VOLUME EIGHT OF EIGHT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
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S.C. Supreme Court

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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Chief Appellate Defender

JOSEPH L. SAVITZ, III
Senior Appellate Defender

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THOMAS E BYRNE DM
SIGNED OFF ON 10/06/05 @ 15:56 BY THOMAS E BYRNE, PHYSICIAN II

** ENCOUNTER: 20 FOLLOW-UP SICK CALL 05/20/02 10:36 ANDERSON CO COMP
P> DIPHENHYDRAMINE 50MG
P> SIG:1 CAP P.O. AT HS X 30 DAYS, REFILL X 2
P> SIG:
P> START DATE: 05/20/02 TOTAL DAYS: 90
P> MD:CUSAK,JOHN -
P> FLUOXETINE 20MG
P> SIG:1 CAP P.O. DAILY X 30 DAYS, REFILL X 2
P> SIG:
P> START DATE: 05/20/02 TOTAL DAYS: 90
P> MD:CUSAK,JOHN -
P> VALPROIC ACID 250MG
P> SIG:1 CAP P.O. BID X 30 DAYS, REFILL X 2
P> SIG:
P> START DATE: 05/20/02 TOTAL DAYS: 90
P> MD:CUSAK,JOHN -
IN COURT ANDERSON CTY...WILL RETURN *****
SIGNED OFF ON 05/20/02 @ 10:40 BY THOMAS K JOHNSON, UNCLASSIFIED
WILL CLOSE OUT OLD 2002 OPEN ENCOUNTER
THOAMS E BYRNE DM
SIGNED OFF ON 10/06/05 @ 15:57 BY THOMAS E BYRNE, PHYSICIAN II

** ENCOUNTER: 19 MENTAL HEALTH CLINIC 05/15/02 13:14 ANDERSON CO COMP
D:I HAVE BEEN DOING ALRIGHT. THE METS HELPED ME SETTLEDOWN I HAVE SOME COUR
T CASES GOING ON THAT ARE GOING TO PRETTY MUCH DETERMINE MY FUTURE IF I HAV
E ONE. INMATE IS ANXIOUS WITH CONCERNS.
A:ANXIETY, WITH POLYSUBSTANCE HISTORY. NO SUICIDAL IDEATIONS OR HOMICIDAL
THOUGHTS.
P:WILL REVIEW MONTHLY, NEXT REVIEW 6/02.
SIGNED OFF ON 05/15/02 @ 13:21 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 18 MENTAL HEALTH CLINIC 04/15/02 7:33 LIEBER COMP
D:I THINK THAT MEDICATION ADJUSTMENT HAS HELPED ME. I'M NOT FEELING AS ANXI
OUS AS I WAS. I GET CONCERNED ABOUT MY SITUATION WITH FAMILT AND LEGAL.
A:ANXIETY, POLYSUBSTANCE ABUSE, NO SUICIDAL OR HOMICIDAL THOUGHTS. WELL ORI
ENTED TO PLACE AND TIME. INMATE WAS CHAIN SMOKING IN HIS CELL.
P:WILL REVIEW MONTHLY. NEXT REVIEW 5/02.
SIGNED OFF ON 04/15/02 @ 7:37 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 17 LAB CLINIC 04/10/02 13:31 LIEBER COMP
VALPROIC ACID DRAWN W/OUT DIFFICULTY.
SIGNED OFF ON 04/10/02 @ 13:32 BY SARAH F CHISOLM, MEDICAL ASSISTANT TECH I

** ENCOUNTER: 16 DOCTOR'S CLINIC 04/09/02 13:36 LIEBER COMP
P> VALPROIC ACID 250MG
P> SIG:1TAB PO BID X30DAYS; 2REFILLS.
P> SIG:

P> START DATE: 04/09/02 TOTAL DAYS: 90
P> MD:CUSAK,JOHN -
P> RISPERDAL 1MG
P> SIG:1TAB PO IN AM AND 2TABS HS X30DAYS; 2REFILLS.
P> SIG:
P> START DATE: 04/09/02 TOTAL DAYS: 90
P> MD:CUSAK,JOHN -
ORDER LABS FOR VALPROIC ACID.
J.R. CUSACK, D.O.
SIGNED OFF ON 04/09/02 @ 13:39 BY JOHN R CUSACK, UNCLASSIFIED
NOTED. RX WRITTEN IN MAR AND LAB REQUEST COMPLETED AND PLACED IN THE LAB.
SIGNED OFF ON 04/09/02 @ 22:57 BY KIMBERLY R GARY, MEDICAL ASSISTANT TECH I
SIGNED OFF ON 04/10/02 @ 1:02 BY TEGAN EGGER, REGISTERED NURSE I

** ENCOUNTER: 15 MENTAL HEALTH CLINIC 04/09/02 13:28 LIEBER COMP
S. THIS IS A 34 YEAR OLD, MARRIED, WHITE MALE. HE IS A DEATH ROW INMATE.
HE STATES, "I'M SEEING THINGS LIKE THE WALLS MOVE. I GOT REAL PARANOIA.
MY MEDICINE IS NOT WORKING."
HE STATES THAT HE ALSO ABUSED HALLUCINOGENS IN THE PAST. HE ADMITS TO
OCCASIONAL "FLASHBACKS."
O. THIS IS A MIDDLE-AGED, WHITE MALE DRESSED IN A DEATH ROW UNIFORM.
AFFECT IS ANXIOUS. NO S/H. HE ENDORSES PARANOIA. HE IS UNSHAVEN.
HE IS COMPETENT. HE IS ORIENTED IN ALL SPHERES. NO PSYCHOTIC
DISTORTIONS OF LANGUAGE OR BEHAVIOR. SOME NEUROVEGATIVE SIGNS ARE EVIDENT.
A. POLYSUBSTANCE DEPENDENCE (HALLUCINOGENS, COCAINE, CANNIBIS)
STATUS-POST GUNSHOR WOUND TO FACE
BIPOLAR DISORDER- BY HISTORY VS. SUBSTANCE INDUCED MOOD AND PSYCHOTIC
DISORDER VS. INTERMITTENT EXPLOSIVE DISORDER
P. SUGGESTED RECHECK IN 2-3MONTHS.
J.R. CUSACK, D.O.
SIGNED OFF ON 04/09/02 @ 13:35 BY JOHN R CUSACK, UNCLASSIFIED

** ENCOUNTER: 14 MENTAL HEALTH CLINIC 03/28/02 14:31 LIEBER COMP
D:I'M DOING FINE MR. WHITTAKER, I CAUGHT SOME NEWS FROM HOME AND I GOT ALIT
TLE UPSET. MY LEGAL WORK IS DOING OK. I'M TAKING MY MEDICINES DOING ALRIGHT
A:DEPRESSION, DENIES SUICIDAL IDEATIONS OR HOMICIDAL THOUGHTS. ORIENTED TO
TIME AND PLACE. SHOWS EXCELLENT COMPLIANCE WITH MEDS.
P:WILL MONITOR BEHAVIOR ON THE CELLBLOCK. REVIEW MONTHLY.
SIGNED OFF ON 03/28/02 @ 14:38 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 13 MENTAL HEALTH CLINIC 03/26/02 10:54 LIEBER COMP
MAR SHOWS 100% COMPLIANCE WITH BENADRYL,RISPERDAL,PROZAC...DENIES MED
SIDE EFFECTS....MED TEACHING REINFORCED..........TJ JOHNSON RN
SIGNED OFF ON 03/26/02 @ 10:55 BY THOMAS K JOHNSON, UNCLASSIFIED

** ENCOUNTER: 12 MENTAL HEALTH CLINIC 03/11/02 7:40 LIEBER COMP
D:I HAVE ADJUSTED AND HAVE BEEN TAKEN OFF OBSERVATION. THE MEDICINES THE
DOCTOR GAVE ME ARE WORKING. RESPONSIVE WITH APPROPRIATE AFFECT.
A:DEPRESSION, GAF = 70. NO SUICIDAL OR HOMICIDAL THOUGHTS. INMATE IS WELL
ORIENTED TO PLACE AND TIME AND EATING MEALS.

P:WILL FOLLOWUP ON THE CELLBLOCK WITH TREATMENT PLAN.COMPLETED THE DRUG AND ALCOHOL TCUDDS QUESTION FORM AND WILL CONCENTRATE ON ADDICTIONS. NO WITHDRA WAL SYMTOMS ARE EVIDENT.
SIGNED OFF ON 03/11/02 @ 7:52 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 11 MENTAL HEALTH CLINIC 03/01/02 12:51 LIEBER COMP
D:I FEEL MUCH BETTER THAT I GOT SOME MEDS AND A SHOWER. I FEEL BETTER NOW AND I'M ADJUSTING TO MY SITUATION. RESPONSIVE WITH APPROPRIATE AFFECT.
A:ADJUSTMENT DISORDER RESOLVING WITH LITTLE ANXIETY. HAS BEEN COMPLIANT WIT H MEDICATIONS. NO SUICIDAL IDEATIONS OR HOMICIDAL THOUGHTS. EATING MEALS.
P:RELEASED FROM OBSERVATION WILL REMAIN ON 15 MINUTE CELL CHECKS. MENTAL HEALTH WILL MONITOR BEHAVIOR.
SIGNED OFF ON 03/01/02 @ 13:57 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 10 BLOOD PRESSURE CLINI 02/27/02 13:30 LIEBER COMP
B/P = 120/ 70 PULSE = 62 WEIGHT = 164
B/P CLINIC COMPLENTS WITH DIET MEDS. AND EXERCISE DISCUSE AND HE VOICED HIS UNDERSTANDING OF ALL TEACHING.I/M IS NOT ON MEDICATION AT THIS TIME FOR HIS HYPERTENSION.
SIGNED OFF ON 02/27/02 @ 13:33 BY MADLIN C DRAYTON, MEDICAL ASSISTANT TECH I
NOTED
SIGNED OFF ON 02/27/02 @ 15:45 BY MICHAEL G SRIBNICK, PHYSICIAN II

** ENCOUNTER: 9 FOLLOW-UP SICK CALL 02/22/02 11:14 LIEBER COMP
TB SKIN TEST ADMINISTERED ON 2-19-02 AND READ ON 2-21-02 AT 0 MM. THIS IS A LATE ENTRY. T.COLEMAN LPN
SIGNED OFF ON 02/22/02 @ 11:14 BY TONYA L COLEMAN, LICENSED PRACTICAL NURSE
DEATH ROW INTAKE VISUAL ACUITY DONE 2-22-02, BY MAX NURSE, RIGHT 20/15, LEFT 20/20, BOTH 20/13....GIVEN IN WRITING TO THIS WRITER, SENT TO NURSE FO R SIGN-OFF.
SIGNED OFF ON 02/22/02 @ 18:59 BY JENNIFER K ALBRECHT, RECORDS ANALYST I
NOTED.
SIGNED OFF ON 02/22/02 @ 22:41 BY KIMBERLY R GARY, MEDICAL ASSISTANT TECH I
SIGNED OFF ON 02/23/02 @ 5:28 BY TEGAN EGGER, REGISTERED NURSE I

** ENCOUNTER: 8 DOCTOR'S CLINIC 02/21/02 13:35 LIEBER COMP
P> PROZAC 20MG
P> SIG:1TAB PO DAILY X30DAYS; 2REFILLS.
P> SIG:
P> START DATE: 02/21/02 TOTAL DAYS: 90
P> MD:CUSACK,JOHN -
P> RISPERDAL 1MG
P> SIG:1TAB PO HS X30DAYS; 2REFILLS.
P> SIG:
P> START DATE: 02/21/02 TOTAL DAYS: 90
P> MD:CUSACK,JOHN -
P> DIPHENHYDRAMINE 50MG
P> SIG:1TAB PO HS X30DAYS; 2REFILLS.
P> SIG:
P> START DATE: 02/21/02 TOTAL DAYS: 90

P> MD:CUSACK,JOHN -
J.R. CUSACK, D.O.
SIGNED OFF ON 02/21/02 @ 13:38 BY JOHN R CUSACK, UNCLASSIFIED
NOTED...TRANSCRIBED TO MAR......TJ JOHNSON RN
SIGNED OFF ON 02/21/02 @ 13:50 BY THOMAS K JOHNSON, UNCLASSIFIED

** ENCOUNTER: 7 MENTAL HEALTH CLINIC 02/21/02 13:21 LIEBER COMP
S. THIS IS A 34 YEAR OLD, SINGLE, WHITE MALE. HE IS AN INMATE ON DEATH ROW. HE COMPLAINS OF PARANOIA AND DEPRESSIVE SYMPTOMS. HE MAINTAINS DEPAKOTE IS HELPFUL. HE STATED SINCE INCARCERATION HE HAS BEEN DIAGNOSED AS BIPOLAR.
BACKGROUND REVEALS HE GRADUATED FROM HIGH SCHOOL. THERE IS A HISTORY OF COCAINE AND CANNIBIS ADDICTION.
O. THIS IS A WEATHERED APPEARING, MIDDLE-AGED, WHITE MALE. HE WAS INTERVIEWED AT HIS CELL DOOR. HE HAD BEEN SLEEPING; NO S/H. AFFECT WAS SUBDUED. SOME NEUROVEGATIVE SIGNS WERE PRESENT. HE ENDORSED PARANOIA. NO OVERT PSYCHOTIC DISTURBANCES OF BEHAVIOR OR LANGUAGE.
A. POLYSUBSTANCE DEPENDENCE (COCAINE, CANNIBIS)
STATUS-POST GUNSHOT WOUND TO THE FACE
BIPOLAR DISORDER- BY HISTORY VS. SUBSTANCE INDUCED MOOD DISORDER VS. INTERMITTENT EXPLOSIVE DIORDER
P. SUGGESTED RECHECK IN 2-3MONTHS.
J.R. CUSACK, D.O.
SIGNED OFF ON 02/21/02 @ 13:33 BY JOHN R CUSACK, UNCLASSIFIED

** ENCOUNTER: 6 FOLLOW-UP DENTAL 02/20/02 14:10 LIEBER COMP
A) DENTAL EXAMINATION
IOE, CHARTING AND OHI
SIGNED OFF ON 02/20/02 @ 14:11 BY JOHN S TIMMERMAN, DENTIST

** ENCOUNTER: 5 LAB CLINIC 02/19/02 17:10 LIEBER COMP
RPR,HIV,SGOT AND CBC DRAWN U/A COLLECTED W/OUT DIFFICULTY.
SIGNED OFF ON 02/19/02 @ 17:11 BY SARAH F CHISOLM, MEDICAL ASSISTANT TECH I

** ENCOUNTER: 4 MENTAL HEALTH CLINIC 02/19/02 13:46 LIEBER COMP
D: I STAYED IN THE GREENVILLE COUNTY JAIL FOR OVER A YEAR AND NEVER I BEEN IN JAIL BEFORE. I WAS DIAGNOSED ON THE STREET WITH BIPOLAR DISORDER. I GET PARANOID SOMETIMES. REPONSIVE WITH APPROPRIATE AFFECT.
A:HISTORY OF BIPOLAR AND PARANOIA, GAF = 60. INMATE APPEARED TO BE NERVOUS ABOUT CIRCUMSTANCES. STATED HE WAS TAKING DEPAKOTE. NO SUICIDAL IDEATIONS OR HOMICIDAL THOUGHTS. INMATE STATED HE WAS EATING HIS MEALS.
P:WILL DISCUSS WITH TREATMENT TEAM AND REFER TO DR. CUSACK FOR MEDICATIONS. HEALTH SUMMARY WILL BE COMPLETED. WILL MONITOR WEEKLY ON THE BLOCK.
SIGNED OFF ON 02/19/02 @ 13:56 BY TERRENCE E WHITTAKER, HUMAN SERVICES COORD

** ENCOUNTER: 3 DOCTOR'S CLINIC 02/19/02 11:40 LIEBER COMP
S> H&P: 34 YO WM NEW SK. STATES THAT MEDICAL PROBLEMS ARE DUE TO 40 CALIBER G
S> SW THAT CAUSED A MILD DEFORMITY OF RIGHT NARES BUT HE ALSO NOTES TINNITIS,
S> EPISTAXIS AND DIFFICULTY WITH BALANCE.
S> PH:HE HAD MUMPS, MEASLES AND CHICKENPOX AS A CHILD BUT DENIES TB OR VD

S> MEDS: TAKES DEPAKOTE ? DOSE AND SOME OTHER PINK PILL FOR BIPOLAR DISORDER.
S> NKA AND NO SURGERY ASIDE FROM AFORE MENTIONED GSW TO RIGHT NARES. HE DENIE
S> S HYPERTENSION OR DM
O> TEMP=098.8 PULSE= 92 RESP=18 BP=140/100 WEIGHT=158
O> VS PER MS. GADSEN.
O> HEENT:PERRLA, EOMS WNL, FUNDI WNL, TMS OBSCURRED BY CERUMEN AND MOUTH WNL.
O> NECK:SUPPLE WITHOUT THYROMEGALY, BRUITS OR ELEVATED JVP
O> CHEST:CLEAR
O> CARDIAC: NSR WITHOUT MURMURS
O> ABDOMEN: WITHOUT MASSES, ORGANOMEGALY BUT MILD EPIGASTRIC TENDERNESS
GU:WNL MALE WITH HEME NEGATIVE STOOL AND NORMAL PROSTATE
NEURO: WITHOUT LATERALIZING SIGNS INCLUDING ROMBERG AND ABILITY TO TANDEM
GAIT
A> BIPOLAR DISORDER WITH ELEVATED BP TODAY
P> HAVE DR. CUSAK RX PSYCHIATRIC MEDS
WEEKLY BP CHECKS X 3 AND SUBMIT TO ME VIA CRT
CBC, RPR, HIV TEST, DNA TEST AND UA AND WILL NEED PPD TO BE READ AT 48 HRS
AS WELL AS VISION SCREEN
RETURN PRN OR BASED ON RESULTS OF BP CHECKS
SIGNED OFF ON 03/19/02 @ 11:52 BY MICHAEL G SRIBNICK, PHYSICIAN II
FH IS NON-CONTRIBUTORY AND HE DENIES DRUGS OR ETOH USAGE IN YEARS
SIGNED OFF ON 03/19/02 @ 11:55 BY MICHAEL G SRIBNICK, PHYSICIAN II
SIGNED OFF ON 03/20/02 @ 10:44 BY MARTHA L GEDERT, NURSE ADMINISTRATOR/MGR II

** ENCOUNTER: 2 NARRATIVE 03/19/02 9:53 LIEBER COMP
NEW DEATH ROW INMATE NEEDS THE FOLLOWING LAB TEST AND ORDERS DONE
1. RPR
2. HIV
3. SGOT
4. CBC
5. UA
6. TB TEST
7. HEIGHT AND WEIGHT ALONG WITH VITAL SIGNS
8. VISION TEST
TB TEST AND VISUAL ACUITITY TO BE DONE BY THE DEATH ROW NURSE ON 2-19-02.
DR. SRIBNICK AND DR. CUSAK TO SEE INMATE TODAY FOR INTAKE PHYSICAL.T COLEMA
N LPN
SIGNED OFF ON 03/19/02 @ 9:57 BY TONYA L COLEMAN, LICENSED PRACTICAL NURSE
SO ORDERED BUT MOST OF THIS ALREADY ORDERED IN MY H&P
SIGNED OFF ON 03/19/02 @ 12:21 BY MICHAEL G SRIBNICK, PHYSICIAN II
SIGNED OFF ON 03/21/02 @ 11:35 BY MARTHA L GEDERT, NURSE ADMINISTRATOR/MGR II

** ENCOUNTER: 1 DNA TEST 03/16/02 17:18 LIEBER COMP
BLOOD DRAWN FOR DNA WILL SEND TO KCI LAB IN AM.
SIGNED OFF ON 03/19/02 @ 17:19 BY SARAH F CHISOLM, MEDICAL ASSISTANT TECH I

*********** END OF SICK CALL NOTES ***********

ANDERSON PROPERTY MANAGEMENT
KEY DEPOSIT APPLICATION

THERE IS A $10 KEY DEPOSIT

All keys must be returned within an hour. Failure to do so may result in the loss of your key deposit.

NAME Connie Jantz DATE 10/30/00

PRESENT ADDRESS 2625 Old Dobbins Br. Rd
Townville, SC.

P O Box 126
Harpers Ferr
WV 25425

PHONE NUMBER 864-287-1658

ADDRESS OF PROPERTY KEYS TAKEN FOR ______

260-4882

Att-Chad

Dec-11-00 01:55P

3506
P.03

ANDERSON PROPERTY MANAGEMENT
(864) 224-2536 PHONE/(864) 224-9547 FAX/ ataylor@peoplepc.com E-MAIL

RENTAL APPLICATION

NAME Elizabeth Wood Martinez

(the "Applicant" whether one or more) hereby applies on Oct. 31, 20 00 to

ANDERSON PROPERTY MANAGEMENT, (the Landlord) for rent of the following described property located in the City or County of ANDERSON, at a monthly rental of $ 425.00.

Property Address: 110 Lani LN. And. SC

Date of Birth: ______ Social Security #: ______ Telephone # 287-1658 Cell 317-6586

Driver's License # & State: SC [illegible]95354 State license tag # 951 CTW

Number of Vehicles: 4 Make & Model '83 Mercury marquis, '84 Dodge Omni, '97 Ford Escort, '85 Nissan Maxima

Other name(s) of applicant used within last 3 years: —

Number of Children: 4 Number & Kind of Pets:

***CHOWS, PIT BULLS, DOBERMAN PINCHERS, ROTTWEILERS, AND OTHER ANIMALS THAT COULD BE DANGEROUS TO OTHER TENANTS ARE NOT ALLOWED. A $300 PET DEPOSIT IS CHARGED PER PET WHEN PETS ARE PERMITTED (SOME OWNERS WILL NOT ALLOW PETS-CHECK WITH AGENT FIRST).**

Cell Fort - 4350

Nivia, Stephen, Naomi, Esperanza

CURRENT ADDRESS:

Present Address: 2625 Old Dobbins Bridge Rd. Townville SC

Reason for leaving: Owner Selling How Long? 2yrs. Monthly rent $ 300.00

Name, Address, & Telephone of Owner or Agent: Mark & Connie Juntz (304) 535-6549

Previous Address: ______ Owner or Agent: ______

EMPLOYMENT INFORMATION:

Present Employer: Office Max

Immediate Supervisor: Dorrie Elgin How Long? 3 months

Address: N. Main st. Belvedere Plaza Telephone# 231-7735

Date Hired: 9/ /00 Employed As: Customer Service Supervisor

Monthly net income: $ 760.00

*Other Sources of Income to be Considered:

Other Income*: $ 750 Source*: Anderson Independent Mail Route

Other Income*: $ 750 Source*: " " " " (2 yrs.)

Other Income*: $ 400 Source*: Greenville News Routes (1 yr.)

Other $ 560 Alimony & Child Support

Name of Nearest Relative (other than Spouse): Connie Juntz

Address: PO Box Harpers Ferry WV (22 Warren st)

Relationship: Sister Telephone # (304) 535 6549

VIRGINIA
LICENSE
CONNIE WOOD
PO BX 1267
WV 25425-1267

2702-A NORTH MAIN STREET • ANDERSON, SOUTH CAROLINA 29621
(864) 224-2538 • Fax: (864) 224-9547 • e-mail: apmcinc@carol.net

FAX
COVER SHEET

TO: ACSO Attn: Chad

FROM: Anderson Property Management
2702 North Main Street
Anderson, SC 29621

FAX #: (864) 224-9547

DATE: 12-11-00

RE:

PLAINTIFF'S EXHIBIT
ID 2A
3-8-07 MES

TOTAL PAGES: 17
(including cover)

Ann D. Taylor, Property Manager In Charge
RESIDENTIAL • COMMERCIAL • MOBILE HOMES

ANDERSON PROPERTY MANAGEMENT
KEY DEPOSIT APPLICATION

THERE IS A $10 KEY DEPOSIT

All keys must be returned within an hour. Failure to do so may result in the loss of your key deposit.

NAME Connie Jantz DATE 10/30/00

PRESENT ADDRESS 2625 Old Dobbins Br. Rd
Townville, SC.

P O Box 126
Harpers Ferr
WV 25425

PHONE NUMBER 864-287-1658

ADDRESS OF PROPERTY KEYS TAKEN FOR ____________________

260-4882

Att: Chad

ANDERSON PROPERTY MANAGEMENT
(864) 224-2536 PHONE/(864) 224-9547 FAX/ ataylor@peoplepc.com E-MAIL

RENTAL APPLICATION

NAME Elizabeth Wood Martinez

(the "Applicant" whether one or more) hereby applies on Oct. 31, 20 00 to ANDERSON PROPERTY MANAGEMENT, (the Landlord) for rent of the following described property located in the City or County of ANDERSON, at a monthly rental of $ 425.00.

Property Address: 203-D Lori LN. And. SC

Date of Birth: ________ Social Security ________ Telephone # 287-1658 Cell 317-6386

Driver's License # & State: SC 009095354 State license tag # 951 - CTW

Number of Vehicles: 4 Make & Model '83 Mercury marquis, '84 Dodge Omni, '97 Ford Escort, '85 Nissan Maxima

Other name(s) of applicant used within last 3 years: —

Number of Children: 4 Number & Kind of Pets: ________

*CHOWS, PIT BULLS, DOBERMAN PINCHERS, ROTTWEILERS, AND OTHER ANIMALS THAT COULD BE DANGEROUS TO OTHER TENANTS ARE NOT ALLOWED. A $300 PET DEPOSIT IS CHARGED PER PET WHEN PETS ARE PERMITTED (SOME OWNERS WILL NOT ALLOW PETS-CHECK WITH AGENT FIRST).

Alicia Stephen, Naomi, Esperanza

Cell Fort-1000

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Previous Address: ________ Owner or Agent: ________

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Present Employer: Office Max

Immediate Supervisor: Dorrie Elgin How Long? 3 months

Address: N. Main st. Belvedere Plaza Telephone# 231-7735

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Monthly net income: $ 760.00

*Other Sources of Income to be Considered:

2 yrs. Other Income*: $ 750 Source*: Anderson Independent Mail Route

Other Income*: $ 750 Source*: " " " "

1 yr. Other Income*: $ 400 Source*: Greenville News Routes

Other $ 560 Alimony & Child Support

Name of Nearest Relative (other than Spouse): Connie Juntz

Address: PO Box Harpers Ferry WV (22 Warren st)

Relationship: Sister Telephone # (304) 535 6549

SPOUSE:

Name________________________ Social Security #____-____-____

Date of Birth:__________ Driver's License Number and State:____________

Other Name(s) of Spouse (maiden name) used within last 3 years:____________

SPOUSE'S EMPLOYMENT INFORMATION:

Spouse's Present Employer.________________________

Immediate Supervisor:________________ How Long?:__________

Address:________________________ Telephone #__________

Employed As:________________________ Date Hired:__________

Monthly net income: $__________

If employed less than one year by present employer, previous employer:__________

Immediate Supervisor:________________ How Long?:__________

Address:________________________ Telephone #__________

Employed As:________________________ Date Hired:__________

Monthly net income: $__________

*Spouse need not disclose alimony, child support, or separate maintaining income or its source, unless Applicant wishes to be considered for the purpose of this rental application.

Failure to abide by lease can result in court costs and/or eviction. Damage to property can result in eviction and/or a judgment against tenant.

Applicant authorizes Landlord to verify the foregoing information and to make credit and reference inquiries deemed necessary by them, and Applicant also authorizes the release of information contained on this application or sought by such inquiries.

In making this application, it is understood that an investigate consumer report may be prepared whereby information is obtained through personal interviews with neighbors, friends, or others with whom Applicant is acquainted. This inquiry includes information as to the character, general reputation personal characteristics and mode of living of Applicant. Applicant has the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigation.

SECURITY DEPOSITS: I understand once I pay a full or partial deposit for a property and change my mind that the deposit is non-refundable. All deposits must be paid in cash.

If this application is accepted by the Landlord, the Applicant agrees to execute a rental agreement of the property and agrees to pay the rent for one month before occupation of the property. **Applicant hereby pays $30.00 non-refundable application fee.** Upon leasing property, a $25 refundable key deposit is required by tenant and will be refunded when property is vacated and keys returned.

Elizabeth M. [illegible] 10/31/00

Signature of Applicant Date Signature of Applicant Date

CASH RECEIPT

Date 10-31-00 0270961

Received From Connie Jantz

Address

Dollars $ 30

For app fee

ACCOUNT			HOW PAID	
AMT OF ACCOUNT			CASH	✓
AMT PAID	30	00	CHECK	
BALANCE DUE			MONEY ORDER / CREDIT CARD	

By END

CB 111 3

VIRGINIA
DRIVER'S LICENSE
CONNIE WOOD
PO BX 1267
HARPERS FERRY, WV 25425-1267

SOUTH CAROLINA LAW ENFORCEMENT DIVISION
FORENSIC SERVICES LABORATORY REPORT

JIM HODGES
GOVERNOR

ROBERT M. STEWART
CHIEF

Trace Department
March 1, 2001
SLED Lab No: L00-13745
Your Case No: N/A
Incident Date: 12-6-00
(S) Karen Pittman McCall
(S) John Wood
(V) Mike Grant

SLED S/A Gene Donohue
Piedmont Region
301 East North Street, Suite 127
Greenville, SC 29601

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Robert M. Stewart, Chief
South Carolina Law Enforcement Division

ITEM(S) SUBMITTED

18. One (1) GSR Kit from John Wood
19. One (1) GSR Kit from Karen McCall

RESULTS OF EXAMINATION(S)

18. In the samples submitted in the kit labeled "John Wood", round lead particles were found on both palms and on the back of the right hand. Round lead particles are one of the components of gunshot residue.

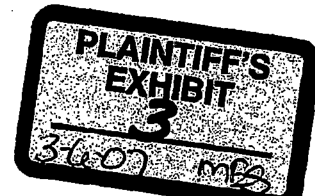
19. In the samples submitted in the kit labeled "Karen Pittman McCall", round lead particles were found on the palms and backs of both hands. Round lead particles are one of the components of gunshot residue.

These examinations were conducted by Special Agent Ila N. Simmons and Lt. Joseph D. Powell, Forensic Trace Evidence examiners with this Division.

Ila N. Simmons
Special Agent

Lt. Joseph D. Powell

3-7-01
Date



dlg

These examinations were conducted by Special Agent Ila N. Simmons and Lt. Joseph D. Powell, Forensic Trace Evidence examiners with this Division.

Ila N. Simmons
Ila N. Simmons
Special Agent

Lt. Joseph D. Powell

2-13-01
Date

dlg

3516

AGENCY I.D. SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER 0,0,0 0 0,1,4,6,5,2,2

☐ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY INCIDENT TYPE: MURDER

SUPPLEMENTAL REPORT ☐ ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY PATROL DISTRICT 03 PAGE 1 OF 4 PAGES

	NAME (LAST, FIRST, MIDDLE)	VICTIM RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	D.O.B.	ETH
☒ VICTIM #	NICHOLSON, ERIC FRANCIS [TROOPER]	was Stranger	was Stranger	—	J.	W	M	28	2	—

ADDRESS	CITY	STATE	ZIP CODE	PATROL DISTRICT	DAYPHONE	EVENING PHONE
1439 LAURENS ROAD [SCHP]	GREENVILLE	SC	29601	CJ:11	241-1000	SAME

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

CASE ASSIGNED: DECEMBER 06, 2000; 2ND INVESTIGATIVE SUPPLEMENTAL REPORT SUBMITTED.

THIS SUPPLEMENTAL REPORT IS BEING SUBMITTED FOR SPECIFIC ADDITIONAL INFORMATION ON THE FOLLOWING MATTER: CELLULAR TELEPHONES SEIZED FROM SUSPECT VEHICLE [JEEP], FIREARM, AND SCOOTER.

* FIREARM [ATF TRACE # T20010066683]

GLOCK 9MM, MODEL 17, SERIAL# DPK610US: SOLD TO: KAREN PITTMAN MCCALL W/F/birthday
[SUSPECT WEAPON] address FLDL# M240515668030

SOLD TO KAREN MCCALL ON 'JULY 07, 2000' BY: GOLD MINER INC., THE
4421 HANCOCK BRIDGE PKWY
NORTH FORT MYERS, FLORIDA 33903
[FFL NUMBER: 15946760]
(B) 941-656-4653

PLAINTIFF'S EXHIBIT 4 3-6-07 MBS

GLOCK 9MM, MODEL 17, SERIAL# DPK510US: CURRENTLY IN STOCK AT: NAGEL GUNSHOP, INC.
[ATF TRACE# T20010066680] 6201 SAN PEDRO AVE
SAN ANTONIO, TX 78216
(B) 210-342-8171

****

SCOOTER, VIN: JH2MF0206NK700069, SC VEHICLE LICENSE PLATE: SC ZE5721:

THE ABOVE VEHICLE IDENTIFICATION NUMBER WAS RESEARCHED ON 'VINASSIST - LAW ENFORCEMENT EDITION' WITH THE FOLLOWING RESULTS:

1992 HONDA MOTORCYCLE, MODEL # CN250, ORIGINATED AND ASSEMBLED IN KUMAMOTO JAPAN. THE SCOOTER WAS SUBSEQUENTLY SHIPPED TO: SOUTH COUNTY HONDA
811 VENICE BYPASS SOUTH
VENICE, FLORIDA 39362 [IN SERASOTA, FLORIDA; SERASOTA SHERIFFS OFFICE
(941) 484-7642 [941] 951-5800]

PROPERTY		TOTAL VALUE
TYPE	NONE	
STOLEN		
DAMAGED		
BURNED		
RECOVERED		
SEIZED		

SUBJECT IDENTIFIED ☒ YES ☐ NO — SUBJECT LOCATED ☒ YES ☐ NO — ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED — ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER — ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1.☐ OFFENDER DEATH. 2.☐ NO PROSECUTION. 3.☐ VICTIM DECLINES COOPERATION 4.☐ EXTRADITION DENIED 5.☐ JUVENILE-NO ARREST

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307) PAS	04-10-01	610	SGT J.M. BROWN (*48)	04-10-01	601

FOLLOW-UP INVESTIGATION ☐ YES ☒ NO

3517

AGENCY I.D. SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER: 0,0,0 0 0,1,4,6,5,2,2

NCIC INQ. ENT

☐ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY
SUPPLEMENTAL REPORT ☐ ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

INCIDENT TYPE: MURDER

PATROL DISTRICT: 03 PAGE 2 OF 4 PAGES

I.D. OVERFLOW

☐ COMPLAINANT ☒ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISSING ☐ JAIL ☐

NAME (LAST, FIRST, MIDDLE): -SEE PAGE ONE-

ADDRESS: -SEE PAGE ONE-

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

CONTINUATION OF SCOOTER RESEARCH:

THE SCOOTER WAS THEN SOLD ON JANUARY 24, 1992 TO A. DALE TAYLOR [FLORIDA DL# T460-004-29-343-0]. FURTHER RESEARCH OF THE VEHICLE IDENTIFICATION NUMBER NOTED BY THE STATE OF FLORIDA HIGHWAY DEPARTMENT REVEALED THAT THE SCOOTER WAS LAST REGISTERED TO:

* ROGER YOUNG [DOB: 11-19-42]
address

ACCORDING TO FLORIDA RECORDS, THE LAST REGISTERED OWNER, ROGER YOUNG, DISPLAYED THE FOLLOWING VEHICLE LICENSE PLATE ISSUED BY THE STATE OF FLORIDA AND HAD NOT BEEN RENEWED SINCE NOVEMBER 2000:

* 96060W

THIS INVESTIGATOR WAS UNABLE TO LOCATE A TELEPHONE NUMBER FOR 'ROGER YOUNG' THROUGH FLORIDA DIRECTORY ASSISTANCE AND THE INTENET, THEREFORE SENDING A LETTER TO ROGER YOUNG TO CONTACT THIS INVESTIGATOR UPON RECEIPT.

****

VEHICLE LICENSE PLATE ON THE SCOOTER UPON ITS RECOVERY ON DECEMBER 06, 2000:

* 'SC ZE5721'

THE ABOVE VEHICLE LICENSE WAS REGISTERED TO: MICHAEL JAMES HOOPER
111 BELFORD ROAD
MAULDIN, SC 29662
(H) 967-7874/(B) 676-6569

ACCORDING TO RESEARCH OF THE LICENSE PLATE NUMBER 'ZE5721', THE TAG WAS REPORTED STOLEN BY MICHAEL JAMES HOOPER TO THE MAULDIN POLICE DEPARTMENT ON NOVEMBER 30, 2000 [SEE ATTACHED MAULDIN POLICE REPORT# M00-18419]. ON APRIL 03, 2001, MICHAEL JAMES HOOPER MET WITH THIS INVESTIGATOR AT THE GREENVILLE COUNTY LAW ENFORCEMENT CENTER - CID OFFICE FOR A SCHEDULED INTERVIEW. MR. HOOPER PROVIDED THIS INVESTIGATOR WITH A SIGNED STATEMENT AS TO HIS ACCOUNT OF THE DISAPPEARANCE OF THE ABOVE DESCRIBED VEHICLE LICENSE PLATE. [SEE ATTACHED STATEMENT].

PROPERTY

TYPE	NONE	TOTAL VALUE
STOLEN		
DAMAGED		
BURNED		
RECOVERED		
SEIZED		

SUBJECT IDENTIFIED ☒ YES ☐ NO — SUBJECT LOCATED ☒ YES ☐ NO — ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED — ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER — ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1.☐ OFFENDER DEATH. 2.☐ NO PROSECUTION. 3.☐ VICTIM/DECLINES COOPERATION 4.☐ EXTRADITION DENIED 5.☐ JUVENILE-NO ARREST

ADMIN

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307) (PAS)	04-10-01	610	SGT J.M. BROWN (*48)	04-10-01	601

FOLLOW-UP INVESTIGATION ☐ YES ☒ NO

CASE NUMBER 0 0 0 0 0 1 4 6 5 2 2

3518

AGENCY I.D. SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

INCIDENT TYPE: MURDER

PATROL DISTRICT: 03 PAGE 3 OF 4 PAGES

NAME (LAST, FIRST, MIDDLE): -SEE PAGE ONE-

ADDRESS: -SEE PAGE ONE-

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

CONTINUATION OF SCOOTER RESEARCH:

ON MARCH 26, 2001, THIS INVESTIGATOR MET WITH FORENSIC TECH BRYAN AT THE GREENVILLE COUNTY LAW ENFORCEMENT CENTER - PROPERTY & EVIDENCE ROOM FOR PURPOSES OF EVALUATING A KEY WHICH IS ENGRAVED 'HONDA T1364' CONTAINED WITHIN THE PROPERTY & EVIDENCE ROOM UNDER 'ITEM# CB-43'. THE KEY WAS SIGNED OUT OF PROPERTY & EVIDENCE BY TECH BRYAN AND CHECKED AGAINST THE IGNITION AND GAS CAP LOCKING MECHANISMS OF THE ABOVE DESCRIBED SCOOTER; THIS SCOOTER IS LOCKED WITHIN THE CONTROL OF THE FORENSWIC DIVISION ONLY. IN CHECKING THE KEY, IN THE PRESENCE OF THIS INVESTIGATOR, THE KEY DIDNOT FIT THE LOCKING MECHANISMS. THE KEY WAS SUBSEQUENTLY PLACED BACK INTO PROPERTY & EVIDENCE BY FORENSIC TECH BRYAN.

ON 04-03-01, THIS INVESTIGATOR MET WITH MR. DENNIS WAYNE BURDEN OF 'POP A LOCK' [CELL# 864-360-0858] AT THE GREENVILLE COUNTY LAW ENFORCEMENT CENTER FORENSIC DIVISION FOR A SCHEDULED MEETING. THIS INVESTIGATOR SIGNED THE ABOVE DESCRIBED ITEM 'CB-43' OUT OF THE PROPERTY & EVIDENCE ROOM FOR VERIFICATION ON THE KEY VERSUS' THE SCOOTER. MR. BURDEN, IN THE PRESENCE OF THIS INVESTIGATOR AND SGT RENEE SHERBERT OF THE FORENSIC DIVISION, CHECKED THE KEY AGAINST THE LOCKING MECHANISMS ON THE ABOVE DESCRIBED SCOOTER. MR. BURDEN ADVISED THAT HE FELT CERTAIN THAT THE KEY DIDNOT FIT THIS PARTICULAR SCOOTER. MR. BURDEN WAS FURTHER PROVIDED THE GAS CAP LOCKING MECHANISM FOR WHICH HE SIGNED FOR THE MECHANISM ON A PROPERTY & EVIDENCE SHEET FOR FURTHER ANALYSIS. MR. BURDEN WAS INSTRUCTED BY THIS INVESTIGATOR, NOT TO PRODUCE ANOTHER KEY YET MERELY GIVE HIS PROFESSIONAL ANALYSIS OF THE LOCKING MECHANISM ON THE SCOOTER. THE KEY WAS SUBSEQUENTLY PLACED BACK INTO PROPERTY & EVIDENCE BY THIS INVESTIGATOR. MR. BURDEN ADVISED THAT HE WOULD PROVIDE THIS INVESTIGATOR WITH HIS FINDINGS ON 'POP-A-LOCK' LETTER HEAD AT A LATER DATE.

****

* TWO CELLULAR TELEPHONES IN PROPERTY & EVIDENCE UNDER ITEM 'CB-F':

NOKIA MODEL 918, SERIAL# 218/09723694: (334) 294-1334; REGISTERED WITH TELEPHONE CARRIER:
* FRONTIER COMMUNICATIONS OF THE SOUTH, INC.
(B) 1-800-662-1220

PROPERTY							TOTAL VALUE
TYPE	NONE						
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

SUBJECT IDENTIFIED ☒ YES ☐ NO — SUBJECT LOCATED ☒ YES ☐ NO — ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED — ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER — ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM DECLINES COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307)	04-10-01	610	SGT J.M. BROWN (*48)	04-10-01	601

FOLLOW-UP INVESTIGATION ☐ YES ☒ NO

3519

AGENCY I.D.
SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER: 0 0 0 0 0 1 4 6 5 2 2

NCIC INQ. ENT.

☐ ORIGINAL REPORT ☐ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY INCIDENT TYPE: MURDER

☑ SUPPLEMENTAL REPORT ☐ ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY PATROL DISTRICT: 03 PAGE 4 OF 4 PAGES

I.D. OVERFLOW

☐ COMPLAINANT ☒ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISSING ☐ JAIL ☐

NAME (LAST, FIRST, MIDDLE): -SEE PAGE ONE-

ADDRESS: -SEE PAGE ONE-

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

CONTINUATION OF CELLULAR TELEPHONE RESEARCH:

SANYO MODEL SCP 4000, SERIAL# 24701499575; CELLULAR TELEPHONE NUMBER: (864) 356-7756 - REGISTERED WITH:

* SPRINT PCS
ANDERSON RETAIL STORE
3192 N. MAIN STREET
ANDERSON, SOUTH CAROLINA
(864) 224-4770 / SPRINT SUBPEONA HOTLINE# (888) 705-5520

THIS INVESTIGATOR SIGNED THE ABOVE TWO CELLULAR TELEPHONES OUT OF PROPERTY & EVIDENCE FOR PURPOSES OF OBTAINING THE RESPECTIVE CELLULAR TELEPHONE NUMBERS. THE FINDINGS ARE NOTED ABOVE. 04-10-01, THIS INVESTIGATOR PROVIDED ASSISTANT SOLICITOR JUDY MUNSON WITH AN 'AFFIDAVIT' REQUESTING A COURT ORDER FOR THE TELEPHONE RECORDS RELATED TO THE ABOVE TELEPHONES INCOMING/OUTGOING CALLS FROM JANUARY 01, 2000 THRU AND INCLUDING DECEMBER 06, 2000. THE RECORDS WILL BE RETAINED WITHIN THIS INVESTIGATIVE FILE UPON THERE RECEIPT WITH A COPY FORWARDED TO THE 13TH CIRCUIT SOLICITORS OFFICE.

****

*******THIS CASE IS CLEARED BY ARREST*******

PROPERTY

TYPE	NONE						TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

SUBJECT IDENTIFIED ☒ YES ☐ NO | SUBJECT LOCATED ☒ YES ☐ NO | ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

ADMIN

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ VICTIM/DECLINES COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST.

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307)	04-10-01	610	SGT J.M. BROWN (*48)	04-10-01	601

FOLLOW UP INVESTIGATION ☐ YES ☒ NO (OFFICER)

AGENCY I.D. SCO230000

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER 0 0 0 0 0 1 4 6 5 2 2 — 3520

☐ ORIGINAL REPORT ☒ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY INCIDENT TYPE: MURDER

☒ SUPPLEMENTAL REPORT ☐ ☒ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY PATROL DISTRICT 03A PAGE 16 OF 19 PAGES

☒ VICTIM # NAME (LAST, FIRST, MIDDLE): -SEE PAGE ONE-

ADDRESS: -SEE PAGE ONE-

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

ON 12-12-00, SPECIAL AGENT JEFF KINDLEY; SLED ALONG WITH INVESTIGATOR TIM JONES, MET WITH KAREN MCCALL'S BROTHER DAVID PITTMAN AND SISTER IN-LAW CARLA PITTMAN, IN ALABAMA. BOTH NOTED PARTIES PROVIDED STATEMENTS AS TO THEIR ACCOUNT OF THE SUSPECTS AND THEIR SUBSEQUENT ACTIVITIES KNOWN TO THEM. [SEE COPIES OF STATEMENTS OF DAVID & CARLA PITTMAN CONTAINED WITHIN THIS INVESTIGATIVE FILE UNDER INDEX 'M']. SEVERAL ITEMS WERE SEIZED FROM THE POSSESSION OF THE PITTMANS AND TRANSPORTED BACK TO THE GREENVILLE COUNTY LEC BY KINDLEY & JONES. THE ITEMS, IN-PART, WERE A GLOCK GUN CASE AND THE PURCHASE APPLICATION FOR THE PURCHASE BY KAREN MCCALL OF A GLOCK 9MM, SERIAL# 'DPK510'.

ON 12-06-00, INVESTIGATORS PAT CROMER AND GABE PARKS OBTAINED A SWORN STATEMENT FROM CAROL MARTIN AS TO HER ACCOUNT OF THIS INCIDENT. MS. MARTIN PROVIDES, IN-PART, THAT WHILE ON WOODRUFF ROAD TRAVELING TOWARDS I-385, SHE OBSERVED A HIGHWAY PATROL VEHICLE IN PURSUIT OF A RED MOPED COMING UP THE RAMP FROM I-85 AND TURNED ONTO THE FRONTAGE ROAD. STATES THE HIGHWAY PATROLMAN CUT THE PERSON OFF' ON THE MOPED. SHE TURNED HER ATTENTION AWAY FROM THE TRAFFIC STOP WHEN SHE HEARD SEVERAL LOUD BANGS, TURNED BACK TO THE TRAFFIC STOP AND OBSERVED THE INDIVIDUAL ON THE MOPED WITH HIS ARM EXTENDED AND POINTED TO THE DRIVERS DOOR OF THE HIGHWAY PATROL VEHICLE. SHE STATED THAT SHE PROCEEDED DOWN WOODRUFF ROAD AND CALLED IN TO DISPATCH AND ADVISED WHAT SHE HAD SEEN AND HEARD. DISPATCH AT THIS TIME WAS UNAWARE OF THE SHOOTING INCIDENT. SHE STATES THAT SHE LOOKED IN HER REAR VIEW MIRROR AND OBSERVED THE MOPED PULL INTO THE CONVIENCE STORE PARKING LOT AT WOODRUFF AND MILLER ROAD; LOOSING SIGHT OF THE MOPED/DRIVER AFTER THAT. SHE STATES THAT THE DRIVER OF THE MOPED REPEATEDLY LOOKED BACK. [SEE SWORN STATEMENT OF CAROL MARTIN; INDEX 'M'].

ON 12-06-00, INVESTIGATOR B.S. SMITH AND MDEP SAYLORS OBTAINED A SWORN STATEMENT FROM ERIN BALMER. BALMER PROVIDES THAT WHILE STOPPED ON WOODRUFF ROAD AT THE TRAFFIC LIGHT THERE AT I-85, SHE OBSERVED A HIGHWAY PATROL VEHICLE CHASING A RED MOPED/MOTOR CYCLE UP THE OFF RAMP OF I-85 AND DOWN THE FRONTAGE ROAD. THE HIGHWAY PATROL VEHICLE BLOCKED THE PATH OF THE MOPED/MOTOR CYCLE, WHICH PLACED THE MOPED/MOTORCYCLE DIRECTLY AT THE DRIVERS DOOR OF THE HIGHWAY PATROL VEHICLE. SHE SAW THE MOPED/MOTOR CYCLE DRIVERS ARM EXTENDED TOWARDS THE HIGHWAY PATROL VEHICLE AND SIMULTANEOUSLY HEARD SEVERAL SHOTS FIRED. SHE STATES THAT THE MOPED/MOTORCYCLE THE PULLED BACK ONTO WOODRUFF ROAD AND WAS TRAVELING DOWN WOODRUFF ROAD BEHIND HER AND PULLED INTO THE CONVIENCE STORE AT THE CORNER OF WOODRUFF ROAD AND MILLER ROAD. SHE THEN LOST SIGHT OF THE DRIVER. [SEE SWORN STATEMENT FROM ERIN BALMER; INDEX 'M'].

PROPERTY		TOTAL VALUE
TYPE	NONE	
STOLEN		
DAMAGED		
BURNED		
RECOVERED		
SEIZED		

PLAINTIFF'S EXHIBIT 5 3-7-07 MB

SUBJECT IDENTIFIED ☒ YES ☐ NO SUBJECT LOCATED ☒ YES ☐ NO ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1.☐ OFFENDER DEATH. 2.☐ NO PROSECUTION. 3.☐ VICTIM/DECLINES COOPERATION 4.☐ EXTRADITION DENIED 5.☐ JUVENILE-NO ARREST

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307)	03-27-01	610	SGT J.M. BROWN (*48)	03-27-01	601

FOLLOW UP INVESTIGATION ☐ YES ☒ NO

AGENCY I.D. 3521 SC0230000 OF

GREENVILLE COUNTY SHERIFF'S OFFICE
SUPPLEMENTAL REPORT

CASE NUMBER: 0 0 0 0 0 1 4 6 5 2 2 | NCIC INQ. ENT

☐ ORIGINAL REPORT ☒ STATUS CHANGE ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY INCIDENT TYPE: MURDER

☒ SUPPLEMENTAL REPORT ☐ ☒ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY PATROL DISTRICT 03A PAGE 17 OF 19 PAGES

I.D. OVERFLOW

☐ COMPLAINANT ☒ VICTIM # ☐ SUBJECT # ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ MISSING ☐ JAIL ☐

NAME (LAST, FIRST, MIDDLE): -SEE PAGE ONE-

VICTIM RELATIONSHIP TO SUBJECT: #1 #2 #3 | RESIDENT | RACE | SEX | AGE | D.O.B. | ETH

ADDRESS: -SEE PAGE ONE- | CITY | STATE | ZIP CODE | PATROL DISTRICT | DAYPHONE | EVENING PHONE

HEIGHT | WEIGHT | HAIR | EYES | FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL, PECULIARITIES, ETC.

☐ VICTIM NO VISIBLE INJURY. ☐ YES ☐ NO EXPLAIN: | COMPLAINT OF NON-VISIBLE INJURIES: ☐ NO ☐ YES | VICTIM USING ALCOHOL: ☐ NO ☐ YES ☐ UNK DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK | ☐ TWO-MAN VEHICLE ☐ DETECTIVE/SPL. ASMT. ☐ ALONE ☐ ONE-MAN VEHICLE ☐ OTHER ☐ ASSISTED

☐ SUBJECT NO USING ALCOHOL: ☐ NO ☐ YES ☐ UNK USING DRUGS: ☐ NO ☐ YES TYPE: ☐ UNK | ☐ ARRESTED ON CURRENT OFFENSE ☐ CLEARED BY ARREST ON PRIOR OFFENSE

ARRESTEE ARMED ☐ YES ☐ NO WEAPON TYPE: ☐ SEMI-AUTO ☐ FULL-AUTO | ☐ ON VIEW ARREST ☐ SUMMONED ☐ CUSTODY

JUVENILE DISPOSITION: 1. ☐ HANDLED, RELEASED ☐ REFERRED TO OTHER AUTHORITY

ON 12-06-00, INVESTIGATOR B.S. SMITH AND MDEP SAYLORS OBTAINED A SWORN STATEMENT FROM DAVID MANCINI REGARDING THIS INCIDENT. MR. MANCINI PROVIDES THAT HE OBSERVED A HIGHWAY PATROLMAN CHASING A RED SCOOTER OFF OF THE I-85 OFF RAMP ONTO WOODRUFF ROAD AND THEN DOWN A FRONTAGE ROAD. THE SCOOTER STOPPED WHICH THE HIGHWAY PATROLMAN PLACED THE DRIVERS DOOR OF HIS VEHICLE NEXT TO THE SCOOTER. HE STATES THAT AS HE WAS TRAVELING DOWN WOODRUFF ROAD HE OBSERVED THE DRIVER OF THE SCOOTER RAISE HIS ARM TO THE OFFICER BUT THOUGHT THAT THE DRIVER OF THE SCOOTER WAS GIVING THE HIGHWAY PATROLMAN THE MIDDLE FINGER. HE STATES THAT THE SCOOTER PULLEED BACK ONTO WOODRUFF ROAD HEADING TOWARDS I-385 WEAVING IN AND OUT OF TRAFFIC. [SEE SWORN STATEMENT OF DAVID MANCINI CONTAINED WITHIN THIS INVESTIGATIVE FILE UNDER INDEX 'M'].

ON 12-06-00, INVESTIGATOR B.S. SMITH AND MDEP SAYLORS OBTAINED A SIGNED STATEMENT FROM RICHARD BEVERIDGE AS TO HIS ACCOUNT OF THIS INCIDENT. MR. BEVERIDGE STATES THAT HE OBSERVED THE HIGHWAY PATROLMAN PULL BESIDE A RED SCOOTER ON THE FRONTAGE ROAD, AS-THOUGH TO MAKE AN 'AGGRESSIVE STOP'. HE OBSERVED THE DRIVER OF THE SCOOTER EXTEND HIS ARM OUT TO THE PATROL CAR. HE STATES THAT HE THEN OBSERVED THE SCOOTER PULLING UP BESIDE THE RIGHT SIDE OF HIS VEHICLE AND THEN TURNING RIGHT ONTO WOODRUFF ROAD, STATING THAT THE SCOOTER WAS ALMOST HIT BY A TRUCK. HE STATES THAT THE HIOGHWAY PATROL VEHICLE WAS NOT MOVING FROM ITS ORIGINALLY OBSERVED STOPPED POSITION ON THE FRONTAGE ROAD. HE FELT THAT SOMETHING WAS WRONG, TURNED AROUND AND WENT TO THE HIGHWAY PATROLMANS VEHICLE. HE STATES THAT AS HE APPROCHED THE PATROL VEHICLE, THE DRIVERS DOOR WAS OPENED AND THERE WERE SOME OTHER PEOPLE APPROACHING. HE STATES THAT THE GLASS WAS SHATTERED ON THE DRIVERS DOOR AND THE TROOPER WAS SLUMPED OVER TO THE PASSENGER SIDE OF THE VEHICLE. [SEE SIGNED STATEMENT OF RICHARD BEVERIDGE CONTAINED WITHIN THIS INVESTIGATIVE FILE UNDER INDEX 'M'].

ON 12-06-00, INVESTIGATOR MATHENY AND DEPUTY KEITH DURHAM SECURED A SWORN STATEMENT FROM TODD HAMLIN AS TO HIS ACCOUNT OF THIS INCIDENT. MR. HAMLIN PROVIDES, IN-PART, THAT HE WAS ON THE LOADING DOCK OF THE EXCEL PLANT WHEN HE OBSERVED A STATE TROOPER TRYING TO STOP A MAN ON A RED MOPED. HE STATES THAT THE MAN ON THE MOIPED WAS NOT STOPPING FOR THE TROOPER AND THE TROOPER APPEARED TO HAVE FORCED THE MOPED TOWARDS THE BUSHES AT THE ENTRANCE OF 'EXCEL'. HE STATES THAT THE PATROL VEHICLES LIGHTS AND SIREN WERE ON AND UPON THE TROOPER GETTING THE MOPED STOPPED, HE HEARD SEVERAL GUNSHOTS. HE STATES THAT THE MOPED DROVE OFF TOWARDS WOODRUFF ROAD AND THE TROOPER WAS NOT MOVING AND THE LIGHTS & SIREN WERE STILL ON. MR. HAMLIN CALLED 911 AND REPORTED WHAT HE OBSERVED. HE THEN WENT TO THE TROOPERS VEHICLE WHERE HE OBSERVED THAT THE TROOPER HAD BEEN SHOT. HE STATES THAT OTHER LAW ENFORCEMENT ARRIVED ON THE SCENE, WHERE HE REMAINED TO PROVIDE A

PROPERTY

TYPE	NONE							TOTAL VALUE
STOLEN								
DAMAGED								
BURNED								
RECOVERED								
SEIZED								

SUBJECT IDENTIFIED ☒ YES ☐ NO | SUBJECT LOCATED ☒ YES ☐ NO | ☐ ACTIVE ☐ ADMIN. CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

ADMIN

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/DECLINES COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE-NO ARREST

REPORTING OFFICER(S)	DATE	UNIT NO.	APPROVING OFFICER	DATE	UNIT NO.
P.A. SILVAGGIO (*307)	03-27-01	610	SGT J.M. BROWN (*48)	03-27-01	601
			FOLLOW UP INVESTIGATION ☐ YES ☒ NO (OFFICER)		

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF GENERAL SESSIONS
3 COUNTY OF GREENVILLE
4
5 STATE OF SOUTH CAROLINA :
6 :
7 -vs- : TRANSCRIPT OF RECORD
8 :
9 JOHN RICHARD WOOD : ORIGINAL
10
11 December 7, 2001
12 Greenville, South Carolina
13
14 B E F O R E:
15 HONORABLE JOHN W. KITTREDGE, Judge.
16
17 A P P E A R A N C E S:
18 ROBERT ARIAIL, ESQ.
19 BETTY STROM, ESQ.
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PLAINTIFF'S EXHIBIT 6 3-7-07 MES

1 I N D E X

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WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
N/A				

EXHIBITS	MARKED	FILED
N/A		

Charge of the Court N/A

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1 THE COURT: This is a hearing in the case of State
2 versus John Richard Wood. There are a number of motions
3 which have been filed. We will first deal with those
4 motions. We will also deal with a request that's been made
5 about a consolidation of charges, part of which will have
6 to be done in an in camera setting. Also, we'll see if
7 there's any remaining issues on the questionnaire, the
8 letter to be sent to potential jurors. And Mr. Mauldin,
9 you've been kind enough to provide a listing of the
10 motions, and if you want to address them in that order it
11 suits me fine. If you want to deviate and address them in
12 another order that you and the State agree upon, I'm
13 amenable.
14 MR. MAULDIN: Yes, sir.
15 THE COURT: I have reviewed the motions which are
16 detailed. I have reviewed the State's responses. I am
17 familiar with both motions and the State's responses. It's
18 not necessary to simply repeat each motion verbatim. I
19 recognize the importance of the motions, however some of
20 the responses, in my judgment, are rather obvious, or are
21 dictated by precedent, and I may simply ask the State at
22 various points if they have anything in addition to what
23 has been submitted, because we do have a good bit to get
24 through. I may rule on some of the motions, or most of
25 them, and I will, either today or next week, issue a short

1 order in some fashion reflecting the decision on these
2 various motions. With that, Mr. Mauldin, you may proceed.
3 MR. MAULDIN: Thank you, Your Honor. Your Honor, the
4 list provided to you, the first motion is a motion for a
5 continuance. This motion, Your Honor, is responded by the
6 State, and by the way we received the responses between
7 4:30 and 5:00 yesterday afternoon. So I may have to take
8 just 15 seconds. I've read them, but I may have to take
9 just a second to look back on the responses very quickly.
10 THE COURT: Take your time. And I do want to thank
11 the State for responding. To be able to have a hearing
12 today, you had to respond quicker than you're required to,
13 and I appreciate your diligence in that regard.
14 MR. MAULDIN: The motion is made, Your Honor, in
15 the -- with the idea, not that we resist the encouragement
16 of our leaders to get on with business as usual. We do not
17 deny that that is appropriate to the extent possible. The
18 interesting analysis could be that what we're getting ready
19 to get into here is not business as usual. Capital cases
20 are very unusual. It's not -- we're not asking -- we're
21 not getting ready to proceed into something that a person,
22 a normal citizen of our country would participate in on a
23 normal basis, a sporting event, or a night out at a
24 restaurant, or going to school, or going to work, which we
25 all should do in the difficult times we're in.

1 What we are asking jurors to do is to participate in a
2 very unusual experience, and that is to come in and be
3 sequestered in a capital trial where the juror, and it's
4 the juror that we're conscious of here, placed in a --
5 essentially a controlled environment, sequestration,
6 separated from their family, with even their communications
7 being monitored for appropriate -- and it's appropriate to
8 do that, but the problem is, is that there's a great bit
9 being said that a juror's or a person's level of anxiety,
10 their level of comfort, their level of security, their
11 level of concern for family or other things in their life
12 is very heightened by what the county is going through, not
13 only as the immediate reaction to the September 11th
14 incident, but the ongoing activities of our country, and
15 it's security.
16 Just -- I think it was either yesterday morning, or
17 the day before, the headlines on our local Greenville News
18 said, alert once again, highest alert necessary, and those
19 kind of things affect a person's capabilities of
20 participating in the type of experience which I classify as
21 not normal of a capital case, and so I ask that the Court
22 take into consideration whether or not John Wood's right to
23 have a fair and impartial jury might be significantly
24 impaired by the individual juror's level of anxiety, or
25 distress, or concern because of the sequestration process

1 and the separation from their families. That's really the
2 essence of that motion, Your Honor.
3 THE COURT: The State have anything in addition to
4 what it's submitted in its written response?
5 MR. ARIAIL: Just to add to this motion was made in
6 the previous death penalty trial that we just started on
7 October the 4th. It was denied in that case, and the judge
8 handled the matter with the jury. There was absolutely no
9 response to that from the jury. And I would submit that
10 there's just no basis for it.
11 THE COURT: Motion is denied. These concerns, which I
12 appreciate, are best addressed by voir dire, specifically
13 each juror can, during the voir dire process, indicate his
14 or her level of concern, not only with these events which
15 are of a public nature, but the voir dire process is also
16 geared to determine if there are events within that
17 particular juror's life which at that time would make
18 sequestration inappropriate and thus impact on the ability
19 of the defendant to receive a fair and impartial trial. So
20 it will be pursued in that manner. Next motion, please.
21 MR. MAULDIN: Your Honor, the second motion is the
22 motion for change of venue. Let me say, and I hope I was
23 looking on the face of my motion to make sure -- yeah, I
24 think our paragraph number 6 in our motion identifies the
25 fact that to the extent that this motion could be

1 considered offhand, is just simply premature. We
2 acknowledge that it -- what we're doing is we want the
3 Court to be aware that we intend to have the Court address
4 in significant detail the issues related to whether a
5 change of venue is appropriate in this case. So this is
6 more of a -- we're trying to kind of sent up a flare, if
7 you will, we're not going to present testimony today in
8 support of this. We're not going to submit affidavits
9 regarding pre-trial publicity, but we do believe that
10 extensive questioning of the jurors at -- at the time of
11 individual -- their individual appearance, and by the Court
12 should be done.
13 That is as opposed to the Court saying, well, Mr.
14 Mauldin, if you're concerned about it you can question the
15 jurors on voir dire. We don't believe that's a sufficient
16 remedy. We believe that because it will appear defense
17 orientated, when in fact the question of whether a person
18 is entitled to venue is in fact a Court decision as to both
19 parties, as to whether or not either or the other is
20 entitled to a change of venue. So it's a -- it's somewhat
21 of an independent inquiry as opposed to inquiry relating to
22 one party in a lawsuit, or the other. So we are asking that
23 the Court make, in terms of its plans and in terms of
24 preparation, make significant inquiry of each of the
25 individual jurors on voir dire regarding the possible need

1 for a change of venue, Your Honor.

2 THE COURT: Very good. I'll proceed in that fashion.

3 I'm simply not permitted to change venue at this time based

4 on the showing, but those concerns are noted and will be

5 explored during voir dire.

6 MR. MAULDIN: Your Honor, the next motion is the

7 motion to bar electronic broadcasting. Our motion is

8 extensive in its -- in text. The motion is being, I guess,

9 contested to the extent their response speaks for itself.

10 I will only make this point, and I make this point whenever

11 this motion comes up. The most glaring example of a

12 comparison with regard to the -- California's handling of

13 the O. J. Simpson case, and South Carolina's handling of

14 the Susan Smith case, that is -- and that I think is the

15 point we ask that the Court take that into consideration

16 and bar electronic broadcasting of this case.

17 THE COURT: State have anything in addition to its

18 written response?

19 MR. ARIAIL: No, Your Honor, except just to note that

20 we've had -- unfortunately this is the third death penalty

21 trial that I've had in the last four years involving a

22 police officer, and all of those cases we've had electronic

23 broadcasting, or -- and several others. And I think the

24 way it's been handed by the Court has been appropriate and

25 has not interfered with any presentation or operation of

1 the --- of the case, and I do concur with Mr. Mauldin's
2 request as to voir dire and the restrictions relating to
3 the jury.
4 THE COURT: I'm inclined to deny the motion to bar the
5 press or the electronic media. I will follow the
6 guidelines as prescribed in rule 605. There will be, if it
7 plays out, a pool camera, and there will be one camera. I
8 will carefully coordinate that, and it will be done in a
9 way that is not disruptive to the trial or to the jury's
10 ability to proceed as the jury should. Obviously it's
11 always a work in progress, and while I'm inclined to permit
12 the media, it will be done with appropriate safeguards to
13 ensure that both sides receive a fair trial, but I do
14 believe that there is a measure of accountability that's
15 achieved if the public has such access, if it's done in a
16 careful and monitored way. So those are my thoughts and
17 that's the manner in which I will proceed. Next motion,
18 please.
19 MR. MAULDIN: Your Honor, the next motion is made with
20 the regard to the position of the defendant that our
21 statute is a violation of the 8th Amendment regarding cruel
22 and unusual punishment.
23 THE COURT: Anything further from the State?
24 MR. ARIAIL: No.
25 THE COURT: The motion is respectfully denied. Next

1 motion.

2 MR. MAULDIN: Your Honor, the next motion is a motion
3 to quash the notice, and this particular motion goes into a
4 little different angle, I guess you will, regarding the
5 Constitutional fabric of our statute. As this Court is
6 intimately familiar, the -- the defendant in a case
7 involving our statute must enter a plea of not guilty in
8 order to have the -- at any subsequent sentencing hearing
9 if necessary, be before a jury. The way the -- and if the
10 Court will indulge me for the record, the -- the guilt or
11 innocence issue is decided first in our bifurcated system.
12 And in order to get -- to get to a sentencing proceeding
13 and have a jury be the sentencing instrument, then the
14 defendant must enter a plea of not guilty even if in fact
15 that defendant may wish to enter a different plea, or a
16 plea of some other type. Any other plea essentially is
17 a -- ultimately works as a prohibition of a -- the
18 selection of a jury for sentencing, resulting in the Court
19 -- or a non-jury proceeding for sentencing. We believe
20 that the statute is therefore fundamentally unfair and
21 results in -- in undue pressure requiring a defendant to
22 enter a plea of not guilty.

23 Now, the response of the State includes the language
24 that the way this statute is set up forces the defendant to
25 make a difficult choice. Well, that is an understatement.

1 It does force a defendant to make an undue or difficult
2 choice, but what we have to deal with in cases like this is
3 jurors aren't lawyers. They are just regular people, and
4 they come into the courtroom looking for a certain level of
5 legitimacy and credibility from litigants.
6 What happens at the very beginning of a capital case,
7 is the defendant, in what the State quotes as having to
8 make a difficult choice, addresses the jury with what turns
9 out to be an obvious untruth, if you will. It becomes --
10 there's a blatant inconsistency with regard to what
11 position a defendant is forced to take and then the jury
12 says, why would a defendant -- and this -- and I'm talking
13 about a hypothetical. I'm not talking about Mr. Woods'
14 case. Why would a defendant, any defendant enter a plea
15 and say, I'm not guilty. By the time the trail of the case
16 is over the defendant's credibility is also over for all
17 intense and purposes.
18 The jury doesn't understand that he has to do it. The
19 jury doesn't understand that he is forced to do that by our
20 statute. The jury believes that when a person says I'm not
21 guilty, they mean it. It's supposed to mean something.
22 And so what our statute does is it essentially takes away
23 the defendant's credibility to the subsequent sentencing
24 panel by requiring him to enter a plea that in many
25 occasions is wholly inconsistent with the facts that the

1 jury will hear.

2 And then the second thing it does is it removes from a

3 defendant the natural benefit of acceptance of

4 responsibility as far as that jury is concerned. In other

5 words you, flip it over and you've got exactly -- you've

6 got a bad effect on the head of the coin but you've also

7 got a bad effect on the tail of the coin too. Not only is

8 he penalized for non-credibility, or lack of credibility,

9 but he is penalized for lack of acceptance and

10 responsibility, or at least the appearance of lack of

11 responsibility. So it's a double whammy for a capital

12 defendant under our statutes.

13 We believe that that process essentially constitutes

14 denial of due process. Thank you, Judge.

15 THE COURT: Thank you.

16 MS. STROM: Nothing further than our written

17 responses, Your Honor.

18 THE COURT: All right. I do appreciate the concern

19 that you've expressed, Mr. Mauldin, but I do not believe it

20 rises to the level of being a Constitutional violation, and

21 I believe the Legislature in fashioning the death penalty

22 statute and procedure in this manner did not run afoul of

23 the Constitution as it is presently interpreted. So that

24 motion is respectfully denied. Next motion, please.

25 MR. MAULDIN: Your Honor, the next motion relates to

1 the process of -- of execution by electrocution. I believe
2 that -- and going directly to the -- I let my motion speak
3 for itself. Going directly to the response of the
4 government, it appears that the simple fact that the
5 defendant in our statute is given an alternative to how he
6 is to die is a -- is an answer to the problem. I guess
7 somehow in some way that -- that makes sense. You know,
8 being somewhat of a purist as I am, I have a hard time with
9 the Court being asked to endorse the process simply because
10 a convicted defendant has his choice of poisons, and so I
11 don't think that solves the problem contained in my motion,
12 and I reaffirm the text of the motion here today.
13 THE COURT: Very good, sir. Anything further from the
14 State?
15 MR. ARIAIL: No, Your Honor.
16 THE COURT: The motion is respectfully denied. Next
17 motion.
18 MR. MAULDIN: Your Honor, the motion number 7 is a
19 motion to prohibit the introduction of photographs of the
20 victim and the scene of the crime. There is no question
21 that until we see the photographs we are being asked to
22 make a ruling in a vacuum. I acknowledge that. The
23 concern I have is to try to plead with this Court, both as
24 to motion number 7 on the photographs of the victim and the
25 crime scene, as well as motion number 8 as to the autopsy

1 photographs. I'll join those two motions together. The --
2 we ask the Court to at least require the government to
3 identify photographs that they propose to use at either
4 phase of this proceeding.
5 So that the -- because it may very well be, if there
6 are a 100 photographs that are going to be proposed to be
7 used, it may very well be that the defense doesn't even
8 enter an objection to 95 of them, or 99 of them, and so the
9 process of doing what we're trying to do here can be very
10 simplified by simply -- and I understand that we've been
11 given the opportunity to view evidence. We don't know, or
12 we would assume that that would involve photographs, and we
13 take that as being the case, that at such time we view the
14 evidence we would also have the opportunity to view
15 photographic evidence. So we're not claiming that they're
16 not providing us with that opportunity.
17 What we are asking the Court to do is to require an
18 identification of photos that would be proposed to be
19 submitted as exhibits in the case at either phase, so that
20 if we are going to have a fight, we can have it long before
21 the jury even comes to the courthouse. As this Court is
22 aware in cases that are complicated like this, sometimes a
23 slip up in the courtroom can be a real nightmare. And if
24 we can do these things in advance, it means that you will
25 have had an opportunity to rule on the 403 or whatever

1 issues the defendant -- we wouldn't have to object. We
2 wouldn't have to even enter a position. I'm a little
3 reluctant to say that because of the default -- procedural
4 default requirements in these kind of cases, but it really
5 would clean up the case.
6 So we're asking that the Court issue an order that
7 does set a parameter regarding photographic evidence.
8 THE COURT: I'll be glad to hear from the State and
9 you can go into your response. What I'm specifically
10 concerned about is this twist that you come forward and
11 identify your exhibits beforehand.
12 MR. ARIAIL: Well, Your Honor, first, he hasn't
13 raised -- that's not a motion here today. And so I would
14 move -- just at this point, I don't want to respond to
15 something that's not a motion. I would respond as we did
16 to 7 and 8, that those are premature at this time, and if
17 we get to the issue of photographs, victim's at the scene
18 of the crime, and photographs of autopsy, at the time of
19 trial then obviously it becomes -- if we elect to present
20 those pictures then it becomes an issue.
21 Now, going to the issue raised which was not raised,
22 but the one he's raised in his argument, it has always been
23 our practice in every case that we will -- first, let me
24 step back. He's got all the photographs. That's -- they
25 were given to him as part of the file. So as -- you know,

1 contact sheet that -- he's got everything in it that he's
2 reviewed. It's not like we've got photographs holding them
3 from him. He's got copies of them. Same as I have copies.
4 I just haven't told them which ones.
5 When we get to that point as -- you know, we're really
6 getting a little bit into my trial strategy. We're kind of
7 crossing the line a little bit. And I don't mind showing
8 the Court ahead of time, and showing them to the defense
9 ahead of time, but my definition of ahead of time is not
10 weeks and weeks ahead of time, it's maybe an hour ahead of
11 time. So that my trial strategy is not -- I mean we've
12 given them the whole file in this case. We continue to
13 give them every piece of information we've got, just to
14 eliminate discovery problems and other issues. I don't
15 want to also have to give them my order of presentation,
16 along with my questions in direct examination and
17 photographs of everything else, and I think that's going
18 too far.
19 I'll show them to the Court and I'll show them to Mr.
20 Mauldin before we put them up so that he can look at them,
21 and that's what we did in the last one. There wasn't any
22 delay and we went right ahead. About an hour ahead of time
23 just what I propose.
24 THE COURT: I'll let you respond if you'd like to.
25 MR. MAULDIN: Yeah, very briefly. We do have a

1 voluminous file that was provided, and not to, you know,
2 split hairs, we did not in this matter get a contact sheet
3 showing the photographs. I'm assuming that that would be
4 made available to us, and I think I mentioned that, that we
5 could see the -- you know, if there were 500 photographs
6 taken, that we would see all 500, and we would want to do
7 that, and that's good. But that really begs the point.
8 The point is, if there are 25 going to be used at trial,
9 shouldn't we know what 25 so we can enter objections to
10 them. And if that's done 15 minutes while the jury is at
11 lunch or something, we don't like that method of trial in a
12 capital case, but you know, that's obviously why you're the
13 judge and I'm the defense lawyer.
14 THE COURT: All right. Well, number one, you just
15 need to insure that those photos have been made available,
16 and I know that's not pursuant to any order, but the State
17 in this case has simply made its file available and the
18 Solicitor has made a representation that it was given, and
19 I'm hearing something else from the other side. We need to
20 follow up and see if that's been done. Number ---
21 MR. MAULDIN: We have spoken, Your Honor, this morning
22 about a date to view the physical evidence, and so if that
23 contact sheet or whatever process is what we'll see then,
24 that's -- we understand that.
25 THE COURT: Very good. Secondly, I'm neither going to

1 grant or deny your motion. I do believe it's premature at
2 this point. I'm going to hold it in abeyance and not
3 require the State at this time to specifically identify
4 what evidence it intends to introduce. We will pursue it
5 in a manner sufficiently before the actual presentation of
6 the evidence that in my judgment will assure that both the
7 strategy of the State is protected as well as the
8 significant and fundamental right of the defendant to a
9 fair and impartial trial. Obviously it will deal with
10 concepts of relevancy under 402, issues of prejudice
11 encompassed in rule 403. That hinges in part on what the
12 aggravating circumstances are but that must be dealt with
13 at that time. That's how I'll handle those two motions,
14 both number 7 and number 8 on your list.
15 MR. MAULDIN: Your Honor, the next motion is the
16 motion of requesting the production of statements of any
17 co-defendants, co-conspirators. There is a co-defendant in
18 the case and the State has, as has been brought out this
19 morning, provided what they have identified as their entire
20 file. So we -- and there was a statement contained in that
21 file identified as the statement of the co-defendant. We
22 acknowledge receipt of that.
23 However, this -- the question then becomes are there
24 subsequent efforts to interview that person, resulting in
25 either supplementals, or additional statements, or other

1 information that that co-defendant may be providing to the
2 government that we now would be entitled to. Keeping in
3 mind, Your Honor, and as we have clearly indicated, we did
4 not file a rule 5 in toto. We've -- the State chose of its
5 own -- took its own position that they would provide us
6 with their file, and that -- that was their position. This
7 request is not tied to any right under rule 5 in my view.
8 We cite in our motion the ---
9 THE COURT: 801?
10 MR. MAULDIN: Pardon me?
11 THE COURT: 801 is what you're relying on?
12 MR. MAULDIN: Yes, sir. And so it is not a -- we're
13 not relying on a rule 5 or reciprocal type of discovery
14 process, and we're also acknowledging receipt of a
15 statement, but would want to be entitled to any subsequent
16 statement given by that co-defendant, either orally or in
17 writing, in anticipation of the trial of the case.
18 And finally, Your Honor, it does bring me back, and I
19 don't have the exact date we made the motion, I could give
20 it to you real quickly for the record, but we did make a
21 motion back on January 30th, which was resolved on February
22 28th by the Court, regarding the revealing of any deals to
23 co-defendants or other witnesses. We remind the State
24 that -- of that obligation as well, with regard to the
25 dealing of the co-defendant between now and trial, or

1 anything that's come up so far.

2 THE COURT: The State in its response provides --

3 provides that, quote, it will continue to provide materials

4 to the defendant despite the fact that the defendant has

5 chosen not to file for full discovery, close quote. Is

6 that not a sufficient response?

7 MR. ARIAIL: Your Honor, could I clarify one thing? I

8 don't know what his definition of a statement is. My

9 definition of a statement is that the individual has given

10 a written statement to law enforcement. Work product,

11 notes, and interviews, and that sort of stuff as part of my

12 trial preparation, my meeting with witnesses, I trust would

13 not be so broad as to be construed as a statement under any

14 definition, but -- and if he's asking for statements under

15 801(D)(2), we're talking about some statement and

16 components of a conspiracy. I assume this conspiracy ended

17 on the date of their arrest, so I don't know how subsequent

18 statements by one of the -- how that rule would be

19 applicable.

20 I can assure the Court this, if any co-conspirator has

21 given an additional written statement to law enforcement

22 then under the rules of being advised of their rights and

23 having a statement written down by law enforcement, or even

24 an oral statement to law enforcement, but not something as

25 a result of interviews that a person has with me. I hope

1 that's not discoverable and that's my constructive -- we've
2 given him everything but where we're talking, trial
3 preparation.
4 THE COURT: All right, sir. Be glad for you to
5 respond.
6 MR. ARIAIL: Of course we'd provide Brady. If in
7 trial preparation I learn something I would of course
8 disclose that also, if it was Brady material.
9 MR. MAULDIN: And finally, Your Honor, with regard to
10 the response now the -- in furtherance of the conspiracy,
11 we're talking about the incident, circumstances involving
12 the incident, and we say a statement given about the
13 incident, even if given six months after the incident,
14 is still contained. So you know -- so to the -- and
15 maybe I was misunderstanding what he was saying. But let
16 me give you the other example of what I mean about this
17 statement.
18 If a defendant, in a hypothetical case, if a
19 co-defendant, under my motion, gave a statement, and a week
20 before -- and that statement was then provided to the
21 defendant who was going to go to trial, and then a week
22 before the trial that co-defendant said to either the
23 solicitor, or an officer, or something, that statement
24 isn't true, I'm going to give you statement B, completely
25 different statement, I don't care if that's told to the

1 prosecution, or to the prosecutor himself, and he then
2 therefore claims it somehow work product, or if it's given
3 to a police officer in writing, or if it's given to an
4 investigator on an audio tape, it's not the form of it I
5 don't think is really the issue, the issue is whether or
6 not there is a statement in addition to the one we already
7 have been provided. And that's what we would want.
8 If it's in the form of a -- say, in this hypothetical
9 case I've given you, the co-defendant says to an
10 investigator, whatever he said, whether it's Brady or not,
11 let's say it's not Brady, it's inculpatory as to the
12 defendant who's going to trial, incriminating to him, but
13 it is not contained in the first statement that's been
14 provided to the defendant, co-defendant says to an officer,
15 just any set of circumstances, and the officer writes it
16 up, not as a written statement to be signed under oath, but
17 just as a summary of that statement, we believe that should
18 be provided to the defendant, if it's a statement of the
19 co- -- of a co-defendant under that rule.
20 THE COURT: And what's the legal authority for the
21 production of that?
22 MR. MAULDIN: Your Honor, I don't -- could I borrow
23 that just a moment? Thank you, Judge.
24 THE COURT: Are you talking about 801(D)?
25 MR. MAULDIN: Hang on just a minute, Your Honor.

1 801(D)(2)(E) says a statement by a co-conspirator of the
2 party during the course and in furtherance of the
3 conspiracy. Now, if -- I don't think that the -- I don't
4 think that the moment of the giving of that statement is
5 the fact. I think that you can talk about something that
6 was in furtherance of the criminal act. You can talk about
7 it six months after, and it would still fall under that
8 requirement. Now, I don't know if I'm answering the
9 Court's question.
10 THE COURT: You'll just have to be patient with me.
11 MR. MAULDIN: Well, me too. I mean, I'm not -- when I
12 start grabbing law books, my office ducks, because it's no
13 telling what's going to get swung. So I am ---
14 THE COURT: Well, let me tell you where I'm coming
15 from and maybe that will narrow the focus and how you can
16 assist me here. When I think of rule 801, and I'm thinking
17 of hearsay, I'm thinking about a trial setting when I'm
18 called upon to rule whether certain evidence given at trial
19 is admissible for the fact finder to consider. I don't
20 view 801 as a tool that I can employ outside of testimony
21 to require one party to produce something to another. Now,
22 there maybe a mechanism to do that, but I view 801 as a
23 rule of evidence dealing with hearsay, generally not
24 admissible but here are some exceptions, one of which is
25 the co-conspirator exception, but not as a tool or

1 discovery device outside of the question of admissibility.
2 Does that make any sense?
3 MR. MAULDIN: Yes, sir. I appreciate you clarifying
4 my thoughts on that, and perhaps I have misapplied that.
5 The -- there is no question that the common application
6 would be a determination of whether it was an exception to
7 hearsay, based upon the presentation in front of -- at the
8 trial of the case. So I think that's the common
9 application of that rule without any doubt. The -- I would
10 hope that notwithstanding that the legitimacy of the
11 position of the defendant is just as sound, and that is,
12 you have -- and again I'm going to go into a hypothetical
13 situation, you have defendant A and defendant B. Defendant
14 A is going to go to trial. Defendant B has given
15 information to the prosecutor and the defendant -- and the
16 question is whether defendant A would be entitled to
17 disclosure of that information.
18 What we have now is we have -- we've already been
19 produced a statement given just subsequent to the incident,
20 during the immediate investigation. We have no idea
21 whether or not there have been additional statements or
22 information provided to the investigators consistent or
23 inconsistent with that. And we ask that the government be
24 required to provide that -- those statements, if they in
25 fact exist.

1 I take the State's word that if a -- an additional
2 written statement were produced by an investigator in this
3 case, that it would be provided, just like they have said
4 their entire file has been provided. So that -- so that
5 solves that problem.
6 The question is whether or not it is in the form --
7 and I guess we deal with this work product idea. If it is
8 in the form that the State, under the graciousness of their
9 production of their entire file would believe, hey, that
10 ain't included, we don't have to give them that, we didn't
11 have to give them anything, we certainly don't have to give
12 them that, because it's work product. I'd like a little
13 definition of what that means. If it's co-defendant B
14 said, I told them in my first statement such and such,
15 well, what really happened is so and so. So defendant A
16 goes to trial thinking this statement which he's been given
17 is what this person says, and it turns out this isn't what
18 the person says, and it is too late at that point to do
19 anything about the contradiction, other than impeach the
20 witness by a prior inconsistent statement, which usually --
21 sometimes a value and sometimes it isn't. So I take the
22 position that, Your Honor, you are correct that that rule,
23 the common application of 801 is a trial admissibility
24 general hearsay exception issue. Last point, Your Honor,
25 any inconsistency of that prior statement is Brady.

1 THE COURT: Right.

2 MR. MAULDIN: Right. That's all I have to say on

3 that, Your Honor.

4 MR. ARIAIL: Can we have our rule book back?

5 THE COURT: Brady is a law that requires disclosure,

6 if it's exculpatory, if it deals with impeachment, that's

7 as provided by law. Rule five, and I understand you

8 haven't filed, from what I'm told, a formal rule five

9 motion, but if rule five were invoked, and it were -- and

10 if was complied with, when would the State be obligated to

11 furnish you the statement of witnesses?

12 MR. MAULDIN: It wouldn't. The statement of a witness

13 would not -- now -- and I will admit to the government that

14 we generally in our rule five add a paragraph, statement of

15 witnesses. We can't bind them on that. So rule five does

16 not require the government to produce statements of

17 witnesses, co-defendants, witnesses or anything, other

18 than by some other application of the law, for example,

19 Brady.

20 THE COURT: We've gone to some detail on this motion

21 but I appreciate your comments, and I am sensitive to the

22 concern that you've expressed, however, I'm not going to

23 order the State to do anything further than what it has

24 agreed to do in its response, and which the State operates

25 under in any event pursuant to Brady, irrespective of its

1 response. I believe to adopt -- and I certainly appreciate
2 your wanting the information, but I believe to acquiesce in
3 your request would be improper on my part, and practically
4 speaking would punish the State for agreeing in the first
5 instance to produce the entire file which its not obligated
6 to do. It would be no good deed goes unpunished and I
7 don't want to adopt that legal principle. Let's move to
8 the next motion, please.
9 MR. ARIAIL: Could I just point one thing out also.
10 I -- in delivering that file, and I don't remember the
11 motions in this case or the motions in the previous case,
12 but there was a big discussion about all of the caveats
13 that I put in the transmittal letter aimed directly at this
14 point, that somehow by me giving that file I created some
15 legal right of entitlement, and I want to make sure the
16 Court's aware that -- that -- and I understand the ruling,
17 and I agree that that's what I intended, but I want to make
18 sure the Court is also aware that I put all that in the
19 transmittal letter and disclosure, and I wouldn't want us
20 to get punished for trying to ease the whole process.
21 THE COURT: All right. Let's move on. Thank you.
22 MR. MAULDIN: Your Honor, the next motion relates to
23 the sequestration of witnesses. This case -- my
24 investigation indicates that this case does involved a
25 number of different interpretations of an incident, a

1 number of different presentations regarding an incident,
2 both -- for the most part by civilian witnesses, to some
3 extent by law enforcement, but in particular by civilian
4 witnesses.
5 Another matter to take into account, Your Honor, with
6 regard to consideration of this motion, is you had -- you
7 did mention at the beginning this morning that we would be
8 taking up the matter of possible consolidation. That
9 certainly is a major -- that would really significantly
10 impact this rule. Perhaps it would be appropriate that you
11 hold this motion in abeyance and rule in light of, but I
12 don't know. I just simply believe that -- that it seems to
13 me like the State is taking the position that unless we can
14 actually show that something in fact is getting ready to
15 happen, or is happening, that sequestration be improper.
16 Well, I don't think that's right. I think that what you do
17 is kind of like an ounce of prevention is worth an ounce of
18 cure, you know. It's better to ask -- or it's easier to
19 ask forgiveness than permission. You know, we can make up
20 all kinds of little words about that, but I believe we do
21 it up front, instead of waiting until something obviously
22 has gone awry, trying to figure out how to fix a broken
23 wheel.
24 THE COURT: Would the State like to respond to that
25 beyond what's in their written response?

1 MR. ARIAIL: No, no, Your Honor.
2 THE COURT: Let me take that under advisement. I'm
3 familiar with both sides. Let's move to the next issue,
4 please, this number 11, motion for production, which I
5 believe is what you sort of captioned, expressions of the
6 public.
7 MR. MAULDIN: Yes, sir. And I would add, Your Honor,
8 that if it makes this issue any easier, we're not
9 interested in invasions of personal views, or privacy, or
10 anything like that. We simply -- what we might add to the
11 motion to make it more cohesive would be the identification
12 based upon the jury draw, so we would add that. You know,
13 what Mr. Jones or Ms. Smith might have told the solicitor,
14 if Mr. Jones or Ms. Smith are not on the jury venire we
15 really don't believe we're entitled to what they think, but
16 we are entitled to what the jury venire might think.
17 THE COURT: Any response to that?
18 MS. STROM: Your Honor, it would apply to both sides.
19 If a potential juror were to respond to Mr. Mauldin, then I
20 think both parties have an obligation to the Court to make
21 the Court aware of any comments such as that, especially if
22 they do not come forward on voir dire.
23 THE COURT: Any objection to making that mutual?
24 MR. MAULDIN: No, sir.
25 THE COURT: Require both sides to inform and disclose

1 to the other, to the extent it comes from a juror, do you
2 want it to go any further than that?
3 MR. MAULDIN: To -- to the extent that either comes
4 directly from a juror, or has direct -- or would -- would
5 have natural, or reasonable connection or effect with the
6 jurors. For example, that might be -- and let me just --
7 not to stretch the point, but let me give you an obvious
8 and somewhat ridiculous example. Hypothetical case, let's
9 say the Daughter's of the American Revolution wrote a
10 letter to Mr. Ariail stating that they wanted a particular
11 person executed, and a juror came in who said she was the
12 president of the Daughter's of the American Revolution, so
13 it's a slight -- it didn't come from her, but it either
14 came from her or had a direct, reasonable connection with
15 that juror, and I would think either one would be required
16 to be disclosed.
17 MS. STROM: Your Honor, there again, not to belabor
18 the point, those matters can be addressed during voir dire.
19 Did you write this letter? Do you hold this position? As
20 opposed to, you know, we get in a letter, we may not know
21 if that juror is a member of the Daughter's of Revolution.
22 We may not learn that until the time that juror --
23 potential juror is actually on the witness stand during
24 voir dire. I think those matters can be handled during
25 void dire. If either party sees that a potential juror is

1 not -- not by any malicious act, but not being forthcoming
2 with certain items, then of course we would bring that to
3 the Court's attention.
4 MR. MAULDIN: And again -- you know, we're stretching
5 it I know, but we just have to deal with the -- we would
6 not know that a letter of that nature had ever been
7 written. We wouldn't know to ask the questions. You know,
8 you can't -- you know, if the person is on the witness
9 stand, if we don't know of the existence of such an
10 expression, then -- and the government perhaps wouldn't
11 know to ask the question either, you know, they got a --
12 let's say they got a letter from an organization, and that
13 organization took a position, and this person who is a
14 juror, unknown to us, we don't even know he's a member of
15 that organization, we don't know what it came directly from
16 him, but we also don't know to ask the question unless we
17 know the letter was written, and I don't know if the
18 Court's following me, but there's got to be a level of
19 disclosure by both sides regarding that type of
20 information.
21 MR. ARIAIL: I'll consent.
22 THE COURT: Yeah, I agree, the question is the
23 terminology that's fair, and even though we're searching
24 the mind and heart of a potential juror, the triggering
25 mechanism for production has to come from the mind of those

1 involved in this case, so it must be from that perspective,
2 and objective knowing that the party, being the State or
3 defense counsel, who has in its possession a public
4 expression, as you have phrased it, who you reasonably
5 believe is from a juror or some one or entity connected
6 with that juror, whose service or partiality may be
7 affected by that public expression.
8 MR. MAULDIN: One final point, then -- is there -- and
9 let me give you this example, Your Honor. Let's assume
10 that the government or us -- let's say we got a statement
11 from an organization, and during the voir dire of a juror,
12 the juror doesn't put on his questionnaire that he belongs
13 to the organization, it's never questioned by either of us,
14 so it goes literally unknown by everyone, even though we
15 really need -- we would have been obligated to bring it to
16 the Court's attention had we been able to connect it, but
17 there was no connection made. What I'm going to suggestion
18 is a solution to that. I think that -- that expressions
19 from an organization, or a group, or some identifiable
20 entity, it just be swapped. If we have an expression
21 regarding this case from a group, or entity, or
22 organization, we would let them know that we had it.
23 MR. ARIAIL: I consent. I'll give him every written
24 explanation from a group, if it's mutual.
25 MR. MAULDIN: Right, and I think that at least --

1 whether we -- neither one of us discovered that a
2 particular juror is connected, at least we would be
3 operating on the same plane.
4 THE COURT: All right.
5 MR. MAULDIN: Your Honor, the next motion ---
6 THE COURT: Let me see if I can resolve this next one,
7 because I've read both sides very carefully.
8 MR. MAULDIN: Yes, sir.
9 THE COURT: Does the State want to take exception to
10 my inclination with regard to NCIC is to order the State to
11 produce such information to the Court, I will then respond?
12 MR. ARIAIL: Yes, sir.
13 THE COURT: And my order will reflect the State to
14 produce that information to my office.
15 MR. ARIAIL: Let's make sure we -- I don't have a
16 problem with that, but we don't want to run NCIC until they
17 respond. We're not going to run NCIC on every
18 potential ---
19 THE COURT: Right. I understand.
20 MR. ARIAIL: Okay.
21 MR. MAULDIN: Once a juror -- once we get an idea, a
22 week or so ahead of time, as to the 120, or 150, whatever,
23 that are actually going to be here, those are the people
24 we're talking about?
25 THE COURT: Right.

1 MR. MAULDIN: All right, sir.
2 THE COURT: Now, let's look at 13 and 14. I believe
3 we can address that. I believe we're in agreement. The
4 motion to produce the names of the jurors is really not
5 something of the purview of the solicitor's officer.
6 That's a Court clerk function. I'd like to grant that, but
7 not direct the State to do, but the clerk to do it and make
8 it mutual to both side so both of you would be kept abreast
9 of what's going on. Ms. Plumley and Ms. Morris will be
10 working with these various jury issues, and I believe both
11 of you desire, number 14, is to make a diligent effort to
12 serve those who do not file their returns, and I believe we
13 can use, unless there's some objection, the civil division
14 of the Sheriff's Office, and I would order them to try to
15 personally serve those who do not respond, and then we'll
16 just take them individually at some point at subsequent
17 hearings.
18 MR. MAULDIN: Yes, sir. And 15, Your Honor, I
19 understand they -- I don't know whether they consent to it,
20 they do not object.
21 THE COURT: Right. It will be the letter which has
22 been submitted to you and revisions are being made, it will
23 be acceptable to both sides, the questionnaire, which we
24 will address, and the map regarding parking, but there will
25 be no pamphlet as to jury service. They would not be

1 exposed to the video. There is an issue regarding the
2 questionnaire, there was a question, I believe it was
3 number 52 or 53, that dealt with the racial makeup of
4 neighbors.
5 MR. MAULDIN: Yes, sir.
6 THE COURT: And if you want to pursue that, I would be
7 glad to hear from you.
8 MR. MAULDIN: All right, sir. Your Honor, the
9 question, for the record, that has been objected to is
10 number 52 on the original proposed questionnaire, quote,
11 growing up were most of your neighbors white, or black, or
12 about even. Secondary question, currently, comma, are most
13 of your neighbors white, or black, or about even. And with
14 the exception of that question, the rest of the
15 questionnaire has been agreed to.
16 We believe that question 52 should be contained in the
17 questionnaire. It appears that the objection relates to
18 the race of the defendant and the victim as part of the
19 objection, and therefore it's not relevant. We don't take
20 that view. We believe that to the extent that that tends
21 to refer to some sort of Batson consideration, the race of
22 the juror is going to be obvious when they're in the
23 courtroom. So we'll know -- we'll know that. The question
24 is at least what is to me the purpose of this
25 questionnaire, the purpose is to reduce to the extent

1 reasonably possible the amount of questioning that goes on
2 in the courtroom with the jurors.
3 Now, we understand that some of the jurors in past
4 cases have felt like questionnaires were personal and dealt
5 with matters of personal information, and my -- and I have
6 been approached by people who were among jury panel members
7 who would have known me and then subsequent to the trial
8 case they would contact me and say, John, you know, what in
9 the heck is all that stuff that came in the mail, tell me
10 what that's all about, and -- and my view is that that's
11 somewhat of a -- while we don't want to get unduly
12 personal, this is a personal process. We're going to be
13 asking these people personal opinions and views on the
14 certain subjects.
15 So what we are asking there is not an opinion or a
16 view that should make a person uncomfortable about the
17 expression of it, it is a fact. We're asking them a
18 factual matter, 50 percent, none, 35. In other words, it's
19 not like my opinion on my neighborhood is so and so. So we
20 don't believe it's unduly personal. We don't believe it's
21 an invasion of any type of privacy to that juror who has
22 been summoned as a citizen of our country to serve on a
23 capital case. We believe that it is relevant, because
24 there are -- there are interpretations that are within
25 reasonable analysis based upon the answers to those two

1 questions. They may be rather subtle. They may be
2 subjective, and they certainly are subjective, but there
3 is analysis just the same. So we ask that the Court
4 retain that question and submit the questionnaire as
5 proposed.

6 THE COURT: Be glad to hear from the State if the
7 State wishes to take a position.

8 MR. ARIAIL: The only reason I can see that would be
9 relevant if you had an inter-racial crime. And the purpose
10 of that questionnaire is to provide to the Court and the
11 two litigants some relevant information to help in the
12 proper seating or seating of a fair and impartial jury, and
13 to divert, or obliterate the need to question jurors to the
14 extensive -- and to that point I agree, but it's just not
15 relevant to anything.

16 Now, we agreed to it -- the one I agreed to was in the
17 Sorrow matter. It was an inter-racial issue, and from that
18 standpoint it was put in there, and this is not. So I
19 submit it's just a -- it's just an unnecessary prying into
20 these people's life that is absolutely of no benefit to the
21 State, and I don't think it's any benefit to the Court.
22 Maybe he can say there's some benefit subtle to him, but to
23 me his need for subtle benefit is outweighed by just
24 sticking the racial issue into a case, and that's all he's
25 doing, is just injecting race right into this case for

1 whatever point.

2 MR. MAULDIN: Finally, Your Honor, there is no race.
3 Let me think. I'm trying to figure out the word. My
4 client is white, and Trooper Nicholson was white. So there
5 is no race per se issue up front. It may not mean a thing
6 to Mr. Ariail where -- what the type of neighborhood or --
7 that a person grew up in, or where they live now. It may
8 not mean anything to the Court personally or as the judge
9 in this case, but it means something to me, and I want the
10 question in there. That -- I got to pick a jury. I'm
11 putting things in this questionnaire that do mean
12 something to me. That's the reason I'm fighting so hard
13 for it, because it in fact does mean something to me.
14 Thank you.

15 THE COURT: The next issue that I want to deal with
16 concerns possible consolidation. The matter in which it
17 has been presented to me requires that it initially be
18 addressed in camera. In other words, on the record in
19 court, but only with the defendant, Mr. Wood, and his
20 counsel and the court reporter. We'll do that. Once we
21 accomplish that part of hearing, well go back on the record
22 to the extent necessary. We've been going a little more
23 than an hour. We'll take a break. So we'll gear back up
24 in 5 to 10 minutes, and we'll be in that posture.

25 MR. ARIAIL: Could I just interpose my objection? I

1 didn't do this the last time, but I'm not sure that I can
2 sit by again and allow this Court to meet ex parte with
3 this defendant and this defendant's lawyers. I understand
4 there's sensitive matters possibly, but he's raised them,
5 and if he wants to raise these issues by filing documents
6 with the Court, I think the State has a right to be in here
7 and hear what he is saying and the reasons for it.
8 And if -- now, it may be appropriate that the matters
9 are sensitive and the press ought to leave and the public
10 ought to leave, but I think in terms of trial preparation,
11 I would like to interpose an objection to the Court being
12 placed in a position of an ex parte situation, not only
13 with defense counsel but with the defendant himself, and I
14 raise that just from the standpoint that I think we have,
15 as lawyers of the State, have a right to be in on it.
16 THE COURT: All right. Your exception is noted. It's
17 respectfully overruled. The in camera proceeding which
18 will be on the record may well involve discussions between
19 counsel and client, and I want to protect, to the extent
20 possible, that privilege, and this is consistent with
21 case law which has addressed the manner in which this
22 issue should be pursued, but I appreciate your position
23 and ---
24 MR. ARIAIL: Well, and I don't mean to interpose that.
25 I'm -- I don't want to get into that, but if it gets beyond

1 that, when it gets beyond counsel -- client/counsel
2 privilege and other matters are discussed, I would like to
3 be a part of that.
4 THE COURT: I can tell you that the merit of a motion
5 to consolidate will be in open court on the record.
6 MR. ARIAIL: Okay.
7 THE COURT: All right.
8 MR. ARIAIL: Do you want us to ---
9 THE COURT: Well, we're all going to take a break, but
10 when we gear up, let's say in 10 minutes, it's going to be
11 me, the court reporter, Mr. Mauldin, Mr. Bannister and Mr.
12 Wood.
13 (A short recess was taken, after which, the hearing
14 continued as follows:)
15 (Present in the courtroom were the Court, Mr.
16 Mauldin, Mr. Bannister, Mr. Wood and the court
17 reporter.)
18 THE COURT: All right. We're back on the record. We
19 are now in an in camera proceeding in court with myself,
20 the court reporter, defense counsel as well as the
21 defendant. This is as a result of a motion which I believe
22 was filed by Mr. Wood himself seeking to consolidate the
23 charges in Greenville County with charges that are pending
24 in Anderson County. Let me give some background. I'll try
25 my best to be succinct.

1 Mr. Wood has made a request in the Anderson County
2 charges to have knew counsel appointed for reasons that
3 weren't put on the record in Anderson County at that time.
4 I granted that request and appointed new counsel for Mr.
5 Wood on the Anderson County charges. Mr. Wood then filed a
6 motion to relieve Mr. Mauldin and Mr. Bannister from the
7 Greenville County charges and have new counsel appointed.
8 That was discussed in an in camera proceeding. That motion
9 was denied, but in the context of that, beyond the primary
10 basis stated by Mr. Wood that he simply didn't trust his
11 lawyers, there was reference made to the what I will call,
12 and perhaps it's not the correct description, but a
13 disagreement or dispute as to whether the Greenville case
14 should go forward and include the Anderson charges as well.
15 And now we are faced with that specific issue.
16 Now, I've have had more time to research what happens
17 when counsel wishes one course of action and the defendant
18 wishes another course of action. And unfortunately there
19 is no litenance (phonetically) test that makes resolution
20 of this matter easy. I want to reference what I found to
21 be the best analysis of the issue. It doesn't answer
22 anything with absolute certainty, or finality, but it does
23 give a good description of the issue and the various
24 factors and policy reason on both sides of the argument.
25 And this is a law review article from the University of

1 Kansas in 1998. It's cited at 47 U. Kan., K-a-n. Law
2 Review, page one. And I would refer this to those
3 present.
4 In that regard this article cites a Supreme Court case
5 of Jones versus Barnes from the United States Supreme
6 Court. That touched upon this issue, that who has the
7 decision making authority over certain issues. That case
8 held that whether to plead guilty, whether to waive a jury
9 trial, whether to testify in one's behalf, whether to take
10 an appeal, fell within the purview of the client's
11 decision. And those are matters I think which we're all
12 well acquainted and don't present any delima.
13 There have been other cases which have addressed other
14 issues such as the existence of a dispositive defense, and
15 the matter which I'm going to treat this comes in part from
16 my review of the case law, but there are model rules which
17 I know do not dictate the result, but still I feel it would
18 be appropriate to look at these model rules from the
19 A. B. A. as some assistance in how best to approach this
20 issue. This is A. B. A. model rule 4-5.2. It is set forth
21 in this extensive law review article I referred to.
22 It incorporates the holding of John versus Barnes on
23 what decisions clearly are to be made by client. This
24 model rule further suggests the following, quote, strategic
25 and tactical decisions should be made by defense counsel

1 after consultation with the client, where feasible and
2 appropriate. Such decisions include what witnesses to
3 call, whether or not to conduct cross-examination, what
4 jurors to accept or strike, what trial motions should be
5 made and what evidence should be introduced. If a
6 disagreement on significant matters of tactics or strategy
7 arises between defense counsel and the client, defense
8 counsel should make a record of the circumstances,
9 counsel's advice and reasons, and the conclusion reached.
10 The record should be made in a manner which protects the
11 confidentiality of the lawyer/client relationship, close
12 quote.
13 This is a motion which has been filed by Mr. Wood. And
14 Mr. Wood, I want to give you an opportunity to tell me
15 about this motion and anything you think is important for
16 me to know in addressing this motion. And I'm going to
17 give Mr. Bannister and Mr. Mauldin an opportunity to
18 respond. And if during this process, sir, you wish to
19 consult with them privately outside my hearing and off the
20 record, I'm going to allow you to do that. So at any point
21 during this process you want to confer with them, you have
22 that right, do you understand that?
23 MR. WOOD: Yes, sir.
24 THE COURT: All right. So are you prepared to tell me
25 about this motion you filed?

1 MR. WOOD: Yes, sir. Basically, they want to keep the
2 cases separate at this point because of my understanding
3 aggravating circumstances, or I believe that's what it's
4 called. But initially they were willing to try the
5 Anderson case first, which would have brought in the
6 aggravating circumstances. Basically I just want to get it
7 over with. I mean, it's pointless to have two trials. It
8 is all part of the same thing, I think, as far as what
9 happened in the events and all that. It all happened the
10 same day. And that's why I want to go ahead and just get
11 it done with. That's it.
12 THE COURT: All right, sir. Mr. Mauldin, I'll give
13 you and Mr. Bannister a chance to respond if you would
14 like.
15 MR. MAULDIN: Your Honor, and I want to couch my
16 response with the greatest amount of respect for my
17 client's position and input. It's been a very difficult
18 process. John expressed concern about trusting us and
19 we're making tough decisions in this case, some of which he
20 just doesn't like, and I know that, and I feel for him,
21 because he's the one whose neck is on the line here. So --
22 so I want him to once again realize that my comments are
23 not directed to him. It's just I have a -- we have a job
24 to do and that is to attempt to save his life.
25 The idea of consolidation of the cases relates to a

1 strategy, and in the event consolidation were pursued, we
2 believe that is a strategy that is detrimental to the best
3 interest of our client. We believe that in the event -- in
4 the initial stages of the case when there were warrants
5 existing in both counties, Jim Bannister and I made effort
6 at that time to contest any efforts made by either of the
7 solicitors in this case, Anderson or Greenville, to form
8 some sort of merger or consolidation of the charges. And
9 we were very prepared to fight any effort to do that.
10 When the cases were then indicted, and I think the
11 Anderson County folks indicted first, we actually believed
12 that we had been put in a great position in terms of our
13 strength at being able to fight any merger or consolidation
14 post-indictment. John, frankly, Your Honor, was not an
15 active participate in those early strategy decisions, and
16 I admit that for the record, because we didn't believe
17 there was really any question. We thought it was pretty
18 obvious that they needed to be prevented from being
19 consolidated if a jury in a death case with going to be
20 able to fairly and impartially determine penalty in a case
21 like this.
22 We believed at that time, and we believe today, that
23 if consolidation were in fact granted, where you have two
24 charges against our client now in Greenville, that is
25 murder of a law enforcement officer in the line of duty,

1 and possession of a weapon during a violent crime, that
2 would go to about 20, and I don't have the number right in
3 front of me, but it would be a significant number of felony
4 level violent type offenses. I, in my opinion, and based
5 upon my experience, believe that any jury would be
6 essentially overwhelmed by the just mere weight and volume
7 of evidence of violence, that the -- the -- the ability of
8 us as counsel to manage, if you will, the passions of the
9 jury during the presentation of the case would be
10 significantly impaired by just the volume of -- of
11 testimony relating to the numerous charges that arose out
12 of Anderson County.
13 Another point, Your Honor, that was taken into
14 consideration is the sequence. This issue would not be
15 nearly as clear to me as John's counsel if the shooting
16 death had been at the what you might call end of sequence
17 of events, because you could say if you were the
18 prosecutor, or to the jury that the point of having it all
19 tried together was that this was the culmination of a
20 course of conduct. That's exactly the opposite of what
21 we have here. What we have here is an incident occurring
22 in our county, a break in contact of a couple of hours
23 and then the -- the sighting, if you will, of alleged
24 suspects in another county, resulting in a lot of chaotic
25 evidence.

1 So it was not the culmination of, but it was the
2 commencement of, and therefore we believe that it is
3 appropriate in fact that it -- even if the government were
4 pushing for consolidation, we believe we would prevail,
5 that it would not be consolidated even if the government
6 wanted it to be. We don't know what their position is
7 quite frankly, but -- but -- so the fact that the offenses
8 for which the defendant is facing the death penalty were
9 the beginning of the case, factually supports not bringing
10 in all of this other stuff that could overwhelm the fact
11 finder and ultimate sentencer in the case.
12 Next point, Your Honor, I would make is the Court has
13 a responsibility to administer its courtroom, and to
14 procedurally administer justice in a fair a way as it can.
15 So even if we were all in agreement, if Mr. -- if John
16 wanted it consolidated, and I said, hey, I think that would
17 be great, and the prosecutor said, hey, I think -- we're
18 all for it, and Anderson came over here and said they were
19 all for it, you could simply say, I find that that would be
20 a -- would amount to procedural unfairness, that I think
21 you have that power. So I believe that simply because one
22 party or the other might request something that this Court
23 would interpret as potentially resulting in unfair and in
24 an unfair proceeding, you could -- you could essentially
25 sua sponte say, I'm not going there, we're going to do it

1 this way. And -- you know, so I believe you do have the
2 power to do that.
3 Finally, Your Honor, the -- the issue involves why --
4 and this is an attorney/client matter, Your Honor, very
5 sensitive attorney/client matter, but I do believe in this
6 form it can be taken up. I have looked straight into my
7 client's eyes, and essentially just wanted to grab him and
8 say, why are you wanting to do this, you know, come on,
9 and -- and I am as satisfied now as I've ever been in the
10 process of this case, that he wants to do it for the
11 exoneration of the co-defendant. He -- this is -- he has
12 from the moment of the processing of this case said that
13 this woman essentially is innocent. And what he believes
14 is -- when the Anderson County case would have been tried
15 first, you will recall our ex-parte in camera proceeding
16 dealt with his wanting to testify, and we were just simply
17 saying, we're not going let you go there, we're not going
18 to let you do that. He wanted to do that, because he
19 wanted to get up there and say what he did and what she did
20 not do.
21 Now, what has happened it's flipped now, Anderson is
22 now second in line. He -- but she's not even going to be
23 on trial here. So he -- now essentially he's saying, I
24 can't help her because they're not trying her. Now, I
25 can -- I have told him that if they consolidate the case,

1 they still don't have to try her, and they won't in fact.
2 I don't believe that -- that there would be a joinder of
3 the trials of both defendants just because of the
4 consolidation. I think that that would be a very dangerous
5 area to go into, trying one defendant on a capital case
6 and another defendant on a non-capital case would be the
7 same -- it's too tricky for me to think about, but his
8 motivation is his concern for the co-defendant, and how
9 best to try to solve her legal problems. And I'm getting
10 in his way, because I just can't let him self-destruct for
11 the purposes of trying to procedurally help her out.
12 He -- and in his comments -- and again I say to my
13 client, I want him to know that is this being done with the
14 utmost respect, I'm sorry he doesn't trust us to some
15 extent, or has some problem with that area, but I got to
16 say these things to -- I got to say them in this area -- I
17 want to get it over with and it's pointless to have two
18 trials, it really isn't pointless from a strategic point of
19 view.
20 Now, if Anderson had been tried first, he -- with
21 record to the aggravating circumstance comment he made, the
22 government perhaps could have moved to use convictions of
23 violent crimes toward another person as potentially an
24 additional aggravating circumstance. We would have fought
25 that as being acts subsequent to the offense and all kinds

1 of legal issues, but we knew we would have to fight that if
2 Anderson were tried first, but we really didn't have a
3 choice. We couldn't say, Greenville first and Anderson
4 second. Well, somehow or another, just through almost
5 magic dust, we ended up kind of getting what we wanted. We
6 wanted our Greenville charges tried first, separate from
7 Anderson, and we have a disagreement on that strategy with
8 our client. One moment, Your Honor.
9 Finally -- finally, Your Honor, we've had
10 conversations with -- with our client within the
11 attorney/client environment regarding -- you know, he
12 mentioned this aggravating circumstance situation. We've
13 discussed with him efforts that will be made, authorities
14 that will be submitted, positions that will be taken in an
15 attempt to prevent the introduction of certain information
16 in Anderson from being brought into a Greenville trial.
17 There would be procedural issues that a Court at some point
18 would have to rule on. These have been discussions between
19 us.
20 Now, there perhaps is some confusion about what is or
21 isn't an aggravating circumstance, and so you know, we have
22 ensured John that -- that the presentations regarding
23 admissibility of certain information would be heard, ruled
24 upon, and that's the way those things would go, but there
25 would be an aggressive effort to, I guess you could say,

1 keep the case as clean and specific as to Greenville as
2 possible.
3 THE COURT: Okay.
4 MR. BANNISTER: Judge, just so we're clear on the
5 record, I would add that it's our position that under
6 citations of authority that you've given us that this is
7 our call, and it is our decision that we do not want to
8 consolidate these cases. And the circumstances that Mr.
9 Mauldin has put on the record are what we believe, and of
10 course what you cited is what we are supposed to do and
11 tell you why we've reached that conclusion, and we both
12 feel like we are on sound legal strategy in reaching our
13 conclusion. There are some other matters that probably are
14 more procedural and do not involve attorney/client
15 privilege, and as I understand our brief discussion with
16 the solicitor that you want to have those on the record
17 with him present. I just would tell you from simply a
18 timing standpoint we think there's going to be a problem
19 with making the February 7th date, and from the standpoint
20 of we got relieved and then ultimately we'd be back into it
21 may create some sort of problem, and without going into any
22 detail on those, when the solicitor is back in here, those
23 are the arguments we're going to present in addition to
24 what we've stated on the record that is attorney/client
25 privilege.

1 THE COURT: All right. Mr. Wood, have you heard what
2 both Mr. Mauldin and Mr. Bannister have said regarding this
3 issue?
4 MR. WOOD: (Nodded his head.)
5 THE COURT: Since you filed the -- he indicates yes.
6 Since you filed the document, or the paper that's brought
7 this to our attention, that has caused us to be here, I
8 want to give you a chance to respond to what they've said.
9 MR. WOOD: Basically, I'd say the jury, I feel has --
10 already knows about Anderson. They'll be in here on the
11 Greenville case, but they know from the media coverage of
12 what happened in Anderson too. So I mean that argument is
13 sort of -- I mean, it's almost like we're trying to hide
14 something from them. So I just feel to go ahead and get it
15 done with, present the evidence and let the jury make the
16 decision.
17 THE COURT: I'm going to ask a question, and it may
18 not be appropriate for you to respond, if you just want to
19 throw it the back at me, it won't hurt my feelings. And
20 I'm basically thinking out loud here because this is new
21 territory for me. Mr. Wood has filed what is captioned a
22 motion, that he moves to have the charges consolidated, a
23 determination as to what evidence to present and the
24 compelling strategy reasons that have been given by
25 counsel. This appears to me very clearly to be one of

1 those matters that falls within the ambet (phonetically) of
2 a counsel driven decision. There has been, pursuant to
3 order, counsel appointed in this case. I respond to
4 motions and resolve motions filed by the parties
5 representatives, i.e., the attorneys. I don't know whether
6 we should even have a hearing on this motion, because to do
7 so is to force you to argue against the compelling strategy
8 reasons which led to your initial decision. I am not going
9 to require Mr. Wood to argue his motion then have you stand
10 up and argue against it.
11 MR. MAULDIN: I do have a view, Your Honor. Because
12 this matter is thoroughly protected and preserved on this
13 record and this -- this particular proceeding would be
14 sealed, so that if any request ---
15 THE COURT: Yes, except for the appellate record.
16 MR. MAULDIN: Right. Right. That any request would
17 be only managed by the Court's release of the seal. I
18 believe the Court and -- if the Court determines in this
19 ex-parte proceeding that the issue that's been raised by
20 the client, thoroughly considered, is in fact a counsel
21 decision, then I do believe that the appropriate
22 disposition would be that that position has been heard and
23 withdrawn, because then it presents nothing to be
24 subsequently heard by the Court.
25 Now, if the government of either Anderson or

1 Greenville then wanted to affirmatively make their own
2 motion, a position would have to be made regarding
3 procedural matters. But I'm thinking that John has made a
4 request in the form loosely termed a motion. You have
5 heard the process we've gone through. You have made -- or
6 if in fact you have had made a ruling that that is a
7 procedural matter that counsel would have the
8 responsibility of pursuing after consultation with the
9 client, then I think the proper disposition would be either
10 to grant it, hear the State and do whatever you're going to
11 do, or mark it -- or rule that it has been withdrawn by
12 defense counsel.
13 THE COURT: All right.
14 MR. MAULDIN: I guess that's about the best way I can
15 address that.
16 MR. BANNISTER: Judge, could I have a moment to ---
17 THE COURT: Yes, take your time, sir.
18 (A discussion was held off the record.)
19 MR. MAULDIN: I'm believing that -- or I'm of the
20 impression