted to speculate about possible effects of parole on conviction.” *State v. Brooks*, 271 S.C. 355, 359, 247 S.E.2d 436, 438 (1978). Ms. Fullwood was thus obligated to attempt to cure her error that directed the jury to this inappropriate information, regardless of whether it would have “drawn their attention” to it. “Counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). Counsel unreasonably failed to request an instruction.

2. Prejudice

Under South Carolina law, once the issue of parole was raised, Mr. Terry was entitled to a curative instruction. *State v. Plath*, 277 S.C. 126, 141, 284 S.E.2d 221, 229 (S.C. 1981) (co-defendant’s attorney mentioned parole, but it was cured by court’s express instruction that jury not consider parole); *State v. Norris*, 285 S.C. 86, 328 S.E.2d

339, 344 (1985) (when issue is raised, jury shall be instructed on plain and ordinary meaning *and* that they should not consider parole.) Thus, had counsel requested the instruction, she would have gotten it. The prejudice resulting from the jury's uncured exposure to incorrect information about Mr. Terry's parole eligibility if sentenced to life cannot be understated. As the study cited above indicates, jurors have vastly incorrect notions about parole. As a result of counsel's failure to properly prepare her witness or request a curative instruction, the jury heard their incorrect preconceived notions come from the witness stand be unobjected to by counsel or corrected by the court, leaving them with an imprimatur of correctness.

4. Mr. Terry's Counsel Erred By Opening the Door to Damaging Information

a. Relevant Facts

During the penalty phase of Mr. Terry's trial, the State called police officer, Mitch Wilkerson. Tr. 1613. Mr. Wilkerson was called because he had responded to the scene of a woman who had been stabbed in the neck. He testified that Mr. Terry eventually pled guilty to Assault and Battery of a High and Aggravated Nature in this crime. Counsel Stone decided to cross-examine. In the course of cross, Mr. Stone referred, for no apparent reason, to the fact that the victim in the matter was a prostitute. Tr. 1617. He then refreshed the officer's recollection about the incident with the victim's statement, Tr. 1618, whereupon the State successfully moved to introduce the entire statement into evidence. Tr. 1619. The statement reflected that Mr. Terry had sought to hire this prostitute, Tr. 1620, that Mr. Terry had been smoking marijuana, Tr. 1621, and that

following the stabbing, Mr. Terry “walked to the door like he hadn’t done anything.” Tr. 1620.

b. Deficient Performance

Out of court statements are not admissible to prove the truth of the matter asserted. S.C. Rule Evid. 801*. As such, the statement of the victim in this case was inadmissible in the State’s case in chief. Out of court statements, are, however, admissible if they have been used to refresh the recollection of a witness. S.C. Rule Evid. 803 (5). Thus, the statement was admissible after Mr. Stone allowed Mr. Wilkerson to refer to it on cross examination.

Strategic decisions are only reasonable to the extent they are made after reasonable investigation of the law. *Strickland*, 466 U.S. at 687. Mr. Stone clearly should have known that under South Carolina Rules of Evidence he would open the door to the admission of this evidence by his conduct. This statement contained damaging evidence in the form of uncharged misconduct, attempting to hire a prostitute and smoking marijuana, and evidence that Mr. Terry felt no remorse for the incident.

Mr. Stone defends his decision to open the door to this prejudicial evidence by claiming that he wanted it in so that he could show the jury that Mr. Terry acted “confused” when he could not find the door after the crime, and “calm” after he had stabbed the woman, as evidence of his brain impairment. Mr. Stone’s alleged strategy only provides more evidence of his profound inattention to detail and inexperience.

First, this evidence does not dovetail with the mental health evidence presented at trial. The experts *did not* say that confusion, or any other tendency to be divorced from reality was an effect of Mr. Terry’s brain damage. Nor did they say acting calm in the

face of a stressor was a symptom. Quite the opposite. They testified that Mr. Terry's brain impairment would make him more emotionally labile.

Second, even if this evidence did offer an example of Mr. Terry's brain impairment at work, its prejudicial value far outweighed its benefit. There were numerous other examples of the impact of Mr. Terry's impulsive behavior already in the record. Counsel did not need to add highly damaging evidence that Mr. Terry hired prostitutes, smoked marijuana, and behaved in a manner consistent with lack of remorse. Mr. Stone's representation was deficient. See ABA Guidelines Concerning Penalty 10.11 (G) ("In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence.").

c. Prejudice

As the result of Mr. Terry's careless and unnecessary cross-examination, the jury was exposed to damaging information of uncharged misconduct. Hiring of a prostitute generally connotes lack of respect toward women and sex. Lack of remorse is one of the most highly aggravating pieces of evidence there is. One study performed by the National Jury Project concluded that where a "denial defense" is used, lack of remorse is an important, if not the major reason given by jurors for imposing a death sentence. Sundby, Scott, "The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty," *Cornell Law Rev.*, Vol. 83 No. 4, 1988. *See also*, Burnstein, BH, et. al., *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, *J. Behav. Sci. and L.*, Vol. 20 (2002): 393-409 (jurors award lower monetary damages in cases where physicians express remorse at time of incident.) As a

result, there is a reasonable probability that had counsel not “opened the door” to this evidence, Mr. Terry would not have been sentenced to death.

**4. Mr. Terry’s Counsel Provided Ineffective Assistance of Counsel at
Closing Argument in the Penalty Phase**

a. Relevant Facts

At sentencing, the defense presented evidence that Mr. Terry, as a youngster, was a shy, good kid. But eventually things started to disintegrate for him. His father was in a terrible accident and the family had to scrape by. He was the smallest in the family, and was beaten on by his brothers. Once, Mr. Terry’s own parents called the police on his brothers for beating him. He started sniffing gasoline at age eight. At age thirteen, his parents found him unconscious after snorting an inhalant. But no intervention was ever undertaken. Finally, as the result of a legal problem, Mr. Terry got some help. He was diagnosed with, among other things, organic explosive disorder and placed on a medication to help him regulate his behavior. Brain scans and testing done prior to trial demonstrate that Mr. Terry has brain damage which impacts his ability to control his behavior.

At closing argument in the penalty phase, Mr. Terry’s counsel did not tell this story. Instead, he opted to repeat twice that Mr. Terry was a “murderer, rapist, and home invader,” and commented three times on how “horrendous” the crime was. Tr. 2099. Eventually, he suggested that people with brain damage should not be sentenced to death. Tr. 2100

b. Deficient Performance

A defense attorney is meant to be an advocate for his client. No where is this obligation more serious then when he attempts to convince a jury to spare his client's life. A lawyer is not an effective advocate when he attacks his client's character in closing. *Horton v. Zant*, 941 F.2d 1449 (lawyer ineffective for argument which included in part the statement that "the one you judge is not a very good person."). A lawyer is not an effective advocate when he emphasizes the seriousness of the crime. *Clark v. State*, 690 So.2d 1280, 1283 (Fla. 1997). Counsel's choice to characterize his client as a murderer and rapist and to reinforce how "horrendous" the crime was is similarly deficient.

At the PCR hearing, counsel first claimed not to remember making the statements. PCR 67. When he was refreshed, however, he offered that his "strategy" in saying it was that the Solicitor had already said it and the jury had already found it to be true. *Id.*

This explanation betrays a total misunderstanding of the lawyer's role at sentencing, which is to tell a story in favor of his client's life. By counsel's logic, he might as well have repeated all of the State's evidence, in gruesome detail, in his closing. Counsel's attempt to justify his behavior should not be countenanced. Moreover, statements of the prosecutor are reasonably considered by the jury as statements of an advocate for executing Mr. Terry. Statements denigrating Mr. Terry coming from the defense take a on a stronger impact, as they are the opposite of what the jury would logically expect defense counsel to offer.

c. Prejudice

Counsel's penalty phase closing indicated to the jury that even the defense considered the defendant to be little more than a "murderer, rapist, and invader of homes," guilty of a "horrendous" crime. This can hardly be squared with a plea for life. Defense counsel's unreasonable performance creates a reasonable probability "that portions fo the closing argument encouraged, rather than discouraged, the jury to impose the death penalty," *Horton*, 941 F.2d at 1463, and created a reasonable probability that the jury's verdict was unreliable.

10. Cumulative Prejudice From Counsel's Errors at the Sentencing Phase Deprived Mr. Terry of a Fair Trial¹²

As discussed in Ground (A 10), *supra*, this Court must consider the cumulative impact of counsel's errors in order to determine whether counsel's performance resulted in a verdict worthy of confidence. In this case, it did not. When the jury retired to determine whether or not to spare Mr. Terry's life, they had been regaled with information to which they should not have been exposed. They should not have had the criminal sexual conduct aggravating circumstance before them. They should not have heard that Mr. Terry tried to hire a prostitute and that he smoked crack and did not pay child support. And they certainly should not have been told that he might be free after thirty years, a fact known to preoccupy jurors in capital sentencing proceedings.

They had heard evidence that Mr. Terry had come from an impoverished background and that he had physical brain damage. But they had not been told why any of that mattered. Defense counsel had told them that the defense had proven mitigating

¹²Counsel is not raising cumulative prejudice as a freestanding, independent claim, but has formatted it in this matter for ease of reading.

circumstances, but counsel had not told them what those circumstances were or why they should be used as reasons to spare Mr. Terry's life, or even what mitigation meant. Finally, they were left with Mr. Terry's counsel, the one who was charged with being the advocate for his life, refer to Mr. Terry as a "murder, rapist, and invader of homes." Counsel simply did not adequately defend Mr. Terry against the State's case in aggravation or put on any meaningful case for life. The death sentence is not a verdict worthy of confidence.

C. Mr. Terry's Rights Under the Eighth and Fourteenth Amendments Were Violated When the State Suppressed Material, Exculpatory Evidence.

1. Relevant Facts

At the post-conviction hearing, Diane Jackson, a former girlfriend of Mr. Terry's testified that she gave somebody from the Solicitor's office involved with the investigation of Mr. Terry's case a photograph of herself and Mr. Terry in the victim's kitchen. PCR 224. Ms. Jackson was certain that she provided this photograph to the State and not to the defense. PCR 227. The photograph was never turned over to the defense.

2. Analysis

Due process is violated when the state suppresses certain information. *Brady v. Maryland*, 373 U.S. 83 (1963). The Supreme Court has recently reiterated the essential components of a *Brady* claim. "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently, and prejudice must have

ensued.” *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Information is material for *Brady* purposes ““if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”” *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quoting *Bagley*, 473 U.S. at 682).

Mr. Terry prevails on each step of the analysis. First, there is undisputed evidence that Ms. Jackson turned this evidence over to the State. While the Solicitors themselves do not recall receiving it, there are many other people that could have received the photograph, and there is no reason to believe Ms. Jackson is being untruthful on this point. Thus, Mr. Terry has demonstrated that the information was suppressed.

Second, the evidence is exculpatory. Mr. Terry told police he had consensual sex with the victim. A photograph indicating he had been on a social call at the victim’s home is highly probative of the fact that he had a familiar relationship with her.

Finally, the evidence is material. At sentencing, the State presented evidence that Mr. Terry had said that he had consensual sex with Ms. Jackson and that he flew into a rage when she attempted to stop him from leaving. The jury knew that a physical examination of the victim revealed no genital injury consistent with forcible sex. This information that Mr. Terry had been in Ms. Jackson’s house socially would have increased the likelihood that they would have credited this scenario. Had counsel known there was physical corroborating evidence of the social relationship between the victim and Mr. Terry, there is a reasonable probability that they would have investigated and presented further evidence of this fact, and that the jury would not have found the aggravating circumstance of criminal sexual conduct and would not have sentenced Mr.

Terry to death. This evidence was critical to Mr. Terry's defense. Had it's existence been known a reasonable credible defense to the charges of murder, burglary and rape could have been presented to the jury.

V. CONCLUSION

For the foregoing reasons, Mr. Terry is entitled to post-conviction relief.

IV. UNFINISHED BUSINESS

At the conclusion of the hearing, the State agreed to send hair samples from the crime scene for DNA analysis. PCR Transcript at 19, 20 (Carol M. Thueme). This has not yet been done.

Defendant reserves the right to supplement this memorandum upon receipt of the result of this testing.

Respectfully submitted,

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) IN THE COURT OF COMMON PLEAS

Gary Dubose Terry,) 2000-CP-32-3470

Applicant,)

v.)

ORDER OF DISMISSAL

The State,)

Respondent.)

This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on or about November 30, 2000. Respondent submitted a Return dated December 28, 2000. The Court held an evidentiary hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Applicant, Gary Dubose Terry (Terry), was present at the hearing. H. Wayne Floyd and Melissa J. Kimbrough, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented Respondent.

At the hearing, Terry presented testimony from his trial attorneys, J. McDuffie Stone, III, Esquire, and Elizabeth C. Fullwood, Esquire. He also presented testimony from Francis A. Humphries, Esquire; Dr. John Carter; Steve Derrick; Nancy Skraba; Lilly S. Gallman; Diane Gibson Smith; Louanne R. Smith; and Patricia R. Terry. Respondent presented testimony from G. Thomas Chase, Esquire; Thomas J. Davis; and Scottie R. Frier. In addition to the testimony of these witnesses, the exhibits introduced at trial and the exhibits introduced at the hearing, the Court also had before it the following materials: (1) the Record on Appeal from the direct appeal; (2) the Final Brief of Appellant; (3) the Final Reply Brief of Appellant; (4) the Final Brief of

Respondent; (5) the March 13, 2000 Opinion of the South Carolina Supreme Court from the direct appeal; (6) the Petition for Rehearing; (7) the Order filed on April 19, 2000 denying rehearing; (8) the Petition for Writ of Certiorari to the South Carolina Supreme Court; (9) the Brief in Opposition to the Petition for Writ of Certiorari to the South Carolina Supreme Court; and (10) the unpublished decision of the United States Supreme Court denying Certiorari.

I. Procedural History

Terry is currently confined on death row at Lieber Correctional Institution, of the South Carolina Department of Corrections (S.C.D.C.) pursuant to commitment orders from the Lexington County Clerk of Court. The Lexington County Grand Jury indicted him at the July 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death Penalty as well as a Notice of Evidence in Aggravation of Punishment. Following Motions hearings on May 28, August 22, September 3 and September 8, 1997, before the Honorable Gary E. Clary, Terry received a jury trial before Judge Clary on September 15-21, 1997. On September 18, 1997, the jury found him guilty of all charges.

Following Terry's exercise of his statutory right to a twenty-four (24) hour waiting period, the sentencing phase was held on September 19-21, 1997. The State relied upon the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997). The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).¹ The jury found the presence of both

¹ With respect to the last mitigating circumstance, the trial judge did not charge the jury on Terry's age but did charge the jury on his mentality.

alleged statutory aggravating circumstances and recommended a sentence of death. Finding that the evidence presented warranted imposition of the death penalty, and that its imposition was not the result of prejudice, passion or any other arbitrary factor, Judge Clary imposed the sentence of death for murder. He also sentenced Terry to life imprisonment for burglary in the first degree, to thirty years imprisonment for criminal sexual conduct in the first degree and to ten years imprisonment for malicious injury to a telephone system. Each of these sentences was imposed consecutive to the sentence for murder. **R. pp. 2128-30.** Lexington County Public Defender Elizabeth C. Fullwood and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

A timely Notice of Appeal was served and filed. Terry's direct appeal was consolidated with the South Carolina Supreme Court's review of his sentence pursuant to S.C. Code Ann. § 16-3-25(C) (1985). Terry filed a Final Brief of Appellant and a Final Reply Brief of Appellant on May 4, 1999. The State filed a Final Brief of Respondent on the same date. Terry's "Statement of Issues on Appeal" presented the following grounds for relief:

1.

Whether the judge denied Due Process, as guaranteed by the Fourteenth Amendment to the United States Constitution, by refusing to admit appellant's statement against interest into evidence during cross-examination pursuant to Rule 804(B)(3), SCRE, since its exclusion denied appellant the right to present a complete defense?

2.

Whether the judge erred by ordering disclosure of appellant's Charter Rivers Behavioral Health Hospital records to the solicitor, since these records were confidential by statute, by this Court's precedents, and were effectively used by the state as evidence to have appellant executed?

3.

Whether the judge impermissibly limited appellant's cross-examination of Investigator Frier when he refused to allow the defense to elicit from Frier that appellant had given the police a statement, since this was relevant evidence, and its exclusion unfairly prejudiced appellant?

4.

Whether the judge erred by admitting a gruesome photograph of the victim, State's Exhibit #55, since it was calculated to inflame the jury, and its probative value was substantially outweighed by its prejudicial effect?

Final Brief of Appellant at 1.

The South Carolina Supreme Court affirmed his conviction and sentence in a published Opinion filed on March 13, 2000. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). A timely Petition for Rehearing was denied in an unpublished Order filed on April 19, 2000. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry on direct appeal.

On June 28, 2000, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. His certiorari petition presented the following question for relief:

Did the exclusion of Petitioner's statement against penal interest, and cross-examination about it, violate due process where the court ruled it would not admit the statement unless Petitioner testified, and the State did not want the statement admitted until the penalty stage to prevent jury consideration of a lesser-included offense?

Petition for Writ of Certiorari, at 1. The State filed a Brief in Opposition on July 31, 2000. The United States Supreme Court denied certiorari in an unpublished Order filed on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). Mr. Dudek again represented Terry before the United States Supreme Court.

Mr. Dudek filed a Petition for Stay of Execution on Terry's behalf on October 6, 2000, and the State did not oppose this request. Therefore, on October 18, 2000, the South Carolina Supreme Court filed an Order staying Terry's execution pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could pursue state PCR remedies.

In the stay Order, the South Carolina Supreme Court appointed the Hon. Marc H. Westbrook to preside over this case and gave him exclusive and statewide jurisdiction over the matter. In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's October 18, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), Judge Westbrook convened a hearing at the Lexington County Courthouse on Thursday, November 9, 2000. Mr. Terry was present at this hearing as were H. Wayne Floyd, Esquire, and Melissa Reed Kimbrough, Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing.

The Court ascertained that Terry wished for counsel to be appointed, so that he may pursue state PCR; and that Mr. Floyd and Ms. Kimbrough met qualifications set forth in S.C. Code Ann. § 12-27-160(B). On November 30, 2000 an Order Appointing Counsel was filed, by which Mr. Floyd and Ms. Kimbrough were appointed to represent Terry, with Mr. Floyd being lead counsel.

Terry filed his original PCR Application on or about November 30, 2000. Terry raised the following grounds for relief in his PCR Application:

9(a) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately explore and present a defense of alibi.*

10(a) Counsel failed to present any defense during applicant's trial despite the existence of witnesses who observed applicant around the time of the victim's killing, and would have testified he was not at or near the place where she was killed. Counsel's failure to offer a defense of alibi was deficient and deprived him of due process, a full and fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws. Strickland v. Washington, 466 U.S. 668 (1984); Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). This ground entitles applicant to a new trial.

9(b) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because trial counsel failed to establish sufficient evidence of criminal sexual conduct, first degree.*

10(b) After the State concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In order to survive a motion for directed verdict as to a charge of criminal sexual conduct, the state must prove beyond a reasonable doubt a lack of consent by the victim. See State v. Taylor, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900). During applicant's trial, the state adduced absolutely no evidence the victim had been *forced* into having sex with applicant. Thus, trial counsel's failure to make a more specific motion based on sufficiency of the state's evidence as to criminal sexual conduct, first degree, was ineffective and prejudiced the outcome of applicant's trial and sentencing proceeding. This ground entitles applicant to a new sentencing phase proceeding.

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because appellate counsel failed to raise the trial court's erroneous denial of trial counsel's motion for a directed verdict based on the state's failure to establish sufficient evidence of criminal sexual conduct, first degree.*

10(c) After the state concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, assuming this ground was adequately available for appellate review, appellate counsel was ineffective for failure to argue it on direct appeal, as it was a sufficient basis for overturning applicant's conviction on this count, as well as his sentence of death. Thus, applicant was

prejudiced by appellate counsel's dereliction, and he is entitled to a new sentencing phase proceeding.

9(d) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to make a Batson v. Kentucky, 476 U.S. 79 (1986) motion in response to the state using all of its strikes against female jurors.*

10(d) During voir dire, the state used its strikes to eliminate six potential jurors, all of whom were female, and one of whom was African-American. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), the United States Supreme Court extended its earlier holding in Batson, ruling it violated due process, equal protection and the right to a fair trial for the state to peremptorily exclude jurors based on gender. Here, the state's strike pattern clearly established a prima facie violation under J.E.B., and trial counsel's failure to make a Batson challenge deprived applicant of the fair jury selection and trial to which he was entitled. Counsel's errors require vacation of applicant's convictions.

9(e) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately investigate and challenge the physical evidence adduced by the state.*

10(e) Despite the absence of any direct evidence of guilt, trial counsel presented no defense on applicant's behalf and failed to adequately investigate and challenge the physical evidence presented during the guilt phase of his trial. Counsel's failure to conduct an adequate investigation is inexplicable in light of the numerous items of fiber evidence, which did not "match" applicant. Counsel's omissions were unreasonable and prejudiced the outcome of applicant's trial, entitling him to a new trial. Strickland v. Washington, *supra*.

9(f) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to investigate possible defenses.*

10(f) As detailed in 10(e), the state's evidence of guilt against applicant was paltry. At most, the state's evidence indicated applicant knew the victim and had had sex with her sometime prior to her death. However, applicant renounced his alleged confessions, and there was no direct evidence of his guilt. Under these circumstances, counsel acted unreasonably in failing to investigate and explore potential defenses, and there is a reasonable likelihood that the result of the proceeding would have been different had counsel adequately researched and presented possible defenses. Strickland v. Washington, supra.

9(g) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel erroneously told the jury applicant "confessed" to the crimes charged when in fact applicant's alleged confession amounted to, at most, an admission of manslaughter.*

10(g) During his opening statement to the jury, trial counsel told the jury applicant had "confessed" to the victim's murder. However, because applicant's alleged confession amounted, at most, to manslaughter, this statement was neither a "confession" to the charges against him nor an admission against interest. State v. Terry, 2000 WL 282450. Consequently, when trial counsel sought to have this statement admitted, which would have allowed the jury to hear evidence applicant was guilty of manslaughter rather than murder, trial court refused. Trial counsel's unreasonable action in informing the jury applicant "confessed" was extremely prejudicial, denied applicant the effective assistance of counsel, and entitles him to a new trial. Strickland v. Washington, supra; State v. Terry, supra.

9(h) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" when this statement had not been ruled admissible by either the trial court or applicant's jury.*

10(h) During his guilt phase opening statement, trial counsel told applicant's jury he confessed to the crimes charged. Not only was this statement inaccurate, as detailed in ground 9(f),

but it also resulted in the withholding of the statement from evidence, which denied applicant a determination of its admissibility by the trial court and by his jurors, who would have been required to determine its voluntariness prior to accepting the statement as evidence. Counsel's actions served no strategic purpose, and clearly worked to applicant's disadvantage, as the jurors were left with the erroneous impression that applicant had voluntarily acknowledged guilt to capital murder. Counsel's unreasonable actions were extremely prejudicial and require that applicant's convictions be vacated a new trial granted. Strickland v. Washington, supra.

9(i) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" based on his erroneous assumption that the state would seek to introduce the statement during trial.*

10(i) As detailed more fully in 10(g) and (h), trial counsel's statement to law enforcement was not an admission of guilt to murder, rape, and burglary. In fact, the statement was exculpatory as to capital murder in that, at a minimum, it negated the aggravating circumstances of criminal sexual conduct, first degree, and burglary, first degree. Nonetheless, trial counsel told the jury applicant confessed to the crimes for which he was then on trial. Counsel not only prejudicially misconstrued the contents of applicant's statement, thereby casting it in the worst possible light, but - - in an apparent attempt to lessen the impact of its later admission--also prevented the jury from being able to hear and consider its actual contents. Counsel's decision to tell the jury applicant confessed was based purely on his assumption the statement would be admitted, which was not sound trial strategy. But for this unreasonable assumption, there is a reasonable probability that the jury would have come back with a more favorable guilt verdict of less than murder, criminal sexual conduct, first-degree, and burglary, first-degree. For these reasons, applicant's convictions should be vacated. Strickland v. Washington, supra.

9(j) *Applicant was denied his right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws when the state improperly misrepresented its intention to rely*

on his alleged confession, which was deemed voluntary and admissible during a Jackson v. Denno hearing.

10(j) Prior to applicant's trial, a Jackson v. Denno hearing was held during which the state contested applicant's attempt to have his alleged confession excluded as evidence at trial. During opening statements, trial counsel told the jury that applicant "confessed." The offering of the confession by the state at applicant's Jackson v. Denno hearing constituted a representation by the state that the confession would be admitted into evidence at trial. This representation caused defense counsel to advise the jury of the confession in an apparent attempt to soften the blow of this evidence. Because the jury had already been informed of the existence of the confession, which was in fact exculpatory as to the charges of rape, murder and burglary, the state then chose not to enter it into evidence. And, because of its exculpatory nature, applicant could not introduce it. Trial counsel's statement to the jury was clearly made in reliance on the state's representations. Accordingly, applicant was denied essential exculpatory evidence because of defense counsel's reliance. In light of the position taken during the Jackson v. Denno hearing, the state acted improperly in withholding this evidence through courtroom chicanery at trial. The state's actions constitute prosecutorial misconduct and is the type of conduct historically condemned by our State Supreme Court. Torrence, supra; Terry, supra.

The case was thereafter reassigned to the undersigned. The Court permitted Terry to amend his PCR Application during the hearing.²

II. Allegations

Terry alleged the following grounds for relief in his "Applicant's Final Amendments":

Ineffective Assistance of trial counsel:

1. Opening statement contained prejudicial error to the extent that the defense conceded guilt of murder, criminal sexual conduct and burglary, first-degree, based on applicant's statement that admitted neither burglary nor criminal sexual conduct, and contained a confession only as to manslaughter;

² He had previously notified Respondent of most of these allegations and Respondent did not object to most of the amendments. The Court overruled the objection to the allegation to which there was an objection.

2. For failure to raise a *Batson/J.E.B.* challenge to the solicitors use of all strikes against all female and one black juror;
3. For failure to move to strike for cause juror Georgia Miller, whose statement that her punishment would be death for any intentional killing was a basis for disqualification;
4. For failure to object to the judge's jury charge on implied malice;
5. For failure to object to the portion of the trial judge's jury charge on the facts surrounding the death of Ms. Jackson;
6. For failure to object to or move *in limine* prevent the introduction of excessive and uncorroborated character evidence used by the state in the penalty phase;
7. For failure to object to hearsay evidence from Lt. Brown detailing the applicant's alleged theft of items from a construction site;
8. For failure to object to hearsay testimony by Officer Wilkerson regarding the statement of Ann Lomax, who was not present to testify;
9. For opening the door in cross-examination of Officer Wilkerson as to the statement of Ann Lomax who was not present to testify;
10. For failure to request a charge on provocation by the victim as a mitigating circumstances as set forth in 16-3-20[(C)(b)](8);
11. For failure to develop and present corroborating testimony that would have allowed introduction of defendant's statement during the guilt phase;
12. For failure to present any evidence or argument to the jury in support of defendant's statement that the killing was manslaughter rather than murder;
13. For failure to present any evidence or argument to the jury in support of defendant's statement that sex with the victim was consensual;
14. For failure to present any evidence or argument to the jury in support of defendant's statement that he did not burglarize the victim's residence;

15. For failure to make any argument at the directed verdict stage even though the evidence failed to establish criminal sexual conduct or burglary first-degree;
16. For failing to object to "character" evidence in the penalty state that was far more prejudicial than probative;
17. In arguing to the jury during closing that defendant was a "rapist", "murderer," "invader of homes" and "thief";
18. In failing to present evidence to the jury that defendant was left-handed even though the state's forensic evidence established that the killer was right-handed;
19. For failure to object and move for a curative instruction when Louanne Terry testified Gary could get out in thirty years, and, in the alternative, for not advising this witness not to mention parole eligibility;
20. For failure to object to officer Phillips testimony that the defendant had an appointment with the Sheriff's Department, but failed to show up;
21. For failure to present any argument or evidence to the Court or the jury that the defendant was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that the defendant's fingerprint was placed on the victim's telephone box based on innocent conduct;

Ineffective assistance of appellate counsel:

22. For failing to argue that the trial court erred in denying defendant's motion for a directed verdict as to all charges.

Brady violation

23. The State failed to disclose photograph of Diane Gibson and Applicant.

III.

In **Grounds 1-21**, Terry alleges that he received ineffective assistance of counsel from his trial attorneys. In **Ground 22**, he alleges that appellate counsel was ineffective. In **Ground 23**, he alleges that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). The Court finds that he is not entitled to relief on any of these allegations.

GROUND 1

Terry's first allegation is that trial counsel Stone was ineffective for telling the jury, in his guilt phase opening statement, that Terry had confessed to the victim's murder. Terry alleges that the statement was "at most, an admission of manslaughter," and the statement was never introduced into evidence. The Court finds that trial counsel was not deficient for making this comment, and that Terry was not prejudiced by counsel's performance.

At the State's request, the trial judge held a pre-trial *Jackson v. Denno*³ hearing to determine the admissibility of Terry's January 17, 1995 non-custodial statement and his March 24, 1995 statement, which he gave after he was arrested for the victim's murder. At the conclusion of this hearing, the trial judge ruled that both statements were admissible. **R. pp. 1133-95.** Terry's trial counsel specifically objected to introduction of his March 24, 1995 statement because the State had allegedly failed to prove a knowing and voluntary waiver of his *Miranda*⁴ rights, since he was ill at the time he made the statement and he had been sick several days previously. **R. pp. 1191-92.**

The trial judge ruled that the March 24, 1995 statement was freely and voluntarily given after Terry had been advised of and made a knowing and intelligent waiver of his rights under the Fifth and Sixth Amendments, and his *Miranda* rights. He further found that the statement was admissible. **R. pp. 1193-95.**

³ See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

Mr. Stone began his opening statement as follows:

Ladies and Gentlemen, Gary Terry over here told the police that he did it. He told the police that he had sexual intercourse with Urai Jackson. He told the police that he killed her, okay. It's called a confession and he made one. He told the police he did it. So what in the world are we doing here? Why are we even having one of these guilt phases?

R. p. 1281, ll. 16-22.

He answered this rhetorical question by explaining that there was a guilt phase because everyone was entitled to a fair trial, and the State had to prove Terry guilty beyond a reasonable doubt. Mr. Stone also emphasized that the jury would "hear evidence that doesn't talk about reasonable doubt, it doesn't talk about any of that." **R. pp. 1281-83.** He then urged jurors that:

I would submit to you Ladies and Gentlemen, by the time you end up listening to everything that you will hear in this case. . . I will submit to you. . . that you will know two things..

One is that Gary Terry told the police he did it. Also, you will know that Gary Terry tried to tell the police he committed another murder. Another murder that he's not charged with and he never will be prosecuted for.

I would submit to you, Ladies and Gentlemen, that for whatever reason, if you ask Gary right, he will admit to just about anything. They have a confession. They have that statement. Parts of which they don't even believe. They're going to ask you to believe it. You may understand by the end of this case that Gary is different. That he is somebody that will confess to a crime that he didn't commit. But because somebody is different, Ladies and Gentlemen, doesn't make him guilty.

R p. 1283, l. 23—p. 1284, l. 15. He concluded by asking the jurors to pay "very close attention" to the evidence and to "come back with a verdict that speaks the truth." **R. p. 1284, ll. 16-18.**

Inv. Scotty Frier, of the Lexington County Sheriff's Department, was one of the two officers to whom Terry had made the statements. Before presenting his testimony, the State informed the trial judge *in camera* that it had decided not to introduce Terry's March 24 statement. The State also moved *in limine* to prohibit Terry from introducing any evidence concerning the statement. **R. pp. 1373-80.** The State explained that:

The State's position is that [the statement] . . . is inculpatory to a certain extent, [but] exculpatory in the grand scheme of things; that is, as to aggravating circumstances and actually attempts to move the charge of murder to voluntary manslaughter and no criminal sexual conduct and no burglary.

We are not required to elicit it and they can't elicit it under the rules as they are now.

R. p. 1375, ll. 10-17.

Following a recess, Terry argued that the statement would be admissible under Rule 804(b)(3), SCRE, as a statement against his penal interest. He also claimed that the statement was admissible as a matter of due process and cited *Chambers v. Mississippi*, 410 U.S. 204 (1973) and *Green v. Georgia*, 442 U.S. 95 (1979). He further argued that the statement "contains sufficient indicia of reliability to take it outside of the hearsay exception. . . ." **R. pp. 1377-79.**

The State responded by noting that Terry's opening statement suggested to the jury that Terry had given a false confession. Moreover, the State had not elicited evidence of any statements. Specifically, it did not introduce evidence of the statement denying involvement out of fairness to Terry because "we didn't want to be in the position of appearing overbearing in regard to statements made by the defendant." However, the State noted that its trial strategy not to introduce Terry's statements did not effect Terry's ability to assert a defense. **R. pp. 1379-80.**

Although the trial judge questioned whether Terry was unavailable, he took the matter under advisement overnight. **R. pp. 1380-82.**

The following morning, the trial judge ruled that the statement was inadmissible under Rule 804(b)(3) because, although Terry's assertion of his Fifth Amendment right not to testify may make him unavailable as a witness for the State,⁵ this did not allow him to introduce a statement that the State did not introduce in its case-in-chief, in order to circumvent the requirement that he could not present his own statements unless he testified. **R. pp. 1386-87.**

The trial judge also ruled that Terry would be unable to elicit evidence that he had given a statement to police. **R. pp. 1387-89.** Based on this ruling, no evidence was presented to the guilt phase jury concerning either statement Terry had given to police. However, the State introduced both statements in the sentencing phase of his trial. **R. pp. 1810-19; State's Exhibits 67-68.**⁶

Both of Terry's trial attorneys testified extensively about their work history prior to their involvement in this case. Ms. Fullwood testified that she had been Lexington County Public Defender since 1991 and, in that capacity was appointed to represent Terry at trial. She was in private practice briefly before becoming the Public Defender; and she had previously she worked at the South Carolina Office of Appellate Defense for eight years. She had handled a number of felony trials, "including at least two death penalty cases" at the time of her appointment. She and co-counsel divided their responsibilities based upon several considerations, including trying

⁵ The trial judge apparently agreed with the State's position (**R. pp. 1373-74**) that any statement of Terry that it chose to admit was admissible under Rule 801(d)(2). *See R. pp. 1386-87.*

⁶ The South Carolina Supreme Court affirmed the trial judge's rulings on direct appeal. *Terry*, 339 S.C. at 355-58, 529 S.E.2d at 276-77.

to make the workload even and assigning work based upon areas of experience or interest. PCR Tr. pp. 186-87; 195-96.⁷

Ms Fullwood testified that the defense's theory in the guilt phase was to point out any gaps or inconsistencies in the State's case to establish reasonable doubt. The defense did not have any evidence to introduce in an effort to show that Terry was not guilty, and "we had to always be mindful of the need to stay credible to the jurors when we reached the second phase of the trial." PCR Tr. p. 207.

Ms Fullwood did not recall whether she and co-counsel discussed whether Terry's statement should be addressed in the opening statement; but she testified, "we probably did." She did recall that the *Jackson v. Denno* hearing and testified that the defense operated under the assumption that the State was planning to introduce the March 24, 1995 statement in the guilt phase of the trial. The statement would not have been mentioned in the opening statement if the defense had known otherwise. Also, the State did not make any representation that it would present the confession in the guilt phase. Rather, it was the defense's assumption that the statement would be introduced because it was a "confession" and the *Jackson v. Denno* hearing was held pretrial. PCR Tr. pp. 187-88; 207-09.

She also did not recall whether there had been a preliminary decision on whether or not Terry would testify. However, this is a matter she would always discuss with a client well in advance of trial, with the idea of maintaining some flexibility based on the events in the trial itself. Also, the trial judge's ruling on State's motion to prevent the defense from introducing the March 24, 1995 statement would have been a factor discussed in connection with Terry's

⁷ Counsel's extensive pretrial investigation and efforts to corroborate the March 24th statement and Terry's other versions of what had occurred, including a purported alibi, are addressed in **Grounds 11-14**. The Court finds that counsel's efforts more than satisfied the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984).

decision on whether or not to testify. PCR Tr. pp. 207-09. Although she did not have any independent recollection, she felt “sure that our advice was not to testify “based on his criminal record and counsel’s observations of him, his general demeanor and their assessment of how well he would “most likely stand up under cross-examination.” PCR Tr. p. 209.

This case was the first murder case Mr. Stone had tried. However, he began working at the Fifth Circuit Solicitor’s Office in 1989. There, he tried “just about any type of case that came along” for roughly a year and one-half. Then, he became one of two drug prosecutors in the Office. His unit at that point handled “probably 35% of the whole docket.” When he left the Solicitor’s Office and went into private practice, he did both civil and criminal cases, including complex civil litigation. By the time of this case, he had roughly seven years of felony trial experience. PCR Tr. pp. 34-36; 69-72.

Mr. Stone testified that the State had very good guilt case. He met with co-counsel “a number of times” to figure out the best way to approach the case. They wanted to maintain credibility with jurors in the guilt phase for when they reached the sentencing phase. They split their responsibilities in the guilt phase. He attacked the fingerprint evidence, and Ms Fullwood attacked the DNA evidence. The “confession” was a little more difficult. In the statement, Terry said that he had consensual sex with the victim. She thereafter got mad and there was a fight. Mr. Stone felt that the statement raised issue of manslaughter and eliminated the statutory aggravator of burglary. PCR Tr. pp. 38-39.

There had been a pretrial *Jackson v. Denno* hearing held to determine the admissibility of the statement. Although no one from the prosecution told him that the State planned to introduce Terry’s statement in the guilt phase, Mr. Stone was under the impression that the State was going to introduce it; and he operated under that assumption when he made his opening statement. He

would not have made the remark that Terry had confessed if he had not thought State was going to introduce the March 24th statement in guilt phase. **PCR Tr. pp. 39-42; 83-85; 100-01.**

“I did it because I was trying to be the first one to say it. I was again trying to buy credibility with the jury and I was also trying to call attention to the fact that he had confessed to another case that we knew for a fact and that law enforcement knew for a fact he didn’t do.” In what Mr. Stone testified was a “unique situation,” there was evidence (that was ultimately presented in the sentencing phase) of a discussion between Terry and another inmate, wherein Terry agreed to take the blame for the crime that the other inmate had committed, so that the other inmate could be freed. So, “we were trying to bring that out as yeah, sure, he confessed to this case, but he also confessed to something else that everybody else knows that he didn’t do.” **PCR Tr. pp. 39-42; 83-85; 100-01.**

Mr. Stone testified that the decision of whether or not Terry should testify was Terry’s to make. However, Mr. Stone did not think Terry should testify because he did not think Terry would be a credible witness. He based his decision, in large part, on his dealings with Terry. Also, the defense was going to present expert testimony regarding a SPEC scan that showed Terry was brain damaged. If Terry had testified, then he would not have come across as brain damaged even if the jury found that he was credible because he would have sounded clear. **PCR Tr. pp. 85-87.**

Mr. Humphries testified that he thought that the defense had requested the *Jackson v. Denno* hearing, but he acknowledged the need for a hearing because the State intended to introduce the statement into the sentencing phase. The way cases were prepared in the Eleventh Circuit Solicitor’s Office at the time of this trial, the second chair would prepare the case up to a point. Then, the Solicitor would come into the case. They would later discuss specific trial

strategies. The State decided that it did not need the March 24, 1995 statement in the guilt phase because the statement was self-serving and contrary to most of what the State was attempting to prove. Because Terry's statement attempted to establish a defense to one or more charges and mitigate the murder to manslaughter, the State decided strategically that it did not want to present it in its guilt phase case-in-chief, so that Terry would have to testify if he wanted it before the jury in the guilt phase. Also, Terry had the right to testify. This is why the State moved *in limine* to bar the defense from introducing it. The State made the strategic decision well in advance of trial to use the statement in the penalty phase. PCR Tr. pp. 107-108; 112-14; 115-18.

Mr. Francis Humphries testified that Mr. Stone independently reach a conclusion about the State's intention to introduce the March 24, 1995 statement in the guilt phase. The defense opening statement appeared to be strategic; and Terry could have testified, as the trial judge's ruling on the State's *in limine* motion made clear. PCR Tr. pp. 116-18.

Mr. Thomas Chase testified that he and Mr. Humphries had discussed whether or not to present the March 24, 1994 statement in the guilt phase of Terry's trial, and they made the strategic decision not to use it in the guilt phase, unless Terry testified. "From a strategic standpoint, we did not need the statement to have Mr. Terry at the scene," since "very solid scientific evidence" established Terry's presence. Also, the statement was somewhat "exculpatory." Mr. Chase and Mr. Humphries decided that if they introduced the statement, "we would essentially be . . . putting in self-serving hearsay that could benefit [Terry] potentially in the case." Therefore, they decided that they would not use the statement in the guilt phase, unless Terry testified and could be cross-examined with it. If Terry wished to put that version of the crime before the jury, he would have to testify. **PCR Tr. Pp. 288-90.**

However, the State felt it needed a pretrial ruling on the question of whether or not the statement was admissible, so that they could formulate their strategy for cross-examining Terry if he testified. The State also planned to introduce the statement in the sentencing phase, to show that he had denied committing the acts that the jury had convicted him of in the guilt phase. Therefore, they requested a pretrial *Jackson v. Denno* hearing. Mr. Chase was not aware that Mr. Stone was going to make the comments he made in his opening statement, but the opening statement did not play any role in the State's decision to introduce the statement in its case-in-chief. Also, neither Mr. Chase nor Mr. Humphries told defense counsel either that the State was planning to introduce the statement in the guilt phase, or that their actual trial strategy was to not introduce the statement. In fact, Mr. Chase testified that he would not have disclosed the State's strategy to Mr. Stone even if asked. **PCR Tr. pp. 288-93; 295-96.**

A PCR applicant bears the burden of proving the allegations in his application for post-conviction relief. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1, SCRPC.

Further, a criminal defendant is entitled to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970). To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel's assistance is not unconstitutionally ineffective merely because trial counsel's defense strategy was unsuccessful. *Id.* at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 2533 (1996) "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an inmate establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "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. See also *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also

Wiggins, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 333, 504 S.E2d 822, 823 (1998) (citing *Strickland*, 466 U.S. at 695).

When these principles are applied to the present case, the Court finds that Terry clearly cannot meet his burden of proof. The Court first finds that Terry has not proven that counsel's decision to make the challenged comments in his opening statement was deficient performance, even though the information about Terry's statement was not presented to the jury in the guilt phase.

An opening statement is intended to inform the jury of the facts that the party intends to prove at trial. *Thompson v. People*, 139 Colo. 15, 21, 336 P.2d 93, 97 (1959). The course of a trial can affect and alter an original defense strategy, and may lead to reasonable decisions not to call witnesses who were mentioned in the opening statement. *See, e.g., Williams v. Bowersox*, 340 F.3d 667, 671-72 (8th Cir.2003).

It is not deficient performance *per se* for counsel to promise something in opening statement, but fails to deliver on that promise during the defense's case. *Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir.1994). *People v. Burnett*, 110 Cal.App.4th 868, 885 (Cal.App. 2003) ("Making promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance *per se*"); *See also United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir.1993) (holding that failure to deliver on opening promise to put on expert witness was not ineffective assistance);⁸ *Schlager v. Washington*, 887 F.Supp. 1019, 1026-27 (D.Ill.1995), *aff'd* 113 F.3d 763 (7th Cir.1997) (holding that strategic decision not to introduce

⁸ In *McGill*, the First Circuit Court of Appeals concluded that, "although a failure to produce a promised witness may under some circumstances be deemed ineffective assistance, *see, e.g., Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir.1988), the determination of inefficacy is necessarily fact based. '[N]o particular set of rules can be established to define effective assistance....' " *Id* at 227 (emphases added) (quoting *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir.1991), *cert. denied*, 502 U.S. 1079 (1992)).

witnesses promised in opening statement was not ineffective assistance). *See also People v. Goodloe*, 263 Ill.App.3d 1060, 1076, 636 N.E.2d 1041, 1052, 201 Ill.Dec. 609, 620 (Ill.App. 1994). “[A]ssuming that counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is ‘virtually unchallengeable.’ ” *Turner*, 35 F.3d at 904 (citation omitted).

The Court finds that the testimony of both trial counsel and both prosecutors is credible. Based upon the testimony discussed above, the Court finds that trial counsel made an objectively reasonable strategic decision to inform Terry’s jury that Terry had given a statement to police, in which he admitted both that he had sexual intercourse with the victim and that he had killed her. Counsel did this to “buy credibility” with Terry’s jury by being the one who first acknowledged the existence of the “confession,” and to set the stage for later pointing out Terry’s willingness to take responsibility for a crime that even law enforcement did not believe he had committed.⁹

In *Florida v. Nixon*, 543 U.S. 175, 191-192 (2004), the United States Supreme Court recognized that:

Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. *See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 329 (1983). In such cases, “avoiding execution [may be] the best and only realistic result possible.” *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his

⁹ The State introduced evidence of this plot with another murderer, Johnny Ray Brewer, in the sentencing phase. *R. pp. 1727-35*. At that time, Mr. Stone did establish on cross-examination of Inv. Hite that Terry was never charged with the murder to which he had planned to admit, so that Brewer would be released from the Lexington County Detention Center. The plan was then for Brewer to break Terry out of jail. *R. pp. 1735-37*.

client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney."); Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L.Rev. 1557, 1589-1591 (1998) (interviews of jurors in capital trials indicate that juries approach the sentencing phase "cynically" where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense); *id.*, at 1597 (in capital cases, a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase). In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in "a useless charade." See *Cronic*, 466 U.S., at 656-657, n. 19, 104 S.Ct. 2039. Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." *Attorney for the Damned: Clarence Darrow in the Courtroom* 84 (A. Weinberg ed.1989); see Tr. of Oral Arg. 40-41 (Darrow's clients "did not expressly consent to what he did. But he saved their lives."); cf. *Yarborough v. Gentry*, 540 U.S. 1, 9-10, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam).

(Footnote omitted).

Here, the Court finds that the decision to try and maintain credibility with the jury was reasonable, particularly in light of the overwhelming forensic evidence establishing that Terry was guilty of tampering with the telephone line, first-degree burglary, first degree CSC and murder.¹⁰ It was likewise not unreasonable for trial counsel to anticipate that the State would

¹⁰ This evidence included both D.N.A. from the vaginal wash and anal swab, Terry's fingerprint on the telephone box where the telephone lines had been pulled and expert testimony on bloodstain and blood spatter analysis. See **Ground 15, *infra***. Further, the State was not under any duty to present the statement in the guilt phase.

introduce State's Ex. 68 in the guilt phase, even though the statement¹¹ was self-serving, since this has been done in any number of capital and non-capital cases.

Moreover, even when it became clear to counsel that the prosecution was not going to introduce Terry's statement in the guilt phase, counsel made reasonable arguments to convince the trial judge to deny the prosecution's motion *in limine* to bar Terry from introducing the statement without testifying. Counsel argued, albeit unsuccessfully, that Terry was an unavailable witness and that his statement was admissible under Rule 804(b)(3) as a statement against interest. Counsel likewise raised a constitutional argument that the statement should be introduced without Terry having to testify, and counsel thereby sought to place the statement before the jury though cross-examination of Mr. Frier. Although South Carolina law prior to adoption of the South Carolina Rules of Evidence was contrary to this position, the Court finds that Mr. Stone's efforts were reasonable because the South Carolina Supreme Court had never ruled on the question of whether a defendant who has procured his own unavailability by invoking his protection against self-incrimination is "unavailable" as a witness for purposes of Rule 804(b)(1), SCRE. *See Terry*, 339 S.C. at 356-58, 529 S.E.2d at 276-77.

Nor was counsel's opening statement deficient, even though the statement never was introduced. The only other way to present the guilt phase jury with the information in the March 24th statement was for Terry to testify and subject himself to cross-examination. However, the Court finds that Terry decided not testify. Counsel so advised him, and he does not raise any allegation that counsel's advice was ineffective.

¹¹ The Court does not view the statement as a confession because Terry does not confess to murder in it. Rather, he presents a version of what occurred that explains why his D.N.A. was found and why the victim was beaten so badly. His statement, however, does not explain his fingerprint on the telephone box or evidence showing that he broke into the victim's home. His statement also does not explain why the victim was found in a position suggesting that the sexual activity occurred where she was found. *See Grounds 10 and 15, infra.*

Under these circumstances, the Court finds that the only way one can conclude that counsel's performance was deficient is to assess it with the benefit of hindsight, which is clearly contrary to *Strickland*. See 466 U.S. at 689. Other cases have found that counsel's performance was not deficient in similar circumstances. For instance, in *Goodloe*, trial counsel said in his opening statement that evidence of cocaine usage would be presented. However, no such evidence was ever presented.

On appeal, the Illinois Court of Appeals rejected the defendant's claim that counsel was ineffective. The Court found that because "the admissibility of evidence is a matter within the sound discretion of the trial court and that determination may not be overturned on appeal absent a clear abuse of discretion, we do not find trial counsel's representation to have been ineffective where he made several good faith attempts to introduce the evidence that he promised in his opening statement, and the trial court, in its discretion, properly kept it out, finding said evidence irrelevant. Defendant could not have been prejudiced by counsel's brief mention of the deceased's cocaine use in his opening statement." *Goodloe*, 263 Ill.App.3d at 1076, 636 N.E.2d at 1052.

In *Turner*, defense counsel had intended, at the outset of the sentencing proceeding, to introduce mitigating evidence. As a result, he told the jury in his opening statement that he would produce certain mitigating testimony and other evidence. However, he rested without putting in that evidence. The Fourth Circuit Court of Appeals rejected the petitioner's claim that his attorney's failure to present the evidence described in the opening statement, in and of itself, was ineffective assistance. The Court found that counsel had "changed his trial strategy because he thought the Commonwealth rested prematurely and because the court indicated that the scope of rebuttal would be quite broad."

The Court in *Turner* held that “his strategic decision to withhold evidence promised in the opening statement was not unreasonable. Nor was it unreasonable for him to mention mitigating evidence in his opening statement. This, again, was a strategic decision; had [counsel] not described mitigating evidence in the opening statement, we suspect that [petitioner] would have challenged that omission.” 35 F.3d at 904.¹² See also *McGill, supra*; *Bowersox*, 340 F.3d at 672 (upholding the state court's finding that counsel did not render ineffective assistance in failing to call two witnesses who were identified during opening statement); *Yancey v. Hall*, 237 F.Supp.2d 128, 135 (D. Mass. 2002) (concluding it was not ineffective assistance for petitioner's attorney to promise that petitioner would testify and that the evidence would show petitioner was not the person who committed the crime, even though petitioner ultimately did not testify and his counsel rested without adducing all of the promised evidence.); cf. *Howard v. Davis*, 815 F.2d 1429, 1432-33 (11th Cir.1987) (holding that a change of strategy in the midst of a trial did not constitute ineffective assistance, even where defense counsel asserted an “insanity defense initially, knowing that he might withdraw the defense at a later time”); *People v. Hill*, 257 Mich.App. 126, 139-40, 667 N.W.2d 78, 86 (Mich.App. 2003); *People v. Witkin*, 2007 WL 1378383, *4-6 (Cal.App., May 11, 2007). The Court further finds that the present case is far different from cases where courts have found counsel ineffective.¹³ Therefore, counsel's performance was not deficient under *Strickland*.

¹² The Court also rejected the Petitioner's allegation that the opening statement was made without the benefit of adequate pretrial preparation because the Court had concluded that counsel's pretrial preparation was adequate. *Id.*

¹³ For instance, in *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Cr.App. 1991), a prosecution for second-degree murder, defense counsel's failure to present any evidence constituted ineffective assistance of counsel. Unlike the present case, in his opening statement, defense counsel explicitly promised the jury that defendant, the defendant's psychologist, and others would testify that defendant was a battered wife who had killed victim in self-defense. Defense counsel failed to call witnesses or introduce evidence which would have supported defendant's version of events which transpired night of murder, and defense counsel advised defendant not to testify in her own behalf despite fact that only victim and defendant were present when offense was committed and only defendant could present full version of her theory of facts. *Id.* In *Zimmerman*, counsel failed to present a defense set out in his

The Court further finds that Terry cannot show prejudice resulting from counsel's alleged error. Despite Terry's argument and trial counsel's testimony concerning the March 24th statement, the Court finds that the statement does not support a jury instruction on voluntary manslaughter. In order to reasonably be viewed as supporting a manslaughter charge, the Court would have to parse out the statement from the prosecution's other evidence. This is improper. *E.g., State v. Foxworth*, 269 S.C. 496, 499, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial and on the remaining evidence found defendant guilty of the lesser offense of simple assault and battery did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of ABHAN); *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) ("the [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.' ") (quoting *State v. Hicks*, 241 N.C. 156, 159-160, 84 S.E.2d 545, 547 (1954)); *State v. Geiger*, 370 S.C. 600, 608-09, 635 S.E.2d 669, 674 (Ct. App. 2006). Again, the statement does not explain

opening. However, here, counsel reasonably expected the State to introduce the statement in its case-in-chief, and he made other reasonable efforts to present this information to the jury, without requiring his client to testify, when he discovered that the State had not intended to introduce the statement.

Similarly, trial counsel here did not withhold crucial evidence without reason as in *Harris v. Reed*, 894 F.2d 871 (7th Cir.1990) where counsel failed to fulfill a promise to call eyewitnesses who saw a man other than the defendant run from the scene of the crime. Also, in *Blankenship v. State*, 23 S.W.3d 848 (Mo.Ct.App.2000), a defense counsel (whose behavior at trial was described as "fumbling, stumbling and bumbling" by the trial judge) was deemed ineffective because in his opening statement he promised to present an expert witness whom he had not yet interviewed, and upon doing so decided not to call. 23 S.W.3d at 850. The Missouri Court of Appeals held that Blankenship's defense counsel was ineffective because, due to his failure to investigate, he "really had no idea what [the expert witness's] testimony would be, prior to trial;" yet, nonetheless, he promised the jury in his opening statement the expert witness would be called. *Id.* at 851. Here, there is no deficiency in counsel's investigation or preparation. Nor was this case like *Anderson, supra*, where counsel promised but failed to call an expert witness to support a theory that defendant was a "a robot" with no appreciation of his actions.

the physical evidence discussed, *supra*. Even considering this statement in isolation, the Court does not find that the victim's actions constituted sufficient legal provocation.

Additionally, when counsel's remarks were placed in the context of his entire opening statement, the court finds that he was emphasizing that Terry's March 24th statement was false, and that law enforcement did not even believe that parts of it were truthful. Thus, even though he miscalculated whether the guilt phase jury would hear the statement, he was suggesting that it was a false confession, as opposed to credible evidence.

Moreover, the trial judge instructed the jury on the State's burden of proof; the presumption of innocence; and that Terry's right not to testify could not be considered in deliberations. He also instructed jurors that they had to base their verdict solely on the testimony and evidence presented at trial, and that the arguments of counsel were not evidence. **R. pp. 192-95; 267-68; 1269-76; 1562-84.** These instructions were sufficient to preclude the guilt phase jury from relying upon either counsel's opening statement or the failure to present evidence of the statement in reaching its verdict.

Further, the record reveals that overwhelming and essentially un-controverted evidence at trial demonstrated that Terry was guilty of each of the crimes charged, and that he broke into Mrs. Jackson's home (after pulling her telephone line, so that she would be unable to call for assistance), sexually assaulted her and beat her to death with a heavy blunt object. *See Ground 15.* Therefore, the Court finds that he has not proved that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.¹⁴

¹⁴ The present allegation only involves counsel's performance in the guilt phase. There could not be any prejudice in the sentencing phase because the March 24, 1995 statement was introduced as State's Ex. 68.

GROUND 2

Applicant's **Ground 2** alleges that trial counsel were ineffective in failing to move for a *Batson*¹⁵ hearing based upon the State's use of five peremptory challenges to remove females from the jury and use of another challenge to remove a female alternate. He premises this argument upon *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), where the United States Supreme Court extended its earlier holding in *Batson* held that it violated equal protection and the right to a fair trial for the State to exclude jurors based on gender. The Court finds that Terry has failed to prove deficient performance because counsel made an objectively reasonable strategic decision not to challenge the jury panel although they were aware of Terry's right to raise a *Batson* motion based upon the State's use of its challenges. Terry also cannot show any prejudice because the State's reasons for the exercise of its strikes, given at the PCR hearing were gender neutral and Terry did not establish that the stated reasons were pretextual.¹⁶

The record reflects that the State used its strikes to eliminate five potential jurors and one alternate, all of whom were female, and one of whom was African-American. However, it had presented twelve female jurors before exercising its final strike on juror Leaphart, and defense counsel struck five of these women. Seven women were seated on Terry's jury before the State exercised its last peremptory challenge, and eight women ultimately sat on his jury. Trial counsel failed to request a *Batson* hearing. **R. pp. 1118-28.**

Mr. Stone testified that he was aware at the time of trial that he could raise *Batson* motion with respect to the State's use of its strikes against female jurors, and that he had made a number

¹⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁶ The Court ruled that the Eleventh Circuit Solicitor's juror selection information is not covered by the work product privilege for those jurors whom they struck but overruled Terry's request for information as to the twelve jurors selected because defense counsel would not have had access to the information about the other jurors. Thus, the work product privilege did apply to the remaining jurors.

of such motions when employed as a prosecutor. However, he looked at the jury and “liked what I saw.” He thought that the defense had the best chance with the jury they had drawn, and that he did not see purpose in *Batson* motion because he was comfortable with the jury they had selected. **PCR Tr. pp. 43-44; 87-88.**

Likewise, Ms. Fullwood testified that she was familiar with *Batson*, even before she became a trial attorney. She was also aware that she could raise challenge to gender-based strikes. However, because the jury was struck in the order in which they were qualified, the defense could think out how to use their strikes and anticipate how the State would use their strikes. Counsel felt that they had gotten the best jury that they could select from the panel. So, the motion was not made. **PCR Tr. pp. 210-11.**

As a general rule, the failure of trial counsel to make a *Batson* objection cannot be deemed deficient, *per se*. Like any other objection, a *Batson* objection can be forgone for strategic or tactical reasons. *See Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991) (“the record supports the state's contention that counsel simply chose not to include the *Batson* claim in the motion as a strategic matter. ... Counsel had included discriminatory jury selection claims in new trial motions in prior cases, but did not include such a claim among the thirteen alleged errors set out in the motion in this case. Rather, he concentrated on evidentiary rulings and allegedly improper comments made by the prosecution in closing argument. Furthermore, trial counsel may have been satisfied with the ultimate racial composition of the jury, and decided not to raise the *Batson* issue on that basis”) (citation omitted). The Court finds that trial counsel’s testimony is credible and that this testimony reflects an objectively reasonable strategic decision not to raise a *Batson* motion because they were satisfied with the jury, as selected. *See Strickland*, 466 U.S. at 690-91 (counsel's strategic choices virtually unchallengeable); *Brownlee*

v. Haley, 306 F.3d 1043, 1066-67 (11th Cir.2002) (counsel was not ineffective for failing to raise *Batson* issue because it clearly lacked “merit. As the trial court found in its Rule 32 ruling, and the district court agreed, nothing in the prosecutor's remarks during the trial indicates any sign of racial bias. Furthermore, trial counsel stated in post-conviction testimony credited by the trial judge that there appeared to be no basis for a *Batson* challenge. Since [petitioner] cannot show that counsel was ineffective for failing to preserve this issue, he cannot overcome the procedural default”).

Even if trial counsel's performance was deficient, the Court finds that Terry has not demonstrated any prejudice under *Strickland* because he cannot prove a reasonable probability of a different result, *i.e.*, that there is a “reasonable probability” that a *Batson* “motion would have been sustained and that the trial judge would have taken curative action before the trial began.” See *Davidson v. Gengler*, 852 F.Supp. 782, 787 (W.D.Wis. 1994).

In *Batson*, the Court overruled *Swain v. Alabama*, 380 U.S. 202 (1965), and held that the equal protection clause of the Fourteenth Amendment barred the prosecution from striking *veniremen* based upon their race. In *McCullum*, 505 U.S. at 59, the Court extended *Batson* and held that criminal defendants were also barred from exercising peremptory challenges based upon race. Therefore, either the defense or prosecution could move to quash a petit jury based upon the other party's violation of the equal protection rights of a juror(s). Finally, in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Court applied *Batson* to improper use of gender in jury selection.

As the Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006):

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).

We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

Further, "in *Batson* inquiries, 'the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.' Because there is rarely any direct evidence of the attorney's state of mind when he made the challenge, 'the best evidence often will be the demeanor of the attorney who exercises the challenge.' This type of credibility assessment lies 'peculiarly within a trial judge's province.'" *Byram v. Ozmint*, 339 F.3d 203, 208 (4th Cir. 2003) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). See also *Batson*, 476 U.S. at 98 n. 21 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because the finding 'largely will turn on evaluation of credibility'"); *Miller-El*, 537 U.S. at 340-41 ("Deference is necessary because a reviewing court,

which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. ... In the context of direct review, therefore, we have noted that ‘the trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal’ and will not be overturned unless clearly erroneous”).

The Court finds that Terry has not even established a *prima facie* case of gender-based discrimination, as demonstrated by the State’s willingness to present twelve female jurors before exercising its final peremptory challenge. However, the Court has examined the reasons proffered in light of *Adams* and *Rayfield*.

The two prosecutors in this case, Mr. Humphries and Mr. Chase, both testified as to their reasons for at the PCR hearing. PCR Tr. pp. 122-123; 130-139; 141. Both denied that there was any reason for striking female jurors, as a class; and they denied that their use of peremptory challenges was gender-based. Indeed, Mr. Humphries correctly noted that striking female jurors, categorically, is contrary to traditional thinking about jurors in a home invasion and rape case. PCR Tr. pp. 109-11; 141; 282. After having the opportunity to observe and hear them testify, the Court finds that the testimony of both prosecutors was credible;¹⁷ and that they provided sufficiently gender-neutral reasons for the State’s exercise of its challenges.

Based upon their testimony, the Court finds that the jurors were struck for the following reasons. Glenda Clifton, juror 35, was the first juror struck. There was a question about whether or not her son might have been in the Eleventh Circuit’s pretrial intervention program, which

¹⁷ In particular, the Court credits Mr. Chase’s explanations, since he had the opportunity to review his notes of the jurors in question several days before the hearing and give the matter more thought than did Mr. Humphries, who was only provided with the notes during his testimony and had considerably less time to review them to refresh his recollection. See PCR Tr. pp. 111-12; 118-21. The Court would note, however, that Mr. Humphries’ stated reasons were not inconsistent with those given by Mr. Chase. Rather, his reasons corroborated those given by his co-counsel and lend credibility to Mr. Chase’s reasons. They simply were less detailed.

raised a concern about potential “animosity towards the prosecution. Also, early during voir dire, she hesitated about her ability to impose a death sentence. This likewise gave the prosecution concern. PCR Tr. pp. 123; 130-31; 282-83.”¹⁸

The Court finds that both reasons are gender-neutral. Obviously, a juror’s views on capital punishment are neutral. *See State v. Evins*, 373 S.C. 404, 417, 645 S.E.2d 904, 910 (2007) (“Where the Solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against that juror upon this ground as a racially neutral reason”); *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991) (vacillating responses to voir dire questions regarding the death penalty will support the use of a peremptory strike against a *Batson* challenge). The remaining reason is likewise gender-neutral. *See State v. Ford*, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (it is legitimate to strike potential jurors because of their employment). *See also Adams*, 322 S.C. at 125, 470 S.E.2d at 372 (finding potential juror’s employment as a court reporter is a valid reason for exercising a peremptory strike); *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994) (prior prosecution by that particular Solicitor’s Office).

Karen Moore, juror 170, the fourteenth juror drawn, was struck for several reasons. First, Mr. Humphries observed that Ms. Fullwood examined the juror first and appeared to have developed a rapport with her. There were also concerns because she worked in a cardiac ward. As a result, she was caring for people and trying to prevent them from dying on a daily basis. This gave the prosecution concerns that she might have problems signing a death verdict. The State was also concerned that she might not be able to sign the verdict if confronted with a

¹⁸ Mr. Humphries noted that he had a question mark about whether she was a category 3 juror and stated that his impression was that she was only marginally able to sign verdict form. PCR Tr. pp. 123; 130-31. Ms. Clifton’s voir dire is on R. pp. 278-310.

mental health case in mitigation. Further, Mr. Chase testified that the State “definitely had the feeling that she was not disclosing everything” on voir dire; and “you definitely don’t want that type of juror sitting on [a capital jury].” PCR Tr. pp. 131-132; 283-84. The Court finds that each stated reason for striking juror Moore is gender-neutral. See *Evitts, supra*; *Matthews v. Evatt*, 105 F.3d 907 (4th Cir.1997) (the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors); *State v. Wright*, 304 S.C. 529, 405 S.E.2d 825 (1991) (struck juror had disinterested attitude and demeanor).

Cheryl Kirkpartrick, juror 137,¹⁹ was struck because she was very hesitant when questioned about her ability to impose the death penalty, which again gave the State concerns about her ability to impose the death penalty. Mr. Chase also felt that she seemed to differentiate between her ability to say that she could impose the death penalty when questioned by the court and counsel and her emotional ability to impose it. She could do so theoretically but not emotionally. PCR Tr. pp. 133; 284-86. Again, under *Bell* and *Evitts*, the Court finds that the stated reasons were gender-neutral.

Juror 139, Sandra Kizer, was struck because there was a note on her information to “see S. R. H.’s file.” This refers to the file in a case prosecuted by Rick Hubbard, of the Eleventh Circuit Solicitor’s Office. She was being prosecuted for “cruelty to animals” and the State was concerned that she might harbor animosity to the Office. PCR Tr. pp. 133-134; 286-87. This was a gender-neutral reason. *Dyar, supra*.

Cassandra Leaphart, juror 141,²⁰ was struck because she had to be brought to court by the Sheriff’s Office. Also, she was confused by the trial judge’s questions, even though the trial judge’s questioning was very clear. Mr. Chase noted that the trial judge almost had to

¹⁹ Her voir dire is on R. pp. 506-21.

²⁰ Her voir dire is on R. pp. 881-93.

rehabilitate the juror because her answer seemed to make her disqualified for cause. Further, Mr. Humphries felt that she was a questionable juror on the death penalty. **PCR Tr. pp. 134-35; 287-88.**

The Court finds that the stated reasons for striking this juror was gender-neutral. Striking a juror who is weak on the death penalty is such a neutral reason. *See Bell and Evitts, supra*. The other reasons for striking juror Leaphart were because she had to be brought to Court, and because her confused answer to the trial judge's questioning suggested that she might be subject to challenge for cause.²¹ Both reasons satisfy *Batson E.g., State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); *United States v. Smith*, 324 F.3d 922, 927 (7th Cir. 2003) (prosecution excused juror because he had made several mistakes on his juror questionnaire that suggested an inability to follow simple instructions).

Terry argues that the proffered reason of views on the death penalty was pretext because a male, Jerry Jumper, was seated although he was supposedly weak on his ability to impose capital punishment. However, with the exception of Ms. Kirkpatrick, each juror struck because of her views on the death penalty was also struck for other reasons that were likewise gender-neutral. The Court further finds that it is unable to find that any of the stated reasons were pretextual based upon the record before it, even when the struck jurors' voir dire responses are compared to those of Mr. Jumper. *See R. pp. 810-26*. Therefore, the Court finds that there was no prejudice under *Strickland* because Terry did not prove a reasonable probability a *Batson* would have been granted but for counsel's failure to make one.

GROUND 3

²¹ Specifically, she twice stated "[n]o" when asked if she would be able to apply the law as instructed by the trial judge if she disagreed with it. The record supports Mr. Chase's testimony that the trial judge thereafter rehabilitated the juror. **R. pp. 883-84.**

Terry's third allegation is that trial counsel were ineffective because they failed to move to have Georgia Miller, juror 163, for cause. The Court finds that he has failed to prove either deficient performance or any resulting prejudice under *Strickland*.

This allegation is based upon the juror's response to questioning by Mr. Stone designed to determine whether the juror could impose the death penalty if it was appropriate under the evidence presented. She stated that "if he did ... intentionally murder somebody and knew it was wrong, I don't want to give him death, but that's what would happen. But I can't say now because I don't know." **R. p. 373, ll. 4-7.**

When Mr. Stone was asked about Juror Miller, he initially did not recall her. After he had reviewed the response at issue, he testified that he felt the response needed clarification. On cross-examination, he again reviewed portions of Juror Miller's responses. He then observed that there was "a good bit of confusion" on the challenged comments, and that he did not understand her responses she would not "want to give him death, but that's what would happen." However, she indicated in response to Mr. Stone's further questioning, **R. p. 374, ll. 17-23**, that she could give either punishment. So, he concluded that the juror had simply been confused. Also, Mr. Stone did not get the impression from the transcript that she would be a leader, if she served on the jury; and there was nothing in her responses that would have caused him to worry. **PCR Tr. pp. 44-48; 89-91; 99.**

Mrs. Fullwood testified that she had looked through her notes on Juror Miller. She had noted Ms. Miller high on her juror list. Juror Miller did make the comment at issue, which Ms. Fullwood had in her notes. However, "it seemed like she didn't really understand the question," and that the juror was actually "soft on the death penalty." Therefore, she was a juror that the defense would want. **PCR Tr. pp. 214-16.**

The Court finds that trial counsel's testimony was credible and, based upon Ms. Fullwood's testimony, the Court finds that counsel had made an objectively reasonable strategic decision that they wanted Juror Miller as a juror in Terry's case because the juror had simply been confused when she made the response at issue and the juror was actually "soft on the death penalty."

Further, the failure to make a motion is not ineffectiveness if making the motion would be futile. *E.g., James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (failure to move to strike special circumstance). In *Adams v. Texas*, 448 U.S. 38 (1980), and *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court held that the appropriate test for exclusion of a juror in a capital case was simply whether the juror's views on capital punishment would "prevent or substantially impair" her ability to follow her oath and the trial court's instructions on the law. *Wainwright* specifically indicated that the test for exclusion required neither automatic decision-making by the juror nor "unmistakable clarity" as to the juror's beliefs. *Id.* at 424-25. *See also Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992); § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law); *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007); *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (citing *Wainwright*).

When reviewing the trial judge's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* The trial judge's determination of a juror's qualification for a capital trial is within his sole discretion, and his decision may not be reviewed on appeal unless wholly unsupported by the evidence. "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999).

In this case, the Court finds that Juror Miller's responses to voir dire, when considered in their entirety, reflect that she was properly qualified under the above-stated authority; and that it appears that the response quoted by Terry simply shows some confusion on her part. On other questioning, both before and after the comments at issue, she testified that she could listen to and follow the law as instructed by the trial judge; that she could decide the case based solely on the evidence presented in the courtroom; that she could listen to both evidence in aggravation and evidence in mitigation; and that she could give either life imprisonment or the death penalty, depending upon the circumstances. **R. pp. 362-79.**

Also, the United States Supreme Court held just last year that:

Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [citations omitted]. Leading treatises in the area make much of nonverbal communication. *See, e.g., V. Starr & M. McCormick, Jury Selection* 389-523 (3d ed.2001); J. Frederick, *Mastering Voir Dire and Jury Selection* 39-56 (2d ed.2005).

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007). The trial judge, who had ample opportunity to view the witness' demeanor and the tone of her voice in making these responses, did not *sua sponte* disqualify her for cause. Neither this Court nor any other reviewing court has the ability to assess her demeanor. This Court, therefore, concludes that Terry failed to prove either deficient performance or any resulting prejudice because the Court finds that the record of Juror Miller's voir dire responses does not support a challenge for cause.

GROUND 4-5

In **Ground 4**, he alleges that counsel were ineffective because they did not object to the judge's jury charge on implied malice because this instruction supposedly shifted the burden of proof to Terry by using the word "implied." In **Ground 5**, he maintains that counsel were

ineffective for not objecting to the portion of the trial judge's implied malice instruction that if the jury found that "a blow delivered ..." caused death. **R. p. 1574, l. 24-p. 1575, l. 2.** He contends that this was a charge on the facts surrounding the death of the victim. The Court finds that he has failed to prove deficient performance or prejudice as to either allegation.

The trial judge gave a lengthy jury instruction on implied malice in the guilt phase of Terry's trial. His instructions are set forth at **R. pp. 1571-75.**

Ms. Fullwood testified at the PCR hearing that she had previously worked at Appellate Defense for eight years. Part of her duties at Appellate Defense included reviewing transcripts of jury charges for error, and she had between seven and nine appeals of death penalty cases while she was there. In her estimation, the trial judge's implied malice instruction was a "straight out of the charge books" and part of a standard charge. She likewise did not perceive the reference to if the jury found that "a blow caused death" as a comment on the facts. **PCR Tr. pp. 186-87; 193-96; 213.** Mr. Stone testified that he did not recall what the law would have been at the time of the trial. However, Mr. Stone did not perceive the language challenged in **Ground 5** as a comment on the facts of the case. **PCR Tr. pp. 58-60.**

A. Ground 4

The appropriate inquiry that this Court must make is set forth in the South Carolina Supreme Court's decision *Lowry v. State*, 376 S.C. 499, 505-506, 657 S.E.2d 760, 763 (2008):

The relevant inquiry for the Court in this matter is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Todd v. State*, 355 S.C. 396, 403, 585 S.E.2d 305, 309 (2003). In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation. *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Todd*, 355 S.C. at 402, 585 S.E.2d at 308. A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory

presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. *Francis*, 471 U.S. at 314, 105 S.Ct. 1965; *Sandstrom*, 442 U.S. at 521, 99 S.Ct. 2450. The ultimate question for the Court to determine is “whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process.” *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (quoting *Estelle*, 502 U.S. at 72, 112 S.Ct. 475).

Despite Terry’s challenge to the implied malice charge, the Court finds that the charge given was proper. The South Carolina Supreme Court has suggested that trial judges instruct jurors that “the law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.” *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The Court finds that the trial judge’s instruction in this case comports with *Elmore*. **R. pp. 1571-75.**

The Court rejects Terry’s argument that the instruction was constitutionally defective because the trial judge used the term “implied” as opposed to “inferred.” His argument ignores that the very definition of the crime of murder. “‘Murder’ is the killing of any person with malice aforethought, either express or *implied*.” S.C. Code Ann. § 16-3-10 (2003) (emphasis added). Thus, it was necessary for the trial judge to use the term “implied” to define the crime of “murder.”

More importantly, the trial judge thoroughly charged the jury that the burden of proof was on the State; he repeatedly emphasized the permissive inference of malice; he emphasized that the jurors were “free to accept or reject” the permissive inference; and he never suggested that Terry was required to overcome any inference of malice. At no time does the charge use the

words “rebuttable” or “presumption.” *Contra Plyler v. State*, 309 S.C. 408, 410-411, 424 S.E.2d 477, 478 (1992); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985). Therefore, the Court finds that the charge as a whole was sufficient. *See State v. Patrick*, 289 SC. 301, 345 S.E.2d 481 (1986), *overruled on other grounds*, *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991). As a result, he cannot show either deficient performance or prejudice. The absence of prejudice is buttressed by the overwhelming evidence - discussed throughout the Order -, which established that the killing was malicious.

B. Ground 5

Terry also contends that counsel were ineffective because they failed to object to the judge’s instruction that “[i]f the evidence should show under what circumstances a blow delivered which took the life of another, then you the jury, would have to determine whether under such circumstances the act was malicious.” **R. p. 1574, l. 24-p. 1575, l. 2.** He contends that this was a charge on the facts surrounding the death of the victim.

The South Carolina Constitution prohibits a trial judge from charging the jury on the facts. *See* S.C. Const. art. v, § 21 (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”); *State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978) (the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused or as to controverted facts); *State v. Simmons*, 209 S.C. 531, 41 S.E.2d 217 (1947) (a judge cannot intimate in his charge any opinion as to the facts at issue).

The Court disagrees with Terry’s construction of the trial judge’s jury instruction and finds that this was not a comment upon the facts of the case. The challenge comment did not tend to indicate the trial judge’s opinion as to the weight or sufficiency of the evidence, the credibility

of witnesses, the guilt of the accused or as to controverted facts. Rather, it clearly emphasized, once again, the permissive nature of the jury's finding as to any blow. Thus, it was part of a constitutionally proper malice instruction and conformed to the facts of the case. *See State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (trial judge's inclusion of lack of consent was not impermissible charge on facts of case, but rather correct statement of law, in conformity with the evidence).²² Counsel were not deficient for failing to object, and Terry cannot show any prejudice. Particularly in light of the overwhelming proof of guilt of each of the charged offenses, the Court finds that Terry's argument lacks merit because he cannot prove a reasonable probability of a different result but for counsel's failure to object to this portion of the trial judge's instructions. *Strickland*.

GROUND 6

Terry further alleges that his attorneys were ineffective because they did not object to or move *in limine* to prevent the introduction of excessive and uncorroborated character evidence used by the State in the sentencing phase of his trial. He predicates this allegation upon Rule 404, SCRE, and upon the fact counsel had not placed his character in issue. Once again, the Court finds that he has failed to prove deficient performance or prejudice.

Mr. Stone testified that the State presented a lot of evidence reflecting upon Terry's bad character in the sentencing phase, trying to make look bad. He did not recall whether or not he had made a motion *in limine* to keep out this evidence. Also, the defense had not presented any evidence in the guilt phase and it had not placed the defendant's character in issue. However,

²² Terry's argument ignores that the trial judge had previously instructed jurors that "I do not have the right to pass upon the facts or even to express any opinion I have as to them, nor may I intimate in any way what I may think about the guilt or the innocence of the defendant." The trial judge also instructed the jury that they were the sole judges of the facts. *R. p. 1568*. Terry's argument likewise ignores the very permissive nature of the challenged charge.

Mr. Stone did not make a motion *in limine* or generally object to this evidence because his understanding of the law is that the defendant's character and the circumstances of the crime may be introduced in sentencing phase of a capital trial. PCR Tr. pp. 61-62; 92.

Mrs. Fullwood likewise testified that her understanding was that the prosecution has a much broader ability to introduce evidence of a defendant's bad character in the penalty phase of a capital trial. PCR Tr. p. 213.

Trial counsel's assessment of the State's right to present evidence of a defendant's bad character in the sentencing phase of a capital trial is correct. Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979) (same); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd. on other grounds*, 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase. *E.g.*, *State v. Rosemond*, 335 S.C. 593, 518 S.E.2d 588 (1999); *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998).

Therefore, the Court rejects Terry's reliance upon Rule 404, SCRE, and the Court finds that trial counsel did not render deficient performance by failing to move *in limine* to prevent the introduction of character evidence used by the State in the sentencing phase because this is

inherently a strategic part of trial strategy and because counsel correctly recognized that a motion for the blanket exclusion of this evidence would not have been meritorious. *Id*; *Hitchcock, supra*. See also *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir.2000) (“counsel cannot be ineffective for failing to raise a meritless claim”); *Cedillos v. State*, 250 S.W.3d 145, 154 (Tex.App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (counsel’s failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy).

Further, Terry cannot show prejudice resulting from counsel’s failure to make an *in limine* motion as to the State’s evidence reflecting upon his bad character because it would not have been meritorious. Further, he only raises four specific allegations related to the counsel’s failure to object or opening the door to the admission of sentencing phase evidence by the prosecution. The Court has rejected each of those allegations for the reasons stated therein. Finally, given the overwhelming evidence establishing the murder and the statutory aggravating circumstances, the Court finds that there is no reasonable probability of a different result but for counsel’s failure to make a motion *in limine*. The Court, therefore, finds that he has not proved that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694 *Strickland*, 466 U.S. at 695.

GROUND 7

Terry maintains that trial counsel was ineffective for not objecting to hearsay evidence from Lt. William Brown, in the sentencing phase, concerning Terry’s theft of items from a

construction site. The Court finds that Terry has failed to prove either deficient performance or resulting prejudice.

Lt. William Brown, of the Richland County Sheriff's Department, was an investigator with that agency on May 4, 1985. He investigated a burglary and grand larceny at a business called "Imports Plus." "About eighteen items ... [were taken]." These included sanders and other items that could be used in a car body shop. He eventually developed Terry as a suspect. Terry admitted his involvement in the burglary and led Lt. Brown to a number of the stolen items that were recovered. Counsel did not object or cross-examine the witness. **R. pp. 1610-12.**

Initially, the Court finds that Terry cannot overcome *Strickland's* strong presumption that counsel's performance was competent because he failed to elicit any testimony from trial counsel concerning why counsel did not raise an objection under Rule 403, SCRE. *See Strickland*, 466 U.S. at 689; *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) ("We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions [that he] made"). The Court further finds that no hearsay was admitted.

Furthermore, after reviewing the above evidence, the Court finds that any objection to this testimony would not have been meritorious because this testimony was proper in the sentencing phase of Terry's capital trial to show his character. *Hitchcock, supra*. When the Court considers that the expanded scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase, e.g., *Gardner, supra*, the Court finds that Terry cannot show either deficient performance in failing to object or prejudice resulting from the failure to raise a Rule 403 objection. *See Clark v. Goose*, 16 F.3d 960, 963-64 (8th Cir. 1994) (Because the Court found no basis for counsel to object to the evidence that was admitted,

counsel's failure to object was not deficient performance);²³ *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *United States ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

The Court further notes that the trial judge properly charged Terry's jury that it could only recommend a death sentence if it unanimously found that the State had proven the existence of one or both statutory aggravating circumstances beyond a reasonable doubt, and he instructed the jury that the statutory aggravating circumstances were burglary in any degree and CSC in any degree. **R. pp. 2104-21**. Finally, the Court notes that there was overwhelming proof that Terry was guilty of the murder and the two statutory aggravating circumstances. In light of the foregoing, the Court finds that he has not proved that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 8-9

Terry's next two allegations are that trial counsel Stone was ineffective because he failed to object to hearsay testimony by Sgt. Wilkerson regarding the statement of Ann Lomax, who was not present to testify (**Ground 8**); and that Mr. Stone was ineffective because his cross-examination of Sgt. Wilkerson about the statement of Ms. Lomax permitted the introduction of hearsay evidence, *i.e.*, Ms. Lomax's entire statement. **Ground 9**. The Court finds that Terry has failed to prove either that counsel's performance was deficient or that he was prejudiced by counsel's performance as to these allegations.

²³ The Court of Appeals further concluded that even if evidence is erroneously admitted but its introduction constitutes, at most, harmless error, then no ineffective performance is shown. *Id* at 964. The Ninth Circuit Court of Appeals reaches the same harmless error result, *i.e.*, no ineffectiveness, in *LePage v. Idaho*, 851 F.2d 251, 257 (9th Cir. 1988), but the Court relies solely upon a prejudice analysis.

On direct examination, Sgt. Mitch Wilkerson testified that, on November 14, 1985, he was an investigator with the City of Columbia Police Department's major crimes unit. On that date, he was called to Beltline Blvd., near Two Notch Rd., where Ann Lomax had been stabbed in the throat with a knife.²⁴ She initially was in the median of the road, but she was transported to the hospital. Terry was developed as a suspect and ultimately pled guilty to assault and battery of a high and aggravated nature (ABHAN), on November 14, 1985. He received a Youthful Offender Act sentence not to exceed six years. This sentence was suspended to six months, or the payment of \$ 750.00 and court costs, as well as two years probation. **R. pp. 1613-16; State's Ex. 22.**

On cross-examination, Mr. Stone initially attempted to elicit that "after the stabbing took place, ... Mr. Terry was so confused that he couldn't actually figure out how to get out of the house that he was in." (Sic). Although Sgt. Wilkerson acknowledged that this is what Terry had claimed in his statement, he denied that the victim had corroborated this version. **R. pp. 1616-17.** Mr. Stone then refreshed Sgt. Wilkerson's recollection by showing him **Defendant's Ex. 2**, which Sgt. Wilkerson indicated was the statement he took from Ms. Lomax. **R. pp. 1617-18.**

The following exchange then occurred, which gives rise to Terry's ninth and tenth allegations:

- Q. Is it fair to say, sir, that after the stabbing took place, Mr. Terry just walked to the door like nothing had happened? He was so calm, but he couldn't get out of the door. In fact, the victim had to show him how to open the door?
- A. Yes. He was having trouble opening the door, but I was referring to the fact that he was calm, acted like nothing had happened. He didn't show any confusion there.

²⁴ "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

Mr. Chase: Your Honor, at this time, under Rule 106, he's referring to a portion of the statement, we would ask that the entire statement be published to the jury so that there's not any confusion there.

The Court: All right, sir.

Mr. Stone: I appreciate that, Your Honor, but I specifically asked him if he needed this to refresh his memory. He did and I asked the same question over again. And that's ... all he's done is refreshed his memory and I asked him specifically about the statement.

R. p. 1618, l. 20-p. 1619, l. 13. After the trial judge reviewed the statement, he held that "pursuant to the Rule, the entire statement will be published." **R. p. 1619, ll. 22-23.**

The jury then heard that Lomax's statement indicated that she and Terry went to her Beltline Blvd. house after they made "a deal." Once there, Terry asked her to put out the candle because he was concerned that someone else was in the house. So, Lomax walked him around her house to prove that no one was there. "As soon as we got to the first room, he stabbed me. He just slowly walked to the door like he hadn't done anything. He was just so calm." **R. p. 1620, ll. 1-18.**

However, Terry could not open the door. Therefore, Lomax told him how to open the door. She locked the door as soon as he was outside, and she went for help after he left. She also explained that she was working as a prostitute, and she said that Terry had told her that he had smoked marijuana and how it affected his head. She had never seen him before; and she did not know with what he had stabbed her, but she said it looked like the broken end of a big knife. Finally, he was in her house for roughly fifteen minutes. **R. pp. 1620-22.** Mr. Stone's further cross-examination reiterated that Lomax had described Terry slowly walked to the door "like he hadn't done anything" after the stabbing, and that no one else was present. **R. pp. 1622-23.**

At the PCR hearing, Mr. Stone testified that Sgt. Wilkerson had put on “pretty damaging evidence already” that Terry had stabbed the prostitute in the neck. Mr. Stone elicited that Terry had not been able to find the door after the stabbing; and that Terry turned and looked at that victim as if nothing had happened. This was the sentencing phase; and the point of the cross-examination was to establish that there was some mitigation on the part of Gary Terry, by showing that there was some mental problem with Terry. Mr. Stone felt that this came from the prostitute’s statement. The prostitute did not testify and her statement was not admissible, but for counsel’s cross-examination of Sgt. Wilkerson. Mr. Stone could not recall why he did not object to the State publishing her statement. **PCR Tr. pp. 65-66; 92-94.**

The Court finds that Terry has not established that counsel’s performance was deficient for either of the alleged reasons advanced by Terry. With respect to his **Ground 8**, the Court finds that Mr. Stone’s failure to object to the publication of Ms. Lomax’s statement was not deficient because an objection would not have been meritorious. The trial judge found, and this Court agrees, that under Rule 106, SCRE, the State had the right, during counsel’s cross-examination of Sgt. Wilkerson, to require the introduction of any other part of Ms. Lomax’s statement, “which ought in fairness to be considered contemporaneously with it.” *Id.* Here, that would be her entire statement.

“Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context.” *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004) (citation omitted).²⁵ As the Court of Appeals

²⁵ This is consistent with South Carolina law before the adoption of the South Carolina Rules of Evidence. See *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975). In *Cabrera-Pena*, the Court held that the common law of this state extends the rule of completeness to oral communications. 361 S.C. at 380, 605 S.E.2d at 526 (citation omitted).

later explained in *State v. Patterson*, 367 S.C. 219, 226-28, 625 S.E.2d 239, 243-44 (Ct. App. 2006):

Adverting to the merits, we find the trial court properly ruled Richardson's statement to police was admissible. Rule 106, SCRE provides:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 was promulgated by Order of the Supreme Court and became effective September 3, 1995. *See* Editor's Note, Rule 106, SCRE. The Rule restates the common law rule of completeness with one significant change. Prior to the enactment of Rule 106, when part of a document, writing, or conversation was introduced into evidence, the opposing party could introduce the remainder of the communication. *See Dukes v. Smoak*, 181 S.C. 182, 186 S.E. 780 (1936). However, whereas under common law the opposing party was required to wait until cross-examination to complete the communication, under Rule 106, the party can now require introduction of the remainder of the statement contemporaneous with the original proffer. *See* Rule 106, SCRE.

As the South Carolina Supreme Court explained in *State v. Taylor*, "The text of Rule 106, SCRE, is substantially similar to Rule 106 of the Federal Rules of Evidence. Rule 106, Fed.R.Evid., is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998) (internal quotation marks omitted) (quoting *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529 (11th Cir.1986)). The rule applies to oral communications as well as written statements. *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 526 (2004); *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975).

In *Cabrera-Pena*, the State elected to use a witness to elicit portions of the defendant's conversation. 361 S.C. at 380, 605 S.E.2d at 526. Our supreme court found the rule of completeness required the defendant to be permitted to inquire into the full substance of the conversation. *Id.* Similarly, defense counsel, by asking Richardson whether her statement to police included

Patterson's admission, opened the door for the State to inquire into the full substance of her statement.

Patterson argues that because the inquiry referred to an alleged omission by Richardson as opposed to an affirmative declaration in the statement, Rule 106 does not apply. We disagree.

After eliciting testimony from Richardson regarding how careful she was in giving police a correct depiction of the events that led to Clark's murder, defense counsel in essence insinuated Richardson's statement to police was incomplete. The defense put Richardson's statement to police at issue, and fundamental fairness required the entire statement be admitted into evidence. Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted Richardson's statement.

Based upon *Cabrera-Pena* and *Patterson*, this Court finds that counsel's cross-examination of Sgt. Wilkerson about Ms. Lomax's comment concerning Terry's conduct after the stabbing was such that the remainder of Ms. Lomax's statement should "in fairness ... be considered contemporaneously" with the statements elicited. Thus, counsel was not deficient in failing to object to the trial judge's ruling that permitted introduction of the entire statement because the objection would have been overruled. *Id.* See also *Clark*, 16 F.3d at 963-64 (because no basis for an objection was present, the Court found that failing to object was not deficient performance); *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Lane*, 811 F.2d at 1170 (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Likewise, the Court finds that Mr. Stone's chosen line of cross-examination of Sgt. Wilkerson was not deficient performance, even though it permitted the introduction of the

hearsay statement of Ms. Lomax. **Ground 9.** Generally, “decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature” and will not support an ineffective assistance claim. See *United States v. Nersesian*, 824 F.2d 1294, 3121 (2d Cir. 1987). See also *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness). The Court finds that the Mr. Stone’s decision to engage in the chosen line of cross-examination was the result of an objectively reasonable trial strategy.

The Court notes that Sgt. Wilkerson was a sentencing phase witness. More importantly, the Court finds that the most damaging aspect of his testimony from trial counsel’s perspective was already before the jury, without any explanation or mitigation: Terry had pled guilty to ABHAN and received a relatively lenient sentence for stabbing a woman in the neck. Because Terry was being sentenced for murdering the victim while in the commission of a burglary and a sexually assault of her, evidence that he had previously stabbed another woman in the neck would obviously be exceptionally damaging proof of his violent character.

However, Mr. Stone’s strategy demonstrated that there was possible some mental problem with Terry and thereby established some mitigation for Gary Terry, in connection with this offense, that was not otherwise present. This was entirely reasonable under *Strickland*. The Court finds that the reasonableness of Mr. Stone’s chosen strategy is further demonstrated by the fact counsel’s decision was made with the obvious knowledge that the defense would present evidence in mitigation that Terry has an “an organic explosive disorder,” which was offered to explain his violent actions. **R. pp. 1995-2043; 2054-64.**

The Court further finds that counsel's strategy did not prejudice Terry. Again, the most damaging aspect of Sgt. Wilkerson's testimony was already before the jury, without any explanation or mitigation. This evidence would not have been mitigated, at all, if counsel had not elicited the information he did on cross-examination. The Court also finds that the minor hearsay details of the incident were not prejudicial. First, the jury learned that the victim of the ABHAN was a prostitute, as opposed to a victim of a burglary or someone chosen at random. The evidence he had told Lomax that he had used marijuana was both cumulative to other sentencing phase evidence that he used drugs and explainable by the defense's case in mitigation.

The Court further finds that the description of the weapon used was also not prejudicial, since the jury knew that he had stabbed her. Further, publication of the entire statement re-emphasized that portion of the statement which counsel had previously elicited. When these aspects of the hearsay in question are considered against the overwhelming evidence proving the murder and both statutory aggravating circumstances, the Court finds that the Court finds that he has not proved that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 10

Next, Terry alleges that trial counsel were ineffective because they failed to request a charge on provocation by the victim as a mitigating circumstance, as set forth in §16-3-20(C)(b)(8) ("The defendant was provoked by the victim into committing the murder"). The Court finds that Terry has failed to prove either that counsel's performance was deficient or that

he was prejudiced by counsel's failure to request an instruction on this statutory mitigating circumstance.

The only evidence to arguably support this mitigating circumstance is Terry's March 24, 1995 statement (**State's Ex. 68**). In this statement, he admitted breaking into the house but he denied the intent to commit a crime therein because he allegedly had been engaged in an ongoing affair with the victim. He also claimed that he had consensual intercourse with the victim as he was leaving, and she struck him from behind. Only then did he lose his temper and strike her - picking up the nearest object he could find and beating her with it - because he had a bad temper. He did not remember pulling the telephone lines and he claimed he could not remember what he had done with the object he used to beat the victim. **R. pp. 1156-71; pp. 1814-18; State's Exhibit 68.**

Mr. Stone testified that he did not request the mitigating circumstance that victim had provoked her death, even though this statement was introduced in sentencing phase. **PCR Tr. pp. 66-67.** However, he explained that he met with co-counsel, Ms. Fullwood a number of times to figure out the best way to approach the case. They decided that they wanted to maintain credibility with the jury in the guilt phase for sentencing phase. **PCR Tr. pp. 37-39; 82-83.**

Ms. Fullwood testified that that the defense made requests to charge on mitigators in the sentencing phase, and she is familiar with §16-3-20(c)(b)(8). She agreed that there was some evidence that the victim had provoked Terry because the statement was in evidence. "However, under the facts and circumstances of this case I do not believe it would have been wise to try to argue provocation. The jury had already found him guilty of [murder, criminal sexual conduct with first degree and burglary in the first degree]. To try to come in at the penalty phase and basically say this woman asked for it would probably be very offensive to the jury and would not

be the type of argument that would persuade them to recommend life as a sentence.” Counsel probably considered this mitigator, but she could not recall, and she would not have raised an argument that, in her professional judgment, she did not feel was persuasive to a jury. **PCR Tr. pp. 191-93.**

She reiterated on cross-examination that the defense did not request the mitigation of the victim’s provocation. The defense presented evidence in the penalty phase that Terry “had a psychological abnormality that made it difficult for him to control his emotions,” and the statement was in evidence. However, it was her belief that the defense could not argue with the guilty verdicts in the penalty phase. Also, there was nothing to corroborate that the victim provoked Terry, other than the statement, which Ms. Fullwood acknowledged could reasonably be viewed as self-serving.²⁶ “You’ve really got to be careful when you’re at the penalty phase of the trial trying to shift the blame for the crime itself from the defendant and shift the blame to the victim after the jury has already convicted him of the killing.” **PCR Tr. pp. 219-21.**

The Court find that trial counsel’s testimony is credible; and accepts Ms. Fullwood’s testimony as establishing a reasonable, strategic decision not to request a jury instruction on the statutory mitigating circumstance in §16-3-20(C)(b)(8) because it would not have been wise to argue with the jury’s verdicts based solely upon the self-serving statement made by Terry. *Cf. Greiner v. Wells*, 417 F.3d 305, 319 (2nd Cir. 2005) (observing that the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance is not overcome by counsel’s inability to recall reason for actions where record reasons appear, noting also counsel’s experience). The Court finds that the position Terry advocates in these proceedings of trying to shift the blame to the murder victim would have been offensive to the

²⁶ As discussed in **Ground One**, this was why the prosecution strategically decided not to introduce the March 24, 1995 statement in the guilt phase.

sentencing phase jury, which had already convicted him of first degree burglary, first degree CSC, murder and malicious injury to telephone system.

This is especially true since the statement was not corroborated by other evidence and, instead, was inconsistent with the physical evidence. The Court finds the statement cannot explain either why he would have pulled the telephone lines or why the victim was found in a position that suggested that the sexual intercourse occurred after the brutal attack on her with a blunt object, or while that savage beating was still being administered. It also does not explain the evidence that Terry had to break into the house or why no murder weapon could be found.²⁷

Even assuming that trial counsel's performance is deficient because Ms. Fullwood did not specifically recall whether counsel considered this statutory mitigator, the Court finds that the various reasons just discussed support the conclusion that counsel's failure to request this instruction was not prejudicial. When the flimsy and self-serving evidence of her provocation is considered against the overwhelming evidence proving the murder and the statutory aggravating circumstances, the Court cannot find that he has proved that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 11

Terry also alleges that he received ineffective assistance of counsel because his trial attorneys failed to develop and present corroborating testimony that would have allowed

²⁷ Moreover, the Court finds that Terry's statement does not support an instruction pursuant to §16-3-20(C)(b)(8). There are no state court cases construing the mitigator. Further, the March 24, 1995 statement indicates that the victim struck him from behind; and that he then lost his temper and strike her - picking up the nearest object he could find and beating her with it - because he had a bad temper. However, the defense offered expert testimony that a SPEC scan showed that Terry was brain damaged. The defense also presented other evidence that he was neurologically impaired and urged that this impairment, "an organic explosive disorder," explained his actions. R. pp. 1995-2043; 2054-64; PCR Tr. pp. 85-86; 219-21. Thus, rather than showing provocation by the victim, the defense sought to establish that the murder was caused neurological impairment and §16-3-20(C)(b)(8) did not apply.

introduction of Terry's statement during the guilt phase. The Court finds that he has not established either deficient performance or resulting prejudice.

Mr. Stone testified that he met with Terry several times before trial, but he could not recall the number of times that they had met. He first met with Terry shortly after he was appointed. Also, he met with Terry after Terry was housed at Broad River Correctional Institution, as a safe-keeper. He also sent the defense psychiatrist (Dr. Donna Schwartz-Watts) and the private investigator (Tommy Davis) to meet with Terry "numerous times." He had received a copy of Terry's statement in discovery. The State had very good guilt case. However, if Terry had legitimate reason for being at the victim's house, other than the crimes for which he was on trial, the D.N.A. and fingerprint evidence establishing his presence would not be harmful to the defense. Mr. Stone did not recall whether he, personally, spoke to Patricia Terry (Terry's mother) or Luann Terry (Smith), Terry's estranged wife. PCR Tr. pp. 36-39; 43; 51-52; 73-75.

Mr. Stone testified, "the very first time I met with him, though the statement [he gave me] was inconsistent with his actual written statement." On another occasion, Terry said that "he could not imagine how the semen got there" and he suggested that his wife, girlfriend or someone had planted it, using a condom. This was close in time to when the book "*Presumed Innocent*" was published; and this story sounded much like the book. Also, Mr. Stone found it was problematic because it was "a particularly unusual defense angle" that was inconsistent with Terry's statement.

Mr. Stone discussed strategic matters with Terry, continuing through the trial. Terry had a number of physical complaints²⁸ and complaints about S.C.D.C. that he wanted Mr. Stone to help handle. Mr. Stone did not think that he was getting a lot of good information to help with

²⁸ Because Terry constantly complained about headaches, the defense hired "just about every psychologist and psychiatrist that he could get our hands on". This is where the defense was headed at sentencing.

the case. So, Mr. Stone sent Dr. Schwartz-Watts, to speak to Terry. The investigator, Mr. Davis likewise met with Terry about various matters. **PCR Tr. pp. 73-76.**

Counsel also sent Mr. Davis to a number of places. Mr. Stone knew that Mr. Davis met with several family members, a Mr. Boozer and others who appeared in the incident report, and other persons who might have dealt with Terry in days before the murder. Mr. Davis spoke to Boozer and a Ms. DeBerry, "trying to establish an alibi that Mr. Terry was somewhere on the lake at the time of the murder." However, they could not establish an alibi. Mr. Stone did not recall any witnesses providing helpful information. **PCR Tr. pp. 76-78.**

Counsel also had an expert, former SLED Agent Donald Girndt, available for crime scene analysis, including blood splatter and fingerprints. Mr. Stone worked very closely with him. Mr. Girndt was taken to the crime scene. The State's evidence concerning the telephone box (including Terry's print) was damaging because it was very difficult to explain this to the jury. This evidence made it tough to get around malice and intent. So, Mr. Girndt tested an unidentified print he found on the telephone box. He eliminated Terry's' left hand on the unknown print, but said it could be Terry's right hand. Also, a D.N.A. expert assisted Ms. Fullwood. Counsel had filed *Brady* and Rule 5 motions, and they had the State's responses before trial. **PCR Tr. pp. 72-73; 78-80.**

Counsel did not just want to give up on the guilt phase, but they were concerned about maintaining their credibility for the sentencing phase. They tried to plant the notion of residual doubt in minds of jurors, *i.e.*, that the case was not a "slam dunk" and that the investigation had not been thorough as it should have been. Mr. Stone thought this and organic brain damage were the best defenses in sentencing. **PCR Tr. pp. 82-83**

Although the decision was Terry's, Mr. Stone did not think that Terry should testify because he did not think Terry would be a credible witness based, in large part, on his dealing with Terry. Also, they were going to present expert testimony regarding a SPEC scan that showed Terry was brain damaged. If Terry had testified, he would not have come across as brain damaged, even if the jury found that he was credible, because he would have sounded clear. Terry had also given a November 17, 1995 statement to police in which he denied any involvement in the murder. **PCR Tr. pp. 86-87.**

After the State failed to introduce Terry's March 24, 1995 statement, the defense unsuccessfully attempted to get the statement into evidence. *See Ground 1.*²⁹ Mr. Stone thought that the defense wanted the statement in because it would somewhat help the defense get a voluntary manslaughter charge because, although Terry admitted killing victim, his statement provided an argument for a manslaughter charge. The trial judge ruled it was not admissible through Inv. Frier, who took statement. **PCR Tr. pp. 49-50.**

Ms. Fullwood testified that she met with Terry more than six times, but she could not remember how many times.³⁰ Counsel discussed all aspects of the case with Terry, as to both phases of the trial; and they kept him informed of the progress of their investigation. In addition to her and Mr. Stone meeting with Terry, a mitigation specialist that Ms. Fullwood had utilized in the past, Vivian Massey, also met with Terry "on a number of occasions." Ms. Massey's main responsibility was to gather background and social history information from Terry, but she also spoke to him about anything that he wished to discuss, including the facts of the crime. Counsel relied on the information provided by Terry to Ms. Massey. **PCR Tr. pp. 196-99.**

²⁹ For the reasons stated in **Ground 1**, the Court finds that counsel's efforts were objectively reasonable.

³⁰ She met with him at the Lexington County jail, the Richland County Detention Center, and at S.C.D.C. She also confirmed that Terry preferred to focus on any number of physical complaints, rather than on the litigation. **PCR Tr. p. 198.**

In addition to Terry's March 24th statement and his earlier statement to police, he provided the defense with at least four additional versions of what had occurred. These ranged from a claim that he had used crack that morning and four hits of acid on the afternoon of the offense, to blaming the former husband of the victim's daughter, to claiming that he was having an affair with the victim and that he had been at her house around the time of her death, having consensual intercourse with her. While he was there, he heard a car drive by the residence. The sound of the vehicle was like that of his live-in girlfriend. He later opined that the girlfriend (Gibson) "had snuck back and killed Ms. Jackson out of jealousy." At some point, he admitted that he had been in the victim's home on the day of the murder. **PCR Tr. pp. 199-203.**

Ms. Fullwood was aware of the contents of Terry's March 24, 1995 statement, and she felt that this statement raised the possibility of a voluntary manslaughter argument. Counsel had their investigator, Ms. Davis, and his associate interview all of the people that Terry had mentioned, "and there was nothing that developed that we could have used either . . . to point the finger at someone else or to corroborate the version of . . . the statement that it was a manslaughter situation." Likewise, counsel's investigation was unable to corroborate that he had an alibi - that he had been with his live-in girlfriend, and that he had gone fishing with her father the next day. Terry's changing statements made counsel's investigation more time consuming because each account had to be investigated.³¹ **PCR Tr. pp. 203-04.**

She explained that "[w]e had the guilt/innocence phase very thoroughly investigated. We talked to all of the people that at one point or another in time he had identified as potential alibi witnesses. We interviewed Ms. Jackson's neighbors as far as her habits and associations. We were unable to develop any evidence that corroborated his statement to the police or any

³¹ Diane Gibson, the live-in girlfriend, was interviewed, as were the people who lived at the lake.

other subsequent statements he made to us insofar as a defense might go.” The defense did not put up a defense to get the statement introduced because “[t]he only way we could have done that was through [Terry’s] testimony.” **PCR Tr. pp. 190-91.**

In addition to the experts who testified, counsel had Mr. Girndt, the former SLED Agent, who was a crime scene expert with expertise in fingerprints, blood spatter and trace evidence. Likewise, Ms. Fullwood worked with Ron Oetrawski, a D.N.A. expert. Neither of these experts testified because neither had testimony that would have been helpful to Terry’s defense. **PCR Tr. pp. 204-205.** Also, a discovery motion and supplemental motions that counsel had filed were ruled on before trial. **PCR Tr. p. 206.**

The defense’s theory in the guilt phase was to point out any gaps or inconsistencies in the State’s case, to establish reasonable doubt. Counsel were aware that the State had not tested a number of evidentiary items.³² Counsel discussed the possibility of having these items tested, but they decided not to do so because the State’s failure to “test” was a hole that we could punch in their case. Several experts were able to assist with cross-examination, even though not utilized as witnesses. Also, the defense did not have any evidence to introduce in effort to show that Terry was not guilty, and “we had to always be mindful of the need to stay credible to the jurors when we reached the second phase of the trial.” **PCR Tr. pp. 205-07.**

Although she did not have any independent recollection, she felt “sure that our advice was not to testify based on his criminal record and counsel’s observations of him, his general

³² After the defense had received the report of SLED Agent Joseph Powell regarding hairs found at the scene (**Respondent’s Ex. 3**), she did not recall any of the defense expert’s suggested further testimony. She also explained that residual doubt is a factor jurors consider in recommending life sentences, but it is a psychological force and it not something that counsel can argue or on which counsel may request a jury instruction. **PCR Tr. pp. 216-17.**

demeanor and their assessment of how well he would “most likely stand up under cross-examination.” PCR Tr. p. 209.

Respondent also presented defense counsel’s private investigator, Thomas J. Davis. Mr. Davis testified that he has been a private investigator since 1993, with the exception of two years when he worked in the security division of the South Carolina Lottery Commission. Prior to becoming a private investigator, he was an F.B.I. agent for twenty-eight years. Mr. Stone sought his services in this case “during the latter part of 1996.” PCR Tr. pp. 297-99.³³

Mr. Stone told him that the defense “was working up against” a statement, and both a fingerprint and D.N.A. were involved. (The Court infers that he was referencing Terry’s March 24th statement). Mr. Davis was also asked to investigate a supposed alibi. Both he and another investigator spoke to a number of people.³⁴ However, they were unable to corroborate either the statement or the alibi. They reported their findings to trial counsel. PCR Tr. pp. 299-303.

The Court in *Strickland* explained the deference owed counsel’s strategic judgments in terms of the adequacy of the investigations supporting those judgments:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

³³ The Court overruled work product and hearsay objections by Terry.

³⁴ For instance, they interviewed an elderly couple, Mr. and Mrs. Boozer, who lived near Terry on the lake. They also spoke to Teresa DeBerry, who allowed Terry to use her electricity for his residence. They likewise spoke to Diane Gibson; several other people at the lake; the victim’s son; several of the victim’s neighbors; and several officers and jail officials involved in the case.

Strickland, 466 U.S. at 690-691. *See also Wiggins*, 539 U.S. at 521-22.

“[T]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Strickland*, 466 U.S. at 691. In assessing counsel’s investigation, this Court “must conduct an objective review of their performance, measured for ‘reasonableness under prevailing professional norms,’ *Strickland*, 466 U.S., at 688, [...], which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time,’ *id.*, at 689 [...] (‘[E]very effort [must] be made to eliminate the distorting effects of hindsight’)” *Wiggins*, 539 U.S. at 523.

In support of this allegation, Terry relies upon the deficiency in counsel’s cross-examination of the pathologist, Dr. Carter, and testimony from his mother, Patricia Terry and his former wife, Louanne Smith (Terry). For the reasons set forth in **Grounds 12-14** and **Ground 21**, the Court finds that he has failed to establish either deficient performance or prejudice, as to those specific allegations.

Once again, the Court finds that the testimony of trial counsel is credible. The Court likewise finds that Mr. Davis is credible. The Court rejects the testimony of Louanne Smith and Patricia Terry and finds that their testimony, even assuming its admissibility, is not credible or believable because their testimony is inconsistent with the testimony of counsel and Mr. Davis, as well as the trial testimony of Sandra Jackson and the trial and PCR testimony of both Diane Gibson Smith and Lt. Scottie Frier.

Based upon the credible evidence before the Court, the Court finds that trial counsel’s performance was not deficient. The Court finds that counsel’s pretrial investigation – with the assistance of Mr. Davis, his associate and the social worker – went beyond the constitutional mandate of *Strickland* and its progeny. Counsel made reasonable efforts to corroborate the

March 24, 1995 statement, as well as Terry's purported alibi. The Court further finds that Terry actively hindered and impeded their efforts by repeatedly changing his version of what had occurred at the time of Mrs. Jackson's death.

Counsel unsuccessfully investigated these other versions as well. The reasonableness of counsel's investigation is corroborated by Mr. Frier's testimony that the Lexington County Sheriff's Department was unable to uncover any evidence of a purported relationship between Mrs. Jackson and Terry, apart from his March 24th statement.³⁵

Despite a reasonable investigation under *Strickland* and *Wiggins*, counsel were unable to discover any evidence corroborating the account given by Terry in his March 24th statement. Therefore, the Court finds that no such credible, admissible evidence exists, separate and apart from Terry's self-serving account (which only the State could introduce without Terry testifying) and the limited evidence that trial counsel elicited on his cross-examination of prosecution witness, Dr. Carter.³⁶ As a result, the Court finds that the pretrial investigation by Terry's trial attorneys was not deficient under *Wiggins* and *Strickland*.

Likewise, Terry made a knowing and intelligent decision not to testify, and he has not raised any claim in this Court that trial counsel's advise not to testify was ineffective under *Strickland*. Obviously, he could have testified and presented the jury with the version of the crime as contained in his March 24th statement. Having elected not to testify, the Court finds that Terry must live with the consequence of his decision: the favorable information in the March 24th

³⁵ Lt. Frier testified that the Lexington County Sheriff's Department made extensive inquiry into the victim's "personal life and any relations and acquaintances she had;" but the only evidence of a relationship between her and Terry was in Terry's March 24, 1995 statement. He had previously not claimed this when questioned before he was arrested and told that D.N.A. linked him to the crime. Lt. Frier testified that if they had developed information about a relationship between the victim and Terry, "we would have been all over that." PCR Tr. pp. 308-11; 318-19.

³⁶ That evidence, however, did not establish that the killing was manslaughter.

statement was inadmissible hearsay.³⁷ As a result, he cannot prove that counsel was deficient in failing to have his statement introduced.

Also, the Court finds that counsel made objectively reasonable efforts to introduce **State's Ex. 68**, without the necessity of Terry testifying, upon learning that the prosecution was not going to introduce it in the State's case-in-chief. Further, counsel's cross-examination of Dr. Carter elicited precisely the testimony that Terry now faults him for not presenting. For these reasons, the Court finds that Terry has failed to prove deficient performance with respect to counsel's investigation and efforts to establish evidence corroborating the March 24th statement.

Moreover, the Court finds that there is no prejudice in the current record. Even if there was credible, admissible evidence that corroborated the statement and further assuming that counsel should have uncovered it and presented it to the guilt phase jury, the March 24th statement was still inadmissible, self-serving hearsay because Terry could not create his own unavailability as a witness under Rule 804. *See Terry*, 339 S.C. at 356, 529 S.E.2d at 277 ("Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield" and create his own unavailability). *See also Cabrera-Pena*, 361 S.C. at 377, 605 S.E.2d at 524 ("*Terry* involves the issue of whether a statement against penal interest may be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE. There, we held that Terry, who had elected not to testify, could not thereafter admit the self-serving statement he made to the police. The rationale for this holding ... was that a defendant may not claim 'unavailability' as a witness by virtue of exercising his fifth amendment privilege against self-incrimination. *Terry*

³⁷ Again, the Court notes that this statement was uncorroborated and was inconsistent with the physical evidence. The Court finds the statement cannot explain either his reason for pulling the telephone lines or why the victim was found in a position that suggested that the sexual intercourse occurred after the brutal attack on her with a blunt object, or while that savage beating was still being administered. It also does not explain the evidence that Terry had to break into the house, on what happened to the weapon used on the victim.

stands ... for the proposition that such an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3)"). As a result, there is absolutely no reasonable probability that Terry could have introduced the statement but for counsel's failure to present sufficient corroborating evidence because it was inadmissible unless and until Terry testified and subjected himself to cross-examination.

Further, there was overwhelming evidence of Terry's guilt of murder, first-degree burglary, first-degree CSC and malicious injury to telephone system. Thus, the Court finds that Terry has failed to prove prejudice resulting from any alleged error under *Strickland*. There is simply no reasonable probability of a different result but for counsel's supposed error. *Id.*

GROUND 12

Terry next maintains that trial counsel were ineffective because they failed to present any evidence to support the March 24th statement that the killing was voluntary manslaughter. However, the Court finds that counsel were not deficient and that Terry cannot show any prejudice resulting from counsel's supposed deficiency because the record from the guilt phase of Terry's trial does not contain any evidence that he was guilty of manslaughter; and the only evidence presented at trial was his statement, which the State introduced in the penalty phase. Rather, the evidence overwhelmingly demonstrates that he was guilty of murder, burglary in the first degree and first degree CSC, as well as malicious injury to telephone system.³⁸

Terry's March 24th statement simply was not introduced until the sentencing phase of Terry's trial. By that time, he had already been convicted of murder, and the failure to argue for a

³⁸ The Court again notes that counsel's cross-examination of Dr. Carter establishes that Dr. Carter's findings upon examining of the victim's vaginal area did not confirm a sexual assault took place. However, Dr. Carter opined that these findings as to the position of the victim's body at the crime scene are very characteristic of "sexual activity or sexual assault at the time." R. pp. 1472-73. See Grounds 13 and 15, *infra*.

manslaughter verdict at that point cannot possibly satisfy either prong for relief under *Strickland*.

GROUND 13

Terry's **Ground 13** is that counsel were ineffective because they failed to present any evidence or argument to the jury in support of the contention in Terry's March 24th statement that the sex with the victim was consensual. The Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance because the physical evidence from the autopsy that he claims should have been argued to the jury was, in fact, presented through cross-examination and closing argument. The remaining testimony Terry proffered in connection with this allegation is inadmissible, completely lacking in credibility or both.

Mr. Stone testified at the PCR hearing that Mrs. Fullwood actually cross-examined the pathologist, Dr. Carter; and she established that he did not find evidence of bruises, scrapes, tears or cuts in the victim's vaginal area. Dr. Carter's finds were consistent with sexual activity in a sexual assault, but he could not opine that a sexual assault had occurred. Mr. Stone did not recall whether or not he argued that the sex was consensual. **PCR Tr. pp. 52-57.**

Mrs. Fullwood disagreed with collateral counsel's characterization of the evidence as not showing that there had been a sexual assault, simply because of Dr. Carter's found at autopsy that there had not been any vaginal tearing, bruising or cutting. She acknowledged that such an argument could be made, but she felt that it would be "tenuous." Despite Dr. Carter's testimony she felt that the following facts suggested that the sex was forced: (1) the position in which the victim's body was found; (2) the position of the victim's clothing; and (3) the blood patterns on the carpet. **PCR Tr. pp. 189-90; 221.**

Terry presented Dr. Carter, who is Director of the clinical laboratories at Lexington Medical Center and the pathologist who performed the autopsy on the victim. Dr. Carter examined the victim's vaginal area; and he did not find any evidence of "bruises, scrapes, tears, or cuts," in the vaginal or anal areas. Semen-like fluid, however, was present the victim vaginal vault. Dr. Carter testified that his findings showed that there was "evidence of a sexual act[,] ... [a]nd there was evidence of a massive assault with the victim attempting to defend herself." However, he could not say that both occurred at the same time. **PCR Tr. pp. 143-48.**

He explained that the absence of any visible trauma to the victim's vaginal area was not unusual, even where someone has been sexually assaulted in a homicide; and that he had worked on a number of cases without any bruises, abrasions or lacerations. In the present case, the victim was found lying on her back, and her nightgown had been pulled up to expose her breasts. **PCR Tr. pp. 152.**

At trial, Ms. Fullwood cross-examined Dr. Carter. She elicited that he did not find evidence of bruises, scrapes, tears or cuts in the victim's vaginal area. **R. p. 1479.**³⁹

In closing argument, Mr. Stone argued that "[w]e know that there's no evidence of rape. The doctor who took the stand and he testified that there w[ere] no cuts, no lacerations, nothing around the vaginal area to indicate a rape. No evidence of it." **R. pp. 1557, ll. 4-7.**

Based upon the present record, the Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance because the physical

³⁹ However, the State's examination of him established that Dr. Carter had visited the scene. He described finding a deceased individual on her back, with one or both legs lifted up and cocked back, and with a small trace of fluid externally on the public hairs that appeared very similar to semen. He opined that these findings are very characteristic of "sexual activity or sexual assault at the time." **R. pp. 1472-73.** At autopsy, he took swabs from the posterior portion of the victim's mouth, the rectum and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. **R. pp. 1471-73; 1478-80.**

evidence from autopsy that he claims should have been argued to the jury was, in fact, presented through cross-examination and closing argument.

The only other evidence presented by Terry at the PCR hearing to support his contention that he and the victim were involved in a relationship was testimony concerning the photograph of him in the victim's home, which the Court rejects for the reasons stated in **Ground 23**, and testimony proffered through his mother and his ex-wife, Louanne Smith.

Patricia Terry (his mother) testified that she had a telephone conversation with the victim "a few moths before she passed away." The victim "identified herself" as "the mother of Samantha and John [Jackson]." When Mrs. Terry asked if she wished to speak to one of her children, the victim said, "No, I want to speak to Gary." However, no one else was home. **PCR Tr. p. 246.**

The victim also called one other time. When Mrs. Terry told her that Terry was not home, the victim hung up the phone. **PCR Tr. p. 247.** Over Respondent's objection, Mrs. Terry testified that she had a conversation with Terry before the murder, in which she asked him what was his relationship with the victim. He told her that "they had a good relationship, ... and I took it from what he was saying they did have a loving relationship." It was Mrs. Terry's belief that she had told the defense about her telephone conversations with the victim. **PCR Tr. pp. 250-51.**

On cross-examination, she testified that she drew the conclusion about a loving relationship because "the way he said it, it was like they had relations." She also implied that he was romantically involved with all of the women in his life. **PCR Tr. p. 252.** The Court finds that her testimony about conversations with the victim simply was not credible and that no such conversations took place. The Court bases this finding upon the Court's earlier conclusions

about the extent of counsel's investigation to support the details in the March 24th statement, and the inability of the prosecution to discover any evidence to support an ongoing relationship between the victim and Terry, as well as Samantha Jackson's trial testimony and Diane Gibson Smith's PCR testimony. If Mrs. Terry had such conversations with the victim, someone would have uncovered it well before the PCR hearing.

The Court makes the same findings with respect to her purported conversation with Terry about his relationship with the victim. Her testimony simply was not credible and the Court finds that no such conversations took place. This testimony is simply inconsistent with the credible evidence about the victim's lifestyle: that she was a loner who was not involved in a relationship. If Mrs. Terry had such conversations with her son, either counsel's investigation or that of law enforcement would have uncovered it well before the PCR hearing. Further, Mrs. Terry did not testify that she told trial counsel about this conversation, and counsel could not be deficient for failing to discover a conversation, which was withheld from them.

The Court permitted Louanne Smith to testify, over Respondent's hearsay objection,⁴⁰ about a conversation she allegedly had with Terry when they were talking about reconciling. She claimed that he told her that he previously had sex with the victim. Mrs. Smith allegedly told several members of the defense team about this conversation, including the social worker and Ms. Fullwood. **PCR Tr. pp. 237-42.**

The Court finds that her testimony about this conversation simply was not believable and that no such conversation occurred. The Court bases this finding upon the Court's earlier conclusions about the extent of counsel's investigation to support the details in the March 24th statement, and the credible evidence that neither the defense nor the Sheriff's Department were

⁴⁰ The Court finds that the objection would have been sustained at trial, but it was permitted for purposes of this PCR allegation.

able to find any evidence to corroborate this aspect of the May 24th statement. Indeed, her testimony that she imparted information about this conversation to Ms. Fullwood squarely conflicts with Ms. Fullwood's credible testimony to the contrary. The Court likewise rejects her testimony because it is inconsistent with Samantha Jackson's trial testimony and Diane Gibson Smith's PCR testimony about the victim's lifestyle, that she was a loner who was not involved in a relationship.

Based upon these findings, the Court finds that Terry has not proved that counsel were deficient in failing to discover the existence of these conversations and utilize them as part of their defense of Terry. The Court further finds that Terry has not proved that he was prejudiced by counsel's failure to discover the existence of these conversations and present them at trial, even assuming *arguendo* that they had actually taken place. First, all of these conversations would be inadmissible at trial. This is particularly true of the supposed conversation Mrs. Terry had with her son and Louanne Smith's conversation with him, since the South Carolina Supreme Court held in *his* direct appeal that he could not create his own unavailability by exercising his right to not testify. *Terry*, 339 S.C. at 356, 529 S.E.2d at 277 ("Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield" and create his own unavailability). *See also West v. State*, 53 Fla. 77, 43 So. 445, 446 (1907) ("Evidence of self-serving declarations and conduct ... when they form no part of the conduct or conversations introduced by the prosecution, should not, as a rule, be admitted in a criminal prosecution...."); *Williams v. State*, 536 So.2d 169, 170 (Ala.Cr.App. 1988) ("The admission of such evidence

would allow the accused to make evidence for himself. ... 'As a general rule, one charged with crime cannot make evidence for himself, by proof of his own declarations'" (citation omitted).⁴¹

Moreover, none of these conversations, except Smith's, establishes that the victim and Terry were romantically involved. This is true in spite of Mrs. Terry's conjecture and speculation about what Terry had meant in her conversation with him. The Court finds that presenting this evidence and arguing that it supported evidence of a romantic relationship may have been insulting to the guilt phase jury, since there was significant evidence of a break-in and that the sexual activity took place at or near the time of death. *See R. pp. 1419-23; 1472-73.* Particularly in light of the State's overwhelming proof that Terry was guilty of the crimes for which he was charged and convicted, the Court finds that he has failed to prove a reasonable probability of a different result, but for counsel's failure to discover the existence of these conversations and present them at trial.

GROUND 14 & 21

In **Ground 14**, Terry asserts that his attorneys were ineffective for failing to present any evidence or argument to the jury in support of the information in Terry's March 24th statement that he did not burglarize the victim's residence. In **Ground 21**, he contends that counsel were ineffective because they did not present any argument or evidence to the trial judge or the jury that Terry "was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that [Terry's] fingerprint was placed on the victim's telephone box based on innocent conduct." The Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance as to either allegation.

⁴¹ Indeed, such statements are "dripping with motivations to misrepresent." *See Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir.1942).

The only two witnesses to give testimony related to these allegations were SLED Agent Steven Derrick and Louanne Terry Smith. Agent Derrick was a senior examiner in SLED's latent print and crime scene lab at the time of the offense. At trial, he testified that glass from a window in the side or rear door had been broken out from the exterior of the house. This was the closest point to the knob and lock on the door. **R. pp. 1419-22.**

Respondent questioned Agent Derrick at the PCR hearing about the glass from the side door, which was found on the floor in the interior of the house. He again opined that the glass (shown in photographs introduced at trial as **State's Exs. 4-6**) on the kitchen floor was consistent with a forced entry. Although he could not determine when the glass was broken, it would have left broken glass on the floor. **PCR Tr. pp. 158-63; 174-75.**

Terry also presented his ex-wife, Louanne Terry Smith, at the PCR hearing. When Terry attempted to introduce hearsay statements he had allegedly made to her, the Court sustained the State's hearsay objection. *See Terry, supra*. He then proffered her testimony that he had told her on several occasions that he had done odd jobs for the victim, such as "fixing the washing machine, [and] fixing a lawn mower." Sometime in mid-May 1994, he allegedly went to Mrs. Smith's Winnsboro home. He "got a telephone crimping tool which we had previously bought for one of our residences whe[n] we had to install our own telephone line. ... And he indicated to me that he needed the tool to try to fix Mrs. Jackson's telephone line." **PCR Tr. pp. 230-33; 235.**

For the reasons discussed, *supra*, the Court finds that trial counsel's investigation was reasonable under *Strickland*. In fact, counsel' reasonable investigation resulted in them discovering additional evidence, undisclosed to the prosecution, that further supported the conclusion Terry had tampered with the telephone box and then burglarized the victim's home:

the fingerprint developed by Mr. Girndt. Agent Derrick's credible testimony on this issue is consistent with his trial testimony. Also and as discussed, the Court finds that Mrs. Smith is not a credible witness. Her testimony that Terry had borrowed a telephone-crimping tool to repair the victim's phone line is likewise not credible.

Further, she never claimed that she informed counsel about the existence of the alleged conversation. Therefore, the Court finds that counsel's performance with respect to the current allegations was not deficient.

Moreover, the Court finds that Terry has not met his burden of establishing prejudice resulting from counsel's alleged errors. First, the Court was not presented with any credible, admissible evidence to support these allegations. Second, the Court finds that no competent defense attorney would present testimony that he got the crimping tool to repair or fix the victim's telephone line. This evidence would show that Terry knew precisely where the phone box was located and it would establish his intent to do something to it, as well as premeditation. It would also permit an inference that he knew how to disable it. The problem with offering this testimony is that, instead of repairing or fixing the telephone line, it was pulled out - with an obvious intent to disable the phone service and isolate the victim from the outside world. Thus, the Court finds that presentation of this testimony would amount to ineffective assistance under *Strickland*.

Further, and assuming that such evidence had been presented, there is not a reasonable probability of a different result because it would not explain the evidence that the telephone line had been pulled out and disabled. Because Terry's print is on the telephone box, the inference is that he disabled the phone service. Mrs. Smith's testimony likewise does not explain why there was evidence of a break-in, or why the victim was found in a manner suggesting that the sexual

activity took place at or near the time of her death and after Terry had begun savagely beating her. Mrs. Smith's testimony also does not explain why Terry's D.N.A. was found in the vaginal wash and anal swab. In light of the overwhelming evidence proving that Terry was guilty of the crimes for which he stood trial, the Court finds that there is no reasonable probability of a different result but for counsel's supposed error. *Strickland*, 466 U.S. at 694.

GROUND 15

Terry's next allegation is that trial counsel were ineffective because counsel allegedly failed to specifically move for a directed verdict on the ground that the prosecution's evidence failed to establish sufficient evidence of criminal sexual conduct (CSC) in the first degree. In particular, he alleges that counsel failed to specifically argue the State did not prove the lack of the victim's consent. The Court finds that Terry cannot show either deficient performance or resulting prejudice based upon the present record.⁴²

At the close of State's case, trial counsel Fullwood moved for a directed verdict as follows:

Ms. Fullwood: Your Honor, at this time, we would move for a directed verdict on all charges contained in the indictment on the grounds that the evidence taken as a whole in the light most favorable to the State is insufficient to convince a rational trier of the facts beyond a reasonable doubt that the State has proved every element of the offenses charged.

R. p. 1537, ll. 10-16. The trial judge denied this motion. **R. p. 1538, ll. 2-11.**

Ms. Fullwood testified that she had worked at the South Carolina Office of Appellate Defense for eight years before she went to the Public Defender's Office, and she had handled

⁴² Although he alleged counsel was ineffective for not moving for a directed verdict on the charge of first-degree burglary, he did not present any evidence thereon and his questioning of Ms. Fullwood centered upon her alleged failure to adequately move for a directed verdict on the charge of CSC in the first degree. The Court finds that he therefore abandoned this portion of **Ground 15**. The Court will address this portion of his argument, in the alternative, *infra*.

between seven and nine appeals of death penalty cases while she was there. PCR Tr. pp. 186-87; 195-96. When Terry's PCR counsel showed the directed verdict motion to her, she testified that she believed that it was sufficient to preserve a challenge to the sufficiency of the State's evidence against Terry on the charge of CSC in the first degree. Mrs. Fullwood also disagreed with counsel's characterization of the evidence as not showing that there had been a sexual assault, simply because of Dr. Carter's findings at autopsy that there had not been any vaginal tearing, bruising or cutting. She acknowledged that such an argument could be made, but felt that it would be "tenuous." PCR Tr. pp. 189-90.⁴³

In relevant part, South Carolina law provides that any person who commits a sexual battery upon a victim is guilty of first degree CSC, if the State proves one or more of the following circumstances:

- (a) The actor uses aggravated force to accomplish sexual battery.
- (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act....

S.C. Code Ann. § 16-3-652(1) (a)-(b) (Supp.2008). *See also State v. McFadden*, 342 S.C. 629, 539 S.E.2d 387 (2000).

The trial judge is required to submit an offense to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989). In reviewing a directed verdict motion, the trial judge as well as the appellate court must view the

⁴³ Terry's counsel on direct appeal, Mr. Dudek, testified that, in his opinion, Ms. Fullwood's motion did not preserve the issue because he did not "think an appellate court would think that was a very serious motion." PCR Tr. pp. 270-73. *See Ground 22, infra.*

evidence in the light most favorable to the State. *State v. Childs*, 299 S.C. 471, 385 S.E.2d 839 (1989).

Applying this standard of review to the case at bar, the Court finds that there was sufficient evidence of lack of consent to submit the offense of CSC in the first degree to the jury because, when the direct and circumstantial evidence is viewed in the light most favorable to the prosecution, it cannot be said that “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). First, and notwithstanding Terry’s allegation to the contrary, the Court finds that counsel’s challenge of the prosecution’s failure to prove “every element of the offenses charged” was sufficient to preserve the question for appellate review of whether there was sufficient evidence of the victim’s lack of consent to intercourse, *see State v. Taylor*, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900), to send the charge of CSC in the first degree to the jury.

Even assuming *arguendo* that trial counsel’s performance was deficient, however, the Court finds that Terry cannot show any conceivable prejudice because the record conclusively demonstrates that a directed verdict motion on the charge of first degree CSC predicated upon the victim’s lack of consent, would have been utterly meritless in light of the evidence.

The State’s guilt phase evidence reasonably tended to show that in May 1994, Urai Jackson, the victim, lived alone in West Columbia, South Carolina. She and her husband had divorced in 1974 and she was not romantically involved with anyone at the time of her murder. Her daughter, Samantha A. Jackson, testified that the victim was “a loner” and did not have any close acquaintances with whom she kept in touch frequently, other than speaking to her neighbors. **R. pp. 1526-28;1536.**

Samantha had maintained very frequent contact with her mother. She often assisted with her mother's finances and she often did her laundry at her mother's house on the weekends. Samantha first met Terry in 1986 or 1987, when was dating her best friend at the time, Diane Gibson. Gibson lived across the street from Samantha's mother. Terry lived with Diane for some period of time, but Samantha lost contact with Diane in 1993. Terry was not living across the street from the victim at the time of the murder, and he only knew the victim "in a passing type sense." **R. pp. 1528-30.**

On Saturday, May 29, 1994, Samantha called the victim and left a message on the victim's answering machine for the victim to call her back. However, the victim did not return her call. On Sunday, Samantha called her mother several times. She did not get an answer and the answering machine did not pick up. Still, Samantha was not worried because it was the Memorial Day weekend and the victim frequently went to Lake Murray on holidays.⁴⁴ When Samantha could not reach her mother on Tuesday, May 31, 1994, however, she became concerned. She drove to her mother's house and noticed that the outdoor light was on, even though it was the middle of the day. This was very odd because the victim was an early riser and she would not have left the light on after she had awakened. As Samantha approached the house, she noticed that the carport door was ajar and there was "glass everywhere." Inside, the kitchen was in disarray, and there was garbage on the floor. Again, this was unusual. Samantha walked into the hall and living room area and saw her mother lying on the floor, dead. She tried to call 911 but could not get a dial tone. Therefore, she immediately ran out of the house and called 911 from a neighbor's residence. A Lexington County Deputy Sheriff arrived on the scene several minutes later. **R. pp. 1529-35.**

⁴⁴ She always went alone.

Officers responding to the scene indicated that the glass pane on the carport door window nearest to the doorknob had been broken out from the exterior of the house. The officers corroborated that the kitchen area was in disarray, but the rest of the house appeared to be reasonably neat. Also, the victim was lying in the area described by Samantha. Her head was facing the hallway and her feet were facing the living room area. The victim had either a T-shirt or gown across part of her body, but her breasts and her genitalia were exposed. Also, her legs were spread and her left leg was up at an angle with the bottom of her left foot on the floor. **R. pp. 1284-98; 1308-09; 1332-36; 1342-43; 1353-58; 1419-22.**

There was dried blood on her face and head. **R. p. 1306.** Agent Derrick gave expert testimony in the area of crime scene analysis and in the area of determining whether the force that resulted in the broken glass from the door came from the outside or inside of the house. He opined that it had come from the outside. Where that glass had been broken, an intruder had the closest point of access to the door handle and the lock mechanism. **R. pp. 1420-22.**

Agent Derrick was also qualified as an expert in blood spatter analysis. There were two pools of blood on the floor. The first was in or near the hallway, and the second blood pool was underneath the victim's head. There was medium velocity spatter on the corner walls that was associated with the first pool of blood; and there was a transfer pattern of blood on the wall, which had been left by something with blood on it coming into contact with the wall. There was also blood that the victim had "coughed up or expired out" on the wall. All of the blood spatter that was noted on both walls around where the victim was found ranged from two inches above the floor to nine inches above the floor, in a parallel pattern. "Therefore, the blows were delivered while the [victim] was at or on the floor." **R. pp. 1424-30.**

Samantha Jackson testified that the victim kept a number of items around the house for protection, including the bottom of a two-piece pool cue. While officers found the top portion of the pool cue, the bottom portion was never recovered. Outside the house, officers discovered the telephone lines had been pulled from the telephone box. A latent fingerprint matching Terry's right ring finger was lifted from the telephone box. **R. pp. 1309-12; 1330-32; 1336-1337; 1343-44; 1356-57; 1430-37; 1534-35.**⁴⁵

Dr. John Carter, the forensic pathologist who performed the autopsy on the victim, testified that he found at least four, and possibly more, blunt trauma wounds where a blunt, heavy, club-like object hit the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind the right ear. These blows would have likely caused immediate unconsciousness and would have quickly resulted in death. He also found a number of superficial lacerations, which may have occurred when the victim was falling. The appearance of the wounds he found indicated that she was struck from behind and possibly from above and behind with a blunt instrument. **R. pp. 1464-70.**

He also found two blunt trauma lacerations on the top of the victim's shoulder that appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm were defensive wounds, as were the wounds to the left forearm. These wounds were consistent with **State's Exhibit 13**, but Dr. Carter opined that the head injuries were more likely caused by a heavier instrument, such as a club or a baseball bat that had a rounded end. He also explained that the victim's thumb was

⁴⁵ A latent fingerprint from one of two beer cans found in the victim's sink did not match either the victim or Terry. However, it was impossible to determine when the print was left; and it could have been left by *anyone* who handled the beer can. **R. p. 1442; 1460-61.**

“almost smashed” and opined this could have been a defensive injury or it could have been caused by the perpetrator stomping on her thumb. **R. pp. 1464-70.**

Dr. Carter had visited the scene and described finding a deceased individual on her back, with one or both legs lifted up and cocked back, and with a small trace of fluid externally on the public hairs that appeared very similar to semen. He opined that these findings are very characteristic of “sexual activity or sexual assault at the time.” **R. pp. 1472-73.** At autopsy, he took swabs from the posterior portion of the victim’s mouth, the rectum and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. **R. pp. 1471-73; 1478-80.**

Subsequent testing by SLED’s forensic serology and DNA laboratory revealed the presence of semen in the vaginal wash and the rectum swab. A blood standard from Terry showed that he had ABO blood type “group A and the secretor status is non-secretor, Lewis A positive.” **R. pp. 1488-91.** His DNA profile matched the DNA extracted from the semen found on the vaginal wash and the anal swab. “[T]he probability of selecting an unrelated individual at random from the population having a DNA profile matching [these items] . . . is approximately one in one hundred ten billion blacks and one in thirty-three billion Caucasian.” **R. pp. 1493-98.**

To convict a defendant of first-degree CSC based upon his use of aggravated force at the time of the assault under S.C. Code Ann. § 16-3-652(1)(a), there must be proof that the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must show the actual use of aggravated force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault. *State v. Lindsey*, 355 S.C. 15, 20-22, 583 S.E.2d 740, 742-743 (2003) (affirming denial of defendant's directed verdict motion

on charge of first-degree CSC where record contained evidence defendant physically forced victim to submit to assault by confining her in automobile, grabbing her hands, getting on top of her, and holding her down as she kicked, pushed and fought to get him off of her). This Court finds that the manner in which the victim's body was found, the extensive nature of the injuries inflicted upon her and the evidence of bloodstains and blood spatter demonstrates that the prosecution's evidence clearly met that requirement. *Id*; see also *State v. Frazier*, 302 S.C. 500, 397 S.E.2d 93 (1990) (affirming attempted first-degree CSC conviction where State presented evidence that defendant grabbed victim, forced her into woods, and ripped her clothes off in effort to commit sexual battery).

The Court further finds that the State's evidence was also sufficient to show that the battery occurred during a burglary. See S.C. Code Ann. § 16-3-652(1)(a). In addition to the broken glass found inside of the house that came from the back or side door, there was a latent fingerprint matching Terry's right ring finger lifted from the telephone box, where the telephone lines had been pulled. In this regard, the Court agrees with Mr. Stone's assessment that the fact Terry's fingerprint was found on phone box was extremely damaging because it is very difficult to explain a legitimate reason for it to be there to a jury. PCR Tr. pp. 78-80. When coupled with the evidence found at the scene and the vicious beating suffered by the victim, it also creates a very compelling inference that the home was burglarized after the victim was isolated from the rest of the world.

All of this evidence reasonably tended to prove an absence of consent; and this evidence creates, *at the very least*, a jury question as to whether the victim consented to intercourse with Terry. Therefore, even if trial counsel's directed verdict motion was deficient under *Strickland*,

this Court finds that Terry still cannot prove a reasonable probability of a different result but for counsel's failure to make a more specific directed verdict motion. *See Childs and Edwards*.⁴⁶

GROUND 16

Terry's sixteenth allegation is that trial counsel were ineffective because they did not "object to 'character' evidence in the penalty state that was far more prejudicial than probative." He contends that unspecified evidence presented through Diane Gibson Smith and Angela Fedorchak, about bad acts "in their presence or to them" for which there was no conviction (PCR Tr. vol. 2, pp. 12-13), should have been excluded under a Rule 403, SCRE, analysis. The Court finds that he is not entitled to relief. Initially, the Court denies relief because Terry has failed to specify what portion(s) of each witness' testimony to which counsel should have but did not object. The Court finds that he has therefore abandoned this allegation. Alternatively, the Court denies relief because he has not proved either deficient performance or any prejudice resulting from counsel's failure to make the objection.

S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed

⁴⁶ Likewise, the Court concludes that he has not established either deficient performance or prejudice from the failure to more fully argue the motion with respect to the charge of burglary in the first degree for the reasons stated, *supra*, but the Court reiterates that he has abandoned the allegation. In South Carolina, "[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime ... (b) causes physical injury to a person who is not a participant in the crime; or ... (3) the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A)(1)(b) & (3) (Supp. 2008). *See also State v. Brooks*, 277 S.C. 111, 283 S.E.2d 830 (1981) (one may be guilty of burglary if there is a breaking and entering of a residence in the nighttime with intent to commit either a felony or a misdemeanor); *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (Ct.App. 2007). "Dwelling house," as used in the arson and burglary statutes, is defined as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a ... person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (Supp. 2008). The Court finds that the State's evidence clearly tended to prove Terry's guilt of burglary in the first degree and that the charge was properly submitted to the jury. So, there cannot be any conceivable prejudice under *Strickland*.

the crime. *See Hitchcock, supra* (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *Shaw, supra* (same); *see also Woodson*, 428 U.S. at 305 (plurality opinion); *Skipper, supra* ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase. *E.g., Rosemond, supra; Gardner, supra.*

The Court has reviewed the testimony of each witness. Mrs. Smith testified that Terry had a "[v]ery hot temper, quick temper," and he would throw or break things when he got mad at her; that he once threw her kitten against a wall because he was mad at her; that he once threw an object at her truck because he was mad at her; that he was very controlling of her "emotionally and mentally," to the point that she did not have any friends and she lost contact with her family after she moved away from them; that he did not have a legitimate job while they were together and he would steal boat and car trailers; that he would take money from her and buy crack with it; that he told her of a fight he had gotten into with another man, where he continued to beat the man after the man was down; that he did not pay child support for a child with his first ex-wife; that he once "poured lighter fluid [o]n the dash of [her truck] and set it on fire" when she attempted to end their relationship; and that, at his request, she once shot him in the leg, so that he would not have to go to court. **R. pp. 1738-55.**

Mrs. Smith also testified about other violent behavior by Terry when she attempted to end their relationship. He once threatened to burn the house she owned that was near the victim's residence. On another occasion, he tried to punch out the window of her vehicle, even though he

had a cast on his hand; and he ripped "the coil wire and something else off my distributor." After he repaired the truck, Mrs. Smith went to her boyfriend's home and telephoned her roommate, Angela Fedorchak. She asked Angela to follow her home. Shortly after they reached the residence, Terry arrived and exhibited violent behavior towards both women. Law enforcement ultimately arrived. **R. pp. 1755-60.**

Ms. Fullwood's cross-examination of Mrs. Smith focused upon Smith's own bad character, such as her willingness to shoot Terry in the leg, the fact she continued her relationship even after discovering that he was already married, and her failure to call police and report that they were living in a trailer that Terry had stolen or that he was purchasing crack. Ms. Fullwood also established that Mrs. Smith also went with Terry to buy crack on at least one occasion. More importantly, Ms. Fullwood's cross-examination established that Terry was nice to her at times; and that Smith only saw irrational behavior from him when he was angry. Indeed, he had threatened to harm himself in her presence. **R. pp. 1763-69.**

Angela Fedorchak also testified about the August 11, 1994 violent incident involving her, Mrs. Smith and Terry.⁴⁷ Mrs. Smith had telephoned her and warned her that Terry was riding around the neighborhood, waiting for Smith to return. Angela Fedorchak saw the vehicle that Smith had described to her. Because Terry had threatened Mrs. Smith, Angela Fedorchak called the Lexington County Sheriff's Department; and they promised to send someone to the house. Then, Angela Fedorchak received the call from Smith, asking her to follow Smith home. **R. pp. 1700-03.**

Angela drove out to a gas station off of Piney Grove Rd. and followed Smith to their residence. Smith went into the house; and Terry arrived while Angela was outside on the porch,

⁴⁷ She was not married at the time of this incident.

with the cordless phone. When he asked whether Smith was home, Angela lied and told him no because she was afraid that he would hurt Smith. He then asked if Smith's truck was parked in the back yard. Angela lied again and said no. He ran immediately to the backyard, pushing Angela out of his way. She ran towards the front door, trying to dial -911 as she ran. 1703-06.

Terry caught Angela before she could get into the house, and he then began a violent struggle with her on the porch. He opened the screen door and slammed her into the brick wall. By the time Angela slammed the screen door into him, he had already opened the front door. He fell to the floor. Then, he knocked the bottom of the screen door with his feet and cracked the glass. She called -911, as Terry went in and found Smith; and the Sheriff's Department eventually arrived. Angela went to the hospital the following day with internal bleeding. **R. pp. 1706-08.** Ms. Fullwood established that Angela had been told that Terry was drinking that day, and this was the reason that she was afraid. **R. p. 1708.**

Initially, the Court finds that because Terry failed to elicit any testimony from trial counsel concerning why counsel did not raise an objection under Rule 403, SCRE, he cannot overcome *Strickland's* strong presumption that counsel's performance was competent. *See Strickland*, 466 U.S. at 689; *Hughes*, 898 F.2d at 702 ("We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions [that he] made"). Also, the Court finds that only a minimal amount of hearsay was admitted, and that no prejudice could result from its introduction since the declarants all testified and they were subject to cross-examination by trial counsel.

Furthermore, after reviewing the above evidence, the Court finds that a Rule 403 objection would not have been meritorious because this testimony was proper in the sentencing

phase of Terry's capital trial to show his character. *Hitchcock, supra*. Moreover, his violent behavior directed towards women, along with evidence of his violent behavior as a bouncer and evidence of his behavior while incarcerated, showed his extremely violent nature and his future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992).

Further, the Court finds that trial counsel's examination of these witnesses established that his irrational and violent conduct dovetailed into counsel's evidence in mitigation, i.e., that he has an "an organic explosive disorder," which was offered to explain his violent actions. **R. pp. 1995-2043; 2054-64**. When the Court considers that the expanded scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase, e.g., *Gardner, supra*, the Court finds that Terry cannot show either deficient performance in failing to object or prejudice resulting from the failure to raise a Rule 403 objection. *See Clark*, 16 F.3d at 963-64 (Because the Court found no basis for counsel to object to the evidence that was admitted, counsel's failure to object did not constitute deficient performance); *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Lane*, 811 F.2d at 1170 (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

The Court further notes that the trial judge properly charged Terry's jury that it could only recommend a death sentence if it first unanimously found that the State had proven the existence of one or both statutory aggravating circumstances beyond a reasonable doubt, and he instructed the jury that the only statutory aggravating circumstances were burglary in any degree and CSC in any degree. **R. pp. 2104-21**. Finally, the Court notes that there was overwhelming proof that Terry was guilty of the murder and the two statutory aggravating circumstances. In

light of the foregoing, the Court finds that he has not proved that “there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 17

Terry contends that Mr. Stone’s closing argument in the sentencing phase was ineffective because he referred to Terry as a “rapist”, a “murderer,” an “invader of homes” and a “thief.” The Court finds that he is not entitled to relief because he has not proved either deficient performance or any prejudice resulting from these comments.

Mr. Stone began his sentencing phase argument by acknowledging that the jury had to think about two things. First, the jury had to think “about the tragedy of the crime.” When placed in proper context, Mr. Stone then argued that:

The second part of your job, Ladies and Gentlemen, is also to consider something else. In any type of sentencing situation, you’ve got the crime and in this case, its horrendous. And when you all came in here and took the witness stand and answered the questions, we asked you, if you get to the sentencing phase of a trial and you have already found somebody to be a murderer and a rapist and a burglar, as Mr. Humphries put it, an invader of homes, can you still give somebody a life sentence. You still have that choice. Why do you have that choice?

If the question is just is this a horrendous crime, there’s no need for this hearing. This is a horrendous crime, Ladies and Gentlemen, and you decided that two days ago and you’re right. You were right then and you’re right now. Gary Terry is a rapist. He is a murderer. He’s an invader of homes. All of that is true. We are not going to sit here and ask you to ignore that. That would be lying to you and I’m not going to do it.

But we have a sentencing hearing for just the reason of what we have heard, what we heard yesterday. This is why we have a sentencing phase because your choice is between life in prison and death. It doesn’t give you a lot of leeway, just one of two choices. We have decided and you have decided this two days ago that the crime itself was horrible and no matter how many pictures you see, nothing is going to take away from that.

Now, the determination is, folks, is there mitigation here, is there a reason to give Gary Terry life?

R. pp. 2098-99. The remainder of Mr. Stone's argument focused upon the mitigating evidence that the defense had presented which, he urged, warranted a life sentence. **R. pp. 2099-2102.**

Initially, Mr. Stone did not recall arguing this portion of his closing argument, until it was shown to him. By the time of Mr. Stone's closing argument, Terry had already been convicted of murder, CSC in the first degree and first-degree burglary; and the jury "had already found all [of] those to be true." Mr. Stone recalled Mr. Humphries using term "home invader,"⁴⁸ which was not a common expression at the time. He surmised that his own argument may have simply been to mimic the State's argument and suggest that the jury needed to move on to what was important at sentencing - those things in the case that are aggravating or mitigating - because State likes to continue to focus on the facts of the crime in the sentencing phase. Also, in sentencing, "you're still trying to build some type of credibility." **PCR Tr. pp. 67; 94-95; 97-100.**

The Supreme Court's decision in *Yarborough*, *supra*, emphasizes that deference to counsel's tactical decisions in closing is particularly important because of the broad range of legitimate defense strategy at that stage. 540 U.S. at 4. Moreover, where counsel focuses on some issues to the exclusion of others, there is a strong presumption that counsel did so for tactical reasons rather than sheer neglect. 540 U.S. at 5. Counsel has wide latitude in closing under *Yarborough* and courts are reluctant to find ineffectiveness for omitting matters. *Knight v. Spencer*, 447 F.3d 6, 18 (1st Cir. 2006).

⁴⁸ See **R.pp. 2091-92.**

Despite counsel's inability to recall his strategy, the record reflects that his argument was in keeping with his theory, as also testified to by Ms. Fullwood, to maintain credibility with the jury and not argue at sentencing with the guilty verdict *See Ground 10. See Greiner v. Wells*, 417 F.3d 305, 319 (2nd Cir. 2005) (presumption that counsel's performance was reasonable is not overcome by counsel's inability to recall reason for actions where record reasons appear, noting also counsel's experience). At the same time, however, Mr. Stone urged jurors to recognize that the evidence in mitigation had to be considered when they imposed their sentence. These remarks also were in response to the prosecutor's argument.

Indeed, if counsel had not made remarks such as these, it might have insulted the jury or it might have appeared that counsel was arguing with the verdict. In light of the overwhelming evidence presented that supported the jury's guilt phase verdict, as well as the other evidence in aggravation, the Court finds that this was not deficient performance. *Hicks v. Collins*, 384 F.3d 204, 216 (6th Cir. 2004) (characterizing the client's crimes as dastardly and heinous was not ineffective but a candid recognition of the brutality of the crimes); *Roberts v. State*, 910 P.2d 1071, 1079 (Okla.Cr. 1996) ("Based on the record before us, we are not convinced trial counsel attempted to distance himself from Petitioner. To tell the jurors counsel was court-appointed or to describe Petitioner as a criminal, illegitimate or below normal intelligence could as easily be interpreted as an attempt to show the jurors counsel was being frank and not misleading them. Additionally, when taken in context, the statements are entirely proper").⁴⁹ *Cf. Nixon, supra*.

The Court further finds that there is absolutely no reasonable probability that the jury would have imposed a life sentence but for these challenged comments in closing argument.

⁴⁹ The Court in *Roberts* also found no ineffectiveness in "counsel's telling the jury in the first stage of the trial that the decision as to punishment is an issue to be dealt with in the second stage of trial. In the same manner, to refer to the victim as an unfortunate victim could be considered sound trial strategy: counsel would not be serving his client well by attacking or attempting to discredit an 80-year-old dead woman." *Id.*

First, these remarks did not tell the jurors anything that they did not already know, since they had convicted Terry of murder, first-degree burglary and first-degree CSC.⁵⁰ Further, there was overwhelming evidence of Terry's guilt of murder and both statutory aggravating circumstances. Therefore, he failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 18

Terry next alleges that trial counsel was ineffective for failing to present the jury with evidence that he is left-handed because this would have supposedly been inconsistent with the pathologist's testimony that the victim's assailant was right-handed. The Court disagrees and finds that he has failed to prove any prejudice resulting from counsel's performance. *Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").

In support of this allegation, Terry presented Dr. John Carter, the Director of Clinical Laboratories of Lexington Medical Center and the pathologist who performed the autopsy on the victim. Dr. Carter opined that the victim's death resulted from a series of blows to the back, rear portion of her head from a blunt, heavy club-like object. The blows fractured the victim's skull. The blows, "more likely than not, were administered. . . from behind the victim. And . . . It would be more likely than not [that] if the assailant is behind a victim hitting the victim with a club that it be more convenient, more likely for the blows to be struck by a right-handed

⁵⁰ Although the jury had also convicted him of malicious injury to telephone system, the Court has only considered proof of the statutory aggravating factors in its prejudice analysis.

individual.” However, his opinion that this was done with the right hand did not mean that the assailant is right-handed, just that “it would have been more easily inflicted if someone used their right hand as opposed to their left hand.” Someone with enough strength could have inflicted the blows even if he was left-handed. **PCR Tr. pp. 143-145; 149-50.**

Very similar testimony was elicited at trial. Also, the record reflects that defense counsel elicited that the assailant “most likely” would have used his right hand. **R. p. 1466-68; 1478-79.**

Mr. Stone testified that he believed Terry was left-handed. He and co-counsel had discussed how best to get this information before the jury. Counsel had thought, at one point, of having Terry walk up and write his name on a note pad. However, Mr. Stone was afraid that Terry would be subject to cross-examination if he did that,⁵¹ and counsel had made a strategic decision that Terry should not testify. So, counsel had Terry write during Mr. Stone’s closing argument; and Mr. Stone attempted to direct the jury’s attention to this by looking at Terry when he told jury assailant was right-handed. Ms. Fullwood did not recall whether nor not Terry ever told her that he was right-handed or left-handed. **PCR Tr. pp. 52-54; 85-87; 206-07.**

The Court finds that Terry has failed to prove that he was prejudiced by counsel’s failure to present the jury with evidence that he is left-handed. First, the Court finds that Terry has failed to establish that he, in fact, is left-handed. His mother, his ex-wife and his girlfriend at the time of Mrs. Jackson’s murder all testified at the PCR hearing. These three women presumably would know whether he was right-handed or left-handed. However, none of these witnesses testified that he was left-handed. **PCR Tr. pp. 223-40; 246-53.** He also did not testify to this, which he clearly had the right to do. *See, e.g., Griffith v. Griffith*, 332 S.C. 630, 641, 506 S.E.2d 526, 532 (Ct.App. 1998) (“it is permissible for the fact finder to draw an adverse inference in a

⁵¹ The Court agrees that this action would have subjected Terry to cross-examination. Again, however, it is unnecessary to address *Strickland*’s first prong because Terry cannot meet the second prong.

civil case against a party invoking the Fifth Amendment privilege against self-incrimination”); *Crocker v. Weathers*, 240 S.C. 412, 126 S.E.2d 335 (1962) (failure of a defendant to testify in civil case raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position); *Bean v. Calderon*, 166 F.R.D. 452, 453 (E.D. Cal. 1996) (habeas corpus petitioner, who invoked the court’s process to overturn an otherwise valid conviction, was permitted to invoke the Fifth Amendment; however, the court could draw an adverse inference from its invocation if the questions to which the privilege was asserted directly related to an allegation made by petitioner in his verified petition, and the questions were otherwise not objectionable). In fact, the only evidence that he is left-handed came from Mr. Stone, who thought that Terry was. Thus, the Court finds that he did not establish that he is left-handed.

Even assuming that he is left-handed, the Court finds that evidence does not entitle him to relief. It is clear that he is capable of using both hands because the prosecution presented evidence that a latent fingerprint matching Terry’s right ring finger was lifted from the telephone box. **R. pp. 1309-12; 1330-32; 1336-1337; 1343-44; 1356-57; 1430-37; 1534-35.** Also, Mr. Stone testified that his expert, Mr. Girndt, found another print on the telephone box that could have been made by a finger on Terry’s right hand. **PCR Tr. pp. 78-80.**

More importantly, Dr. Carter’s opinion was not that the assailant was right-handed. Rather, he simply testified that “it would have been more easily inflicted if someone used their right hand as opposed to their left hand.” However, an individual with enough strength could have inflicted the blows with his right hand, even if he was left-handed. Particularly given the overwhelming evidence of guilt of murder and the aggravating circumstances of criminal sexual conduct and burglary, as well as the telephone tampering charge, the Court concludes that Terry cannot prove a reasonable probability of a different result but for counsel’s failure to present

evidence that he is left-handed. *See Griffin v. Delo*, 33 F.3d 895, 901 (8th Cir. 1994) (failure to introduce evidence that the defendant was left-handed was not ineffectiveness where the witness was not sure and the defendant was otherwise persuasively identified).

GROUND 19(a)-(b)

Next, Terry alleges that trial counsel Fullwood was ineffective for failing to advise Terry's estranged wife, Louanne Terry not to mention parole eligibility when she testified in the sentencing phase (**Ground 19(a)**) and for failing to object and move for a curative instruction when the witness testified that Terry could get out of prison in thirty years if he received a life sentence. (**Ground 19(b)**). As to both allegations, the Court finds that Terry has failed to prove either deficient performance or resulting prejudice.

During Louanne Terry's sentencing phase testimony, she testified in part that his children (that she had during their marriage) loved him very much; and that it was difficult for her to explain to them that "it might be a very long time before Daddy got to come home." **R. pp. 1929-30.** Then, the following colloquy occurred about which Terry now complains:

Q. Did you have to tell the children something real hard- -

A. Yes --

Q. --- this week ---

A. --- Thursday night. The hardest thing I ever had to do in my life [was] to go home and tell those four children that the jury had returned guilty verdicts on all four counts and that *at best Daddy would not get to come home for thirty years*. That there would be no cub scout projects, that there would be no time to spend with them, that there would be no camping trips, no fishing trips, no vacations. That he would probably not get to walk his daughter down the aisle, the daughter he hoped for so long.

R. p. 1930, ll. 11-24 (emphasis added).

Mrs. Louanne Smith testified at the PCR hearing that she had previously been married to Terry and that they were estranged at the time of Terry's trial.⁵² She claimed that she only met with Ms. Fullwood "[v]ery briefly" during a "general meeting of the defense team" before Terry's trial, and that she was never told not to mention her ex-husband's parole eligibility or anything about the possibility of him coming home. She claimed that she would not have made the statement in question if she been so advised. **PCR Tr. p. 233.**

Ms. Fullwood testified that the defense felt that it was strategically important for his estranged wife, Louanne Terry, to testify because it might have looked funny if a capital defendant's wife did not testify on his behalf, even if they were estranged. Ms. Fullwood worked with Mrs. Terry for several hours on the day before she testified,⁵³ to prepare her testimony; and Ms. Fullwood was under the impression that Mrs. Terry would be able to present favorable mitigation testimony. However, when she actually testified, she was "all over the place." **PCR Tr. pp. 211-14; 222.**

Ms. Fullwood did not tell the witness to mention Terry's parole eligibility and did not mention parole in the preparation of her testimony. In her estimation, the challenged response was gratuitous and unresponsive to the question asked. Terry would have been parole eligible if sentenced to life imprisonment, and Ms. Fullwood believed that Mrs. Terry's testimony injected parole eligibility. Ms. Fullwood requested and received a "plain and ordinary meaning" jury charge, in light of Mrs. Terry's testimony. **Respondent's Ex. 2.** Ms. Fullwood did not move to strike the testimony in question because it would have drawn further attention to Mrs. Terry's testimony.

⁵² She testified that they divorced in December 1997. **PCR Tr. p. 210.**

⁵³ This was during the twenty-four hour waiting period after the jury had convicted Terry of murder.

The Court has elsewhere found that Mrs. Terry is not a credible witness⁵⁴ and that both trial attorneys were credible. The Court again resolves any discrepancies in the testimony of Ms. Fullwood and Mrs. Terry in favor of finding only counsel's testimony credible. Based upon Ms. Fullwood's testimony, the Court finds that trial counsel did not intend for Mrs. Terry to inject parole eligibility into the trial; and that the statement in question was gratuitous and unresponsive to trial counsel's intended inquiry. Instead, Mrs. Terry apparently injected it for reasons known only to her. Therefore, the Court finds that trial counsel was not ineffective for failing to warn her to inject her husband's parole eligibility in her testimony.

The Court further finds that Terry has failed to prove that counsel's failure to object to her response or move for a curative instruction was not deficient performance because counsel made a reasonable, strategic decision not to do so, since any such reaction to this testimony would have simply focused the jury's attention on this statement. The Court finds that this was a reasonable strategic decision. *See United States v. Nguyen*, 504 F.3d 561, 575-76 (5th Cir. 2007) (trial counsel for defendant whose alleged role in fraudulent home buying scheme was to procure straw buyers was not ineffective for failing to object to straw buyer's testimony that he pleaded guilty to role in fraudulent real estate transaction where his plea agreement was not accepted, or to the court's decision not to inform jury about withdrawn plea; objecting to decision not to inform jury about withdrawn plea would have highlighted straw buyer's testimony, and the jury was specifically cautioned not to conclude one could be guilty of conspiracy without intent to defraud); *Nixon v. Epps*, 405 F.3d 318, 328 (5th Cir. 2005) ("Because an objection by Nixon's counsel would have been fruitless, there can be no claim of deficient performance under

⁵⁴ As an example, the Court would note her willingness to admit at the time of the trial that she loved Terry. **R. p. 1922**. Yet, she only admitted at the PCR hearing that she loved him as the father of her children. She also only made this admission very reluctantly, in spite of repeated efforts by Respondent to elicit this simple response. **PCR Tr. p. 242**.

Strickland"); *Phyle v. Leapley*, 66 F.3d 154, 159 (8th Cir. 1995) (where the Court recognized recognizing the "virtually unchallengeable" broad subjective factors that lawyers take into account as they make repeated, instantaneous judgments whether to object, to move to strike or to move for a mistrial, factors that cannot be duplicated on a transcript. These factors include the witnesses' demeanor, the desire not to emphasize, and the jury's apparent reaction to the testimony).

More importantly, the Court finds that Terry cannot show any prejudice with respect to either counsel's failure to advise Mrs. Terry not to mention parole eligibility, or counsel's failure to object and move for a curative instruction when the witness testified that Terry could get out of prison in thirty years if he received a life sentence. First, the Court finds that despite this unresponsive injection of Terry's parole eligibility, the witness' testimony was generally beneficial and provided mitigation for the sentencing phase jury. Indeed, when the challenged comments are viewed in the context of the rest of her testimony, she clearly was emphasizing the significant impact of a guilty verdict and life sentence on Terry's children. Also, she then did "the second hardest thing" that she had ever done and begged her estranged husband's jury to sentence him to life, as opposed to death. **R. p. 1930-31.**

The Court further finds that counsel also was able to provide the jury with information about the good qualities of Terry that she saw during their marriage through her testimony. **R. pp. 1925-29.** More importantly, the Court finds that neither the State (**R. pp. 2077-91**) nor the defense (**R. pp. 2092-2103**) argued that Terry would be parole eligible. Therefore, Mrs. Terry's unresponsive remark was the only time his possible release was mentioned. Trial counsel, however, requested and received a "plain and ordinary meaning" jury charge, in light of Mrs. Terry's testimony. **R. pp. 2073-74; Respondent's Ex. 2.** This instruction was proper under state

law, and it precluded the jury's speculation about parole if Terry received a life sentence. *See Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

Finally, the Court would note that there was overwhelming evidence presented at trial supporting the statutory aggravating circumstances found by the jury. Based upon the current record, the Court concludes that Terry has not established "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" if the jury had not heard the isolated remark. In other words, he has failed to prove that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones*, 332 S.C. at ___, 504 S.E.2d at 829-30 (concluding that petitioner did not meet burden).

GROUND 20

Terry further alleges that his attorneys were ineffective because they failed to object to Officer Phillips testimony that Terry did not show for a scheduled appointment with the Sheriff's Department. The Court finds that Terry abandoned this allegation because he did not present any evidence thereon at the PCR hearing. At most, therefore, he has a conclusory, self-serving allegation that will not support a claim of ineffective assistance of counsel. *E.g.*, *Ellis v. Lynaugh*, 873 F.2d 830, 838-39 (5th Cir. 1989) (habeas petitioner's "mere conclusory allegations of discriminations" in grand jury selection were "insufficient to entitle an individual to relief"); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("a petitioner is *not* entitled to an evidentiary hearing, however, when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible") (internal quotations omitted) (emphasis in original). Alternatively, the Court finds that he has failed to prove either

deficient performance or, more importantly, any conceivable prejudice resulting from counsel's performance because he has not shown either why the testimony was objectionable or how he was prejudiced by its introduction.

Lt. H. E. Phillips testified in the guilt phase of Terry's trial that concerning his involvement in the investigation. By January 1995, Terry had become a suspect; and Lt. Phillips felt it was important to talk with him, and obtain his consent draw bodily fluids and hair for D.N.A. testing. Inv. Frier contacted Terry and "he advised [Frier] that he would be in Lexington [on January 17, 1995,] and he would come by the Sheriff's Department and talk to us." However, he did not show up that day. When contacted in at his Winnsboro, South Carolina residence, Terry said that he did not have any transportation. So, the officers went to Winnsboro and obtained his consent. **R. pp. 1358-61.**

It is well settled that the prosecution is prohibited from using a defendant's post-*Miranda* silence to impeach that defendant's testimony providing an exculpatory version of the events in question. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "However, states may use a defendant's pre-*Miranda* silence, whether it occurred before or after arrest, to do so." *Buckner v. Polk*, 453 F.3d 195, 208 (4th Cir. 2006) [citing *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (concerning post-arrest, pre-*Miranda* silence) and *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980) (Stevens, J., concurring) (concerning pre-arrest silence)].

In the present case, the Court finds that Terry has failed to establish that the questioned testimony was inadmissible under *Doyle* because there was no comment upon Terry's post-*Miranda* silence. Further, he has not argued or proved that Phillips' testimony was irrelevant.⁵⁵ Nor has he advanced any other theory that would support an objection to Inv. Phillips'

⁵⁵ It is relevant to explaining the course of law enforcement's investigation, and how his consent was given so officers could obtain samples from him for D.N.A. testing.

testimony. Thus, he has failed to prove that counsel's failure to object constituted deficient performance.

More importantly, he cannot show any conceivable prejudice from the introduction of this testimony. First, testimony presented through Inv Phillips, immediately after that now challenged by Terry, presented the jury with unchallenged evidence that Terry had cooperated with law enforcement during the course of the investigation by providing the officers with blood, saliva and pubic hair samples on January 17, 1995 (**R. pp. 1362-1363; State's Exhibit 14**), even though the officers, while informing him that they were investigating the victim's murder, did not tell him he was a suspect. According to the officers, Terry told them that he had been the victim's neighbor; that he knew the victim; that he was a friend of her two children; and that he had been over to the victim's house. **R. pp. 1364-66; 1403-04**. In fact, Inv. Phillips testified that Terry "consented to anything [we] wanted" after being informed that the Sheriff's Department was investigating the victim's murder; and he described Terry as "very cooperative." **R. p. 1371, ll. 10-22.**⁵⁶

Evidence of his cooperation was consistent with counsel's strategy of putting the State to its burden of proof by pointing out any deficit in the State's case, while attempting to maintain credibility with the jury for the sentencing phase. Moreover, in light of the overwhelming proof establishing Terry's guilt of each of the crimes of which he was convicted, the Court finds that he cannot prove a reasonable probability of a different result but for counsel's failure to object to Lt. Phillips' testimony.

⁵⁶ Likewise, Inv. Frier described Terry as "very cooperative" and "pleasant to deal with" even though he was aware the officers were investigating Urai Jackson's murder. **R. p. 1404, ll. 4-22**. Similarly, counsel elicited that Terry had provided SLED Agent Derrick with a clear set of his fingerprints. **R. p. 1459, ll. 17-25**. Moreover, defense counsel skillfully argued Terry's cooperation with law enforcement in closing argument. **R. pp. 1560-62**.

GROUND 22

Terry alleges in **Ground 22** that appellate counsel was ineffective for failing to raise on direct appeal the trial judge's denial of the directed verdict motion on the charge of first degree CSC. This allegation is predicated upon the alleged absence of evidence that the victim did not consent to intercourse. The Court finds that Terry cannot show either deficient performance or, more importantly, any conceivable prejudice resulting from appellate counsel's failure to make this argument because such an argument would not have been meritorious, for the reasons found in **Ground 15**.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000)

(citation omitted).⁵⁷ Although recognizing that “[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim” on direct appeal, the Supreme Court has recently reiterated that “it [will be] difficult to demonstrate that counsel was incompetent.” *Robbins*, 528 U.S. at 288. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Id.* (quoting *Gray*, 800 F.2d at 646. See also *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In the present case, Assistant Appellate Defender Robert M. Dudek represented Terry on direct appeal. Mr. Dudek testified that he has worked at Appellate Defense for approximately seventeen years at the time of the hearing. He and one other attorney in his Office handled all of the death penalty appeals at the time of Terry's appeal; and he had handled several death penalty appeals before he was appointed to represent Terry.⁵⁸ He explained that he prepares an appellate brief by first ensuring that he has a copy of all transcripts in the case. Next, he “always” goes to the courthouse and views all of the exhibits, he orders all of the paper exhibits and he reads the entire record. He keeps two sets of notes of the record and he records all objections and motions in one set of notes. **PCR Tr. pp. 266-69.**

In his opinion, Ms. Fullwood's motion did not preserve the issue because he did not “think an appellate court would think that was a very serious motion.” Although he could not recall whether he considered raising the directed verdict issue on appeal, he noted that he was not

⁵⁷ *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal”). Indeed, “[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.” *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751); see also *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed “to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims”).

⁵⁸ He handles a total of roughly one hundred appeals a year. **PCR Tr. p. 267.**

constitutionally required to raise every issue that is preserved for appellate review. **PCR Tr. pp. 270-73.**

Again, the Court finds that there is no merit to Terry's argument that he was entitled to a directed verdict on the charge of first degree CSC. Because the allegation lacks any merit, the Court finds that he cannot meet either prong for relief under *Strickland*.⁵⁹

GROUND 23 (a)-(b)

Terry's **Ground 23** raises two allegations. First, he asserts that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide a photograph to defense counsel that was supposedly taken in the victim's home and which depicted the victim seated in his lap.⁶⁰ Alternatively, he maintains that trial counsel were ineffective because they failed to discover this photograph and utilize it at trial. The Court finds that both allegations lack merit.

Trial counsel Mr. Stone testified at the PCR hearing that the defense had filed *Brady*/Rule 5 motions, and that the defense had the State's responses before trial. **PCR Tr. pp. 80-81.** Counsel sent the investigator, Tommy Davis, to number of places. Mr. Davis met with several family members, a Mr. Boozer and others who appeared in the incident report. However, Mr. Stone did not recall witnesses providing helpful information. **PCR Tr. pp. 76-78**

⁵⁹ The Court finds that Terry has abandoned any claim that appellate counsel should have argued that he was entitled to a directed verdict on the burglary charge. See **Ground 15**. For the reasons stated in **Ground 15**, the Court further finds neither deficient performance nor prejudice resulting from the failure to argue that issue as well. The Court finds that trial counsel's motion preserved a challenge to the sufficiency of the evidence to convict Terry of burglary in the first degree but Terry was not entitled to a directed verdict because there was sufficient evidence to submit that charge to the jury. See **Ground 15**.

⁶⁰ Terry's witnesses gave conflicting accounts of what the picture depicted. As will be more fully discussed, Terry did not introduce the photograph at the PCR hearing. However, it was clear from collateral counsel's questioning of Mr. Humphries, Mr. Chase and Diane Gibson that Terry alleged that the photograph depicts the victim sitting in his lap.

Mr. Humphries testified that, to his knowledge, no one produced photos of the victim sitting on Terry's lap to the prosecution. Also, he did not recall any such photograph. The State was aware that Terry had previously been in the house. However, this was in connection with the victim's daughter. **PCR Tr. pp. 105-06.** Although he did not recall any such photograph, he was sure that he would have disclosed such a photograph, if he had it, because it was his Office's policy to always disclose every photograph, including those involving victim impact evidence. **PCR Tr. pp. 117-18.**

Ms. Fullwood testified that the counsel's pre-trial discovery motion and supplemental motions had been ruled on before trial. Further, the defense's investigation did not reveal any information that could corroborate Terry's statement that he and the victim had an affair, and that he had consensual sex with the victim on the night of her murder. Also, he had given the defense team several different accounts as to his version of what he did around the time of the murder. Each account was unsuccessfully investigated. **PCR Tr. pp. 190-91; 196-204; 206.**⁶¹

Terry also presented testimony on this allegation from Diane Gibson Smith. Mrs. Smith testified that she was involved in a relationship with Terry at the time of the victim's death. She testified that she provided an investigator for the State with a photograph depicting her and Terry that had been taken in the victim's home. However, she could not recall to whom she had given the photograph or when she had done so. She, the victim's daughter and Terry were all friends; and she lived across the street from the victim at the time of the crime. **PCR Tr. pp. 223-26.**

However, she testified that she and Terry had only been in the victim's home, together, one or twice; and she had never seen Terry and the victim together. She described the victim as not "very social" and said that the victim "kept to herself". Also, she denied that she had told

⁶¹ Trial counsel's testimony was corroborated by the defense's private investigator, Mr. Davis. Also, Terry had given Mr. Stone an account in which he suggested that he had been framed. **PCR Tr. pp. 75-76.**

Terry's mother, Patricia, that she had given the Solicitor's Office a picture showing the victim and Terry together, with the victim sitting in Terry's lap. When asked to describe the photograph, she indicated that it was taken in the victim's kitchen, and she (Mrs. Smith) is sitting in Terry's lap. The victim, however, was not in the photograph. **PCR Tr. pp. 225-27.**

Patricia Terry, Terry's mother, attempted to testify about this issue, but the Court sustained Respondent's hearsay objection to what Diane Smith had told her. **PCR Tr. pp. 247-48.** Terry then proffered testimony from her that she had spoken to Diane Gibson Smith about photographs that Ms. Gibson had provided to the State. Mrs. Smith allegedly told Mrs. Terry that one photograph showed the victim, Terry and Gibson sitting on the couch; and that the victim was sitting in Terry's lap. **PCR Tr. pp. 249-50.**

Mr. Chase testified that he did not have any recollection of anyone showing him a photograph depicting the victim sitting in Terry's lap. However, if one existed, "I'm sure we would have provided it." **PCR Tr. p. 291.**

A. Alleged *Brady* violation (Ground 23(a))

In *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), the United States Supreme Court stated the applicable law under *Brady* as follows:

"In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' . . . We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor

has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.”

(Citations omitted).⁶² See also *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Taylor*, 339 S.C. 159, 508 S.E.2d 870, 879 (1999); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997).

The Court in *Strickler*, however, observed that “the term ‘Brady violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;” however, “strictly speaking, there is never a real ‘Brady violation’ unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” 527 U.S. at 281. Thus, the Court recognizes three components of a true *Brady* violation. “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 282.

The Court later explained the materiality prong under *Brady* as follows:

As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. . . . Rather, the question is whether ‘the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.’

Id. at 290 (citations omitted).

⁶² The Court in *Strickler* found that the petitioner could not show prejudice resulting from the procedural default of his *Brady* claim because the suppressed evidence was not material. *Id.* at 292-96.

In the present case, the Court finds that Terry has failed to prove that any photograph exists which was taken in the victim's home and depicts the victim sitting in his lap. There was no admissible testimony presented to substantiate this claim, and Terry did not introduce any photograph at the PCR hearing. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice") (citing *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). *See also Beaver v. Thompson*, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony).⁶³ Even if Mrs. Patricia Terry's testimony concerning the conversation she supposedly had with Diane Gibson Smith was admissible, the Court finds it was not credible.⁶⁴

Assuming that such a photograph exists, it was available to Terry through another source: his girlfriend at the time, Diane Gibson Smith. Indeed, he not only would have had at least equal access to the witness, he would know or reasonably should know that the photograph he claims was taken actually existed, since he was in it. "[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have

⁶³ The Court would note that he had access to all of the contents of the Solicitor's file, except those this Court ruled were protected as work product. None of the contents over which the work product privilege was asserted were photographs. He also had the right to civil discovery under S.C. Code Ann. § 17-27-130 (Supp. 2008). However, no photograph was introduced at the hearing.

⁶⁴ As discussed elsewhere, the Court finds that she was not a credible witness. The Court finds that her testimony about the victim, both generally and specifically as to the current issue is contradicted by Samantha Jackson's testimony and Mrs. Smith's testimony about the victim not having a close relationship with Terry. It is likewise inconsistent with Lt. Frier's testimony before this Court that the Lexington County Sheriff's Department made extensive inquiry into the victim's "personal life and any relations and acquaintances she had;" but the only evidence of a relationship between her and Terry was in Terry's March 24, 1995 statement. He had previously not claimed this when questioned before he was arrested and told that D.N.A. linked him to the crime. Lt. Frier testified that if they had developed information about a relationship between the victim and Terry, "we would have been all over that." PCR Tr. pp. 308-11; 318-19. Based upon his testimony as well as Ms. Jackson's trial testimony, the Court finds that no affair took place.

looked, a defendant is not entitled to the benefit of the Brady doctrine.” *United States v. Wilson*, 901 F.2d 378, 381 (1990). *See also Bagley*, 473 U.S. at 675; *Barnes v. Thompson*, 58 F.3d 971, 975-76 (4th Cir. 1995).

The Court further finds that, at most, Terry has established that a photograph was provided to the prosecution depicting he and his former girlfriend, Diane G. Smith, together in the victim’s house. Assuming that such a photograph does exist even though Terry failed to introduce it at the hearing, the Court does not find that failing to disclose this photograph was such that it “‘could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.’” *Strickler*, 527 U.S. at 290 (citations omitted). At most, the Court finds that any such photograph would demonstrate that he and his girlfriend were in the house. This was known to counsel for both the State and the defense, and it was never disputed that he had lived across the street from the victim or that Diane G. Smith and Samantha Jackson were friends. It does not establish any relationship between the victim and Terry, whatsoever, much less corroborate either his March 24, 1994 statement or any possible guilt phase defense based upon a theory that he and the victim were having an affair, and that the killing was the result of her provocation of him. Thus, the *Brady* claim fails, because the photograph is not material.

B. Trial counsel’s failure to discover the photograph (Ground 23(b))

The Court likewise rejects Terry’s ineffective assistance of counsel claim predicated upon trial counsel’s supposed failure to discover and use a photograph of the victim sitting on his lap, at trial. First, the Court finds that the efforts trial counsel made to corroborate his claim that he was romantically involved were more than reasonable under *Strickland*. Second, the Court finds that Terry has failed to prove that any photograph exists which was taken in her home and depicts the victim sitting in his lap. There was no admissible testimony presented to substantiate

this claim, and Terry did not introduce any photograph at the PCR hearing. *See Bannister, supra; Underwood, supra.* Therefore, the Court finds that Terry has failed to establish that trial counsel's performance was deficient.

He likewise has failed to establish Sixth Amendment prejudice. At most, Terry has merely established that a photograph was provided to the prosecution depicting he and his former girlfriend, Diane G. Smith, together in the victim's house. Assuming that such a photograph does exist, even though Terry failed to introduce it at the hearing, the Court does not find that he prejudiced by his attorneys' deficient performance, *i.e.*, "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. At best, the Court finds that any such photograph would demonstrate that he and his girlfriend were in the house.

This was known to counsel for both the State and the defense, and it was never disputed that he had lived across the street from the victim or that Diane G. Smith and Samantha Jackson were friends. It does not establish any relationship between the victim and Terry, whatsoever, much less corroborate either his March 24, 1994 statement or provide evidence supporting a guilt phase defense of manslaughter; that he and the victim were having an affair and the killing was the result of her provocation of him. Particularly in light of the overwhelming evidence of guilt of murder and the statutory aggravating circumstances, he has failed to meet his burden of showing any conceivable prejudice. For the above-stated reasons, the Court finds that this allegation is without merit.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and
2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this ____ day of _____, 2008.

JOHN C. FEW
Presiding Judge, Eleventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF LEXINGTON)

Gary Dubose Terry,) 2000-CP-32-3470
)

Applicant,)
)

v.)

CERTIFICATE OF SERVICE

The State,)
)

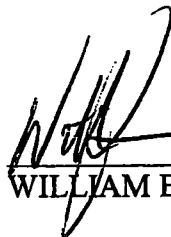
Respondent.)
)
 _____)

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Respondent's proposed form of Order of Dismissal in the foregoing action on counsel for Applicant by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

H. Wayne Floyd, Esq.
 Wayne Floyd Law Office
 P.O. Box 3972
 West Columbia, SC 29171-3972

Melissa Jane Reed Kimbrough, Esq.
 Kimbrough & Taggart
 1811 Pickens Street
 Columbia, SC 29201-2630

This 11th day of September, 2008.


 WILLIAM EDGAR SALTER, III

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
Gary Dubose Terry,	)	2000-CP-32-3470
	)	
Applicant,	)	
	)	
v.	)	APPLICANT'S OBJECTIONS
	)	TO RESPONDENT'S
	)	PROPOSED ORDER OF
The State,	)	DISMISSAL.
	)	
Respondent.	)	
	)	

GROUND 1¹

The applicant objects to respondent's proposed basis for dismissing ground one. As an initial matter, respondent misapprehends the nature of applicant's claim. Applicant claims that counsel Stone was ineffective because he told the jury that Mr. Terry "confessed" to murder, burglary, and rape. Applicant does not claim counsel erred for failing to produce evidence or call Mr. Terry as a witness to testify as to the contents of his own statement. Applicant claims that counsel was deficient for informing Mr. Terry's jury that he "confessed" to murder, rape and burglary when he did not do so.

Applicant agrees with respondent that Mr. Terry's statement was exculpatory.

Both the trial court and, on direct appeal, the South Carolina Supreme Court held Mr. Terry's statement to be exculpatory. Tr. 1388; *State v. Terry*, 339 S.C. 352 (2000),

¹ Respondent's proposed order fails to address certain issues and/or sub issues raised by the applicant. Therefore, applicant relies on his post-hearing memorandum of law in support of those issues unaddressed by the respondent. Specifically as to Ground 1, the confession issue, applicant alleged prosecutorial misconduct due to the state's misrepresentation of its intentions insofar as the confession. See pp. 15-20 of Applicant's Post-Hearing Memorandum of Law in Support of His Application For Post Conviction Relief.

cert. denied, 531 U.S. 882 (2000). Hence, the trial court's *Denno* ruling established only one thing--that the state could use Mr. Terry's statements against him, whereas defense counsel could not.

Because the statement was exculpatory of both murder and rape, there can be no finding of reasonableness insofar as counsel's decision to tell the jury Mr. Terry "did it," and confessed to the charges of burglary, murder and rape. Respondent disagrees and sets forth two reasons for denying applicant's claim. First, Counsel Stone testified that telling the jury Mr. Terry confessed built credibility for the defense. Second, Respondent argues, in direct contradiction to counsel Stone's PCR testimony, that counsel was implicitly telling the jury that Mr. Terry's confession was false.

Counsel's decision to inform Mr. Terry's jurors that he confessed to murder and rape did not build credibility for Mr. Terry. Mr. Terry pled not guilty, and thus an admission of guilt at the beginning of trial was in itself unreasonable, and most likely confusing to the jury. Moreover, Mr. Terry's version of events did not amount to murder and rape, but manslaughter and consensual sex.

Counsel underscored the detrimental impact of his opening remark on the jurors with his rhetorical question to them: "[s]o what in the world are we doing here? Why are we even having one of these guilt phases?" Tr. p. 1281. There can be no doubt that the jurors' collective unspoken answer to counsel's Stone's question was that Mr. Terry, because he "confessed," was wasting their time and taking advantage of the system by pleading not guilty and participating in a time-consuming charade.

Counsel's second "strategic" purpose was also unreasonable. Respondent contends that, when read in context, counsel Stone was arguing that Mr. Terry's

confession was "false." RPO² p. 30. However, the only evidence of Mr. Terry having falsely confessed came in the form of counsel's bare allegation that he had done so. As jurors are routinely told, arguments of counsel are not evidence. Evidence comes from the witness stand and by items introduced into the record. More importantly, however, Mr. Terry's false confession was unrelated to the homicide for which he was being prosecuted. Rather, Mr. Terry's false confession was part of a poorly-planned ruse in which Johnny Brewer had convinced Mr. Terry to confess to his own crime.

The most significant reason this court should reject respondent's proposed dismissal is that the PCR testimony of counsel establishes that counsel Stone's reference to a "confession" was a gaff with detrimental consequences for Mr. Terry. Both counsel Fullwood and Stone testified they would not have mentioned the statement, but for their joint assumption that the solicitor was going to introduce it during the state's case-in-chief. PCR Tr. pp. 187-188; 207-209.

Counsel Stone's two reasons for mentioning Mr. Terry's confession were based on a bare assumption. To his credit, counsel Stone admitted he made a mistake and "slipped on" the opening statement insofar as this issue was concerned. PCR Tr. p. 84. Counsel Fullwood considered counsel Stone's slip "regrettable." PCR Tr. p. 218. Significantly, the state did not even hint at the existence of a "confession" during opening statement, thus underscoring the unreasonableness on Mr. Terry's counsel's decision to mention it.

Counsel Stone's reference to Mr. Terry's statement as a "confession" was

² Respondent's Proposed Order.

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prejudicial to him. Mr. Terry did not confess guilt to murder, rape, and burglary. He stated he entered Ms. Jackson's home, she got him some water and they had consensual sex. Mr. Terry then stated Ms. Jackson instigated a physical altercation with him when he attempted to leave her, after which Mr. Terry flew into a rage and beat her. This version amounts to voluntary manslaughter.

Respondent maintains that Mr. Terry's statement does not set forth facts sufficient to obtain a jury charge on manslaughter, arguing that this Court would have to "parse out the statement from the prosecution's other evidence." RPO p. 29. This is incorrect. Mr. Terry's statement does not conflict with the state's other evidence, rather it serves to refute the state's *theory* of what the evidence of establishes. Mr. Terry's version amounted to manslaughter, whereas the state opined the evidence amounted to murder. Theories are not evidence, and do not constitute a basis for denying a proper jury charge in the face of facts amounting to a lesser included offense.

Obviously, given that Mr. Terry's statement sets forth a version of events amounting to manslaughter, counsel's Stone's error in confessing his client's guilt to capital murder was extremely prejudicial. For the foregoing reasons, respondent's proposed ruling as to both deficient performance and prejudice should be rejected. Applicant's conviction and sentence should be reversed.

GROUND 2

Respondent proposes that this Court should deny and dismiss applicant's claim for relief under *J.E.B. v. Alabama*, 511 U.S. 127 (1994). The state used all of its strikes, five total, to eliminate women from the jury. This strike pattern should have raised the suspicion of defense counsel, and applicant believes it was ineffective to let the issue of

gender discrimination slide at trial. Respondent disagrees, and proposes a series of reasons this ground should be dismissed.

Respondent relies on counsels' testimony that they were satisfied with the jury. Second, respondent relies on the fact that the state presented twelve female jurors before using its final peremptory strike. RPO p. 35. Third, and finally, respondent argues the reasons set forth by solicitors Chase and Humphries for their striking of female jurors, exclusively, were gender-neutral and proper. RPO p. 35.

Respondent's first and second proposed reasons for denying applicant's claim should not be endorsed by this Court. First, defense counsels' decision to forego a *J.E.B.* challenge must be analyzed for reasonableness based on the jurors who actually sat versus those who were struck. Testimony from counsel that they "liked" the jury is meaningless, unless their feelings were reasonable, which they were not. Second, it is well-established that even *one* improper strike violates the constitutional rights of both the defendant and the juror. *Id.*, 511 U.S. at 142 n.13. It is, therefore, constitutionally, factually and legally irrelevant that the state "presented" twelve female jurors.

Lastly, respondent proposes that, even if counsel had raised a *J.E.B.* claim, the reasons set forth as a basis for their strikes by counsels Humphries and Chase would have passed constitutional muster. RPO p. 35. This Court should reject respondent's claim because it is unsupported by the record. As set forth below, counsels Chase and Humphries' testimonies were demonstrably pretextual.

According to the state, jurors Glenda Clifton and Cheryl Kirkpatrick were struck for being weak on capital punishment, with Ms. Kirkpatrick having been struck solely on that basis. However, Juror Jumper, a white male, was also weak on giving death and yet

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he was seated. Respondent concedes juror Kirkpatrick was struck on this basis, and for no other reason. RPO p. 38. The pretextual nature of the state's use of its strike against Juror Kirkpatrick is crystal clear. Juror Jumper's responses were nearly identical to juror Kirkpatrick's insofar as his enthusiasm for capital punishment was concerned. The improper exercise of this strike against juror Kirkpatrick requires reversal of Mr. Terry's conviction. *J.E.B.*

In the case of Karen Moore, the solicitor offered a "dual motivation" for the strike. This was impermissible under South Carolina law. *Payton v. Kearsse*, 329 S.C. 51 (1998)(invalid basis for exercise of peremptory strike vitiates other nondiscriminatory explanations for the strike). The first reason offered by the state was not gender neutral. Solicitor Humphries testified that Karen Moore was struck due to her "rapport" with counsel Fullwood. In effect, Solicitor Humphries' first reason for striking juror Moore was that she did not behave with hostility to counsel Fullwood. On its face, the reason offered by the state for its strike demonstrates gender bias, not to mention outright paranoia about women. Nothing in juror Moore's responses indicated a pro-defense stance or that she was deferential and/or sympathetic to the defense.

Recently, the South Carolina Supreme Court reversed and remanded a case for retrial due to a strike exercised under similar circumstances. In *McCrea v. Gheraibeh*, ___ S.E.2d ___, 2008 WL 4693073 (S.C.), a peremptory strike was exercised against a potential juror because he had "long dreadlocks" and made defense counsel "uneasy." *Id.*, at 1. In ruling that the strike was improper, the Court focused intensely on the historical social and religious associations between dreadlocks and black cultures. Here, Juror Moore and counsel Fullwood's rapport was no better or different than that juror

Moore had when she was examined by the solicitor. Not surprisingly, neither counsel Chase nor Humphries could point to any portion of the trial record to support the assertion that Ms. Moore and Beth Fullwood were inordinately friendly.

Respondent notes the state had an additional reason for striking juror Moore, that being she was a nurse, a profession devoted to saving lives. However, a "dual motivation" cannot rescue an unconstitutionally exercised peremptory strike. *Payton v. Kearsse*. The record evidence in this case establishes that juror Moore was struck on the impermissible basis of her gender.

This Court should reject respondent's proposed denial of relief, and grant applicant a new trial.

GROUND 3

Applicant objects to respondent's proposed basis for dismissal as to his claim that counsel was ineffective for failing to move to strike for cause juror Georgia Miller. Juror Miller stated unequivocally she would give death if the act of killing had been intentional. Tr. p. 373. Counsels Stone and Fullwood did not offer a reasonable strategic decision for having Ms. Miller serve, as none was available. Counsel simply opined that Ms. Miller was "confused." Assuming this to be true of juror Miller, counsel had an obligation to ensure that her confusion did not inure to Mr. Terry's detriment. It is also further proof that counsel was deficient in not moving to strike juror Miller for cause.

This Court should reject respondent's proposed denial of relief on this ground. The record evidence makes clear that counsel had a legitimate basis for striking juror Miller, and a duty to do so as well. Applicant's conviction should be reversed on this ground.

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GROUND 4 & 5

Applicant objects to respondent's proposed basis for dismissal as to the ground that counsel was ineffective for failing to object to the trial court's erroneous charge on "implied" malice. Applicant will rely on his Memorandum as to ground 5.

Respondent correctly sets forth the ruling of *State v. Elmore*, 279 S.C. 417 (1983). In *Elmore*, the South Carolina Supreme Court cautioned the trial bench to carefully tailor jury charges on malice arising from the use of a deadly weapon:

The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

The Court concluded "hereafter only slight deviations from this charge will be tolerated." *Id.*, 279 S.C. at 421.

The trial judge's charge in applicant's case on the issue of malice was erroneous. Unlike the charge endorsed in *Elmore*, the trial judge in applicant's case repeatedly used "implied" and "implication" in discussing the concept of malice. Tr. p. 1573-1575. The trial judge used the implication language throughout his charge on malice generally, and not just when discussing malice arising from the use of a deadly weapon. The court's excessive use of implied malice throughout the charge shifted the burden to applicant to disprove malice.

Respondent asserts that the charge given would, even if found to be defective, not form a basis for relief. Respondent takes this position based on the absurd notion that the evidence of murder, rape and burglary against Mr. Terry was overwhelming. Applicant

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disagrees. The evidence established only that sexual relations had occurred between Mr. Terry and Ms. Jackson. The circumstances of the sexual contact and ultimate death of Ms. Jackson were open questions. There is a reasonable likelihood that the overbroad malice charge impacted the outcome of Mr. Terry's trial. This Court should reverse Mr. Terry's convictions.

GROUND 6

Respondent submits and applicant agrees that the law allows the defendant's character to be delved into during the penalty phase; however, applicant believes respondent misapprehends the extent to which the state is allowed to introduce evidence of "bad" character.

The United States Supreme Court has held that due process applies in the sentencing phase of a capital trial. *Romano v. Oklahoma*, 512 U.S. 1 (1994). The role of the jury during its penalty phase deliberations is to consider evidence in mitigation and aggravation, and to assess the "character" of the defendant. It is not an opportunity for the state to bring out every bad thing the defendant ever did. *State v. Bennett*, 369 S.C. 219, 229-230, *cert. denied*, *Bennett v. South Carolina*, 127 S.Ct. 681 (2006)(capital sentencing proceeding is not intended to be a "referendum" on the defendant's prior crimes).

Rule 403 allows trial courts to limit relevant evidence when its admission would cause "unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E. Like respondent, counsels Stone and Fullwood erroneously believed the state could introduce any amount and kind of character evidence

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that its investigation produced.

The state's evidence related to applicant's "character" was excessive and went well beyond an amount consistent with Mr. Terry receiving a fair trial. The state introduced Mr. Terry's prior crimes, great and small, including very detailed testimony from law enforcement, correctional officers, and even applicant's probation agent. Tr. 1610-1662. While arguably relevant, due to the fact that it related to his prior criminal conduct, the sheer volume of the testimony was prejudicial and created a strong likelihood that the jury impermissibly sentenced Mr. Terry as much for his prior crimes and bad acts, as much as for the death of Ms. Jackson.

Equally prejudicial was the state's hearsay evidence provided by Jeffrey Ford, Diane Gibson, Angela Fedorchak, and Tamatha Griffin. These witnesses testified about Mr. Terry's carousing with various women, "partying" with his friends, unspecified acts of fighting, inability to pay child support, failure to spend time with his children, tumultuous past relationships, petty thievery, property crimes, an unreported rape and other acts of unreported violence, and drug abuse. These witnesses testified to numerous undocumented "bad acts" and repeatedly gave their own *opinion* about Mr. Terry's character.

The Court should reject respondent's argument that counsel acted reasonably in not objecting to the excessive character evidence introduced against the applicant in the penalty phase. The state may introduce evidence of the defendant's character, but the law does not allow for open season concerning the defendant's prior bad conduct. Due process forbids this type of approach to capital sentencing. Applicant's sentence should be reversed.

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GROUND 7

As in ground 6, applicant objects to respondent's position that the state may essentially introduce as much bad character evidence as its investigation dredges up. Lt. William Brown's testimony was rife with hearsay, and it was extremely prejudicial. Counsel's failure to object was unreasonable, as this was simply more information upon which the jury could base a sentence of death.

GROUND 8 AND 9

Applicant objects to respondent's proposed order of denial of the ineffectiveness claim related to counsels' failure to object to the hearsay testimony of Sgt. Wilkerson and to counsel Stone's cross-examination of Sgt. Wilkerson. As with the preceding two grounds, counsel failed to object to prejudicial hearsay testimony. Counsel offered no explanation for his failure to object. PCR Tr. Pp. 65-66. No reasonable strategic decision exists for failure to object to Sgt. Wilkerson's testimony. This error was quite prejudicial. Ann Lomax alleged a violent assault with a weapon after sexual intercourse with Mr. Terry. As conceded by the respondent, RPO at 55, the facts of the Lomax incident are strikingly similar to those alleged by the state in the present case. The prejudicial impact of Lomax's statement being introduced cannot be overstated.

Counsel Stone's slip up in opening the door to Ms. Lomax's entire statement being introduced into evidence was likewise unreasonable. Admission of the Lomax statement highlighted and reemphasized the inflammatory nature of the crime against Ms. Lomax. Counsel Stone's gaff allowed the state not only to reemphasize the ugly details of the Lomax crime, but also to have this evidence in the jury room for further review

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during their sentencing phase deliberations. Counsel Stone's speculation that the jury might view Mr. Terry as possibly having some "mental problem" due to his weird behavior after the crime was an unreasonable strategy upon which to open the door for the statement's admission.

Counsel was deficient in failing to object to Sgt. Wilkerson's hearsay testimony, and even more so for opening the door for the introduction of Ann Lomax's statement. The striking similarity between the Lomax assault and Jackson homicide is abundant evidence of the prejudicial impact counsel's action had on Mr. Terry's sentencing phase trial. Applicant should be granted a new sentencing trial.

GROUND 10

Respondent's proposed basis for finding counsel effective, despite their failure to request a mitigation charge on provocation, is nonsensical. Moreover, neither counsel testified that they had a *strategic purpose* for their failure to request the provocation mitigating circumstance charge. This Court should not endorse respondent's effort to reverse engineer a strategic purpose on behalf of defense counsel. Moreover, the one suggested by counsel Fullwood and advanced by respondent--that the jurors might take offense by being charged that provocation was mitigating--is misguided, and ultimately unavailing.

Mr. Terry's statement was introduced into evidence. Obviously, the jury was aware that Mr. Terry alleged provocation. Thus, an instruction as to "provocation" as mitigation would have at least done no further harm, and might have helped sway the jury to spare Mr. Terry's life. Since it would have been the trial judge, rather than defense counsel, instructing the jurors to consider provocation as a mitigating factor, Mr. Terry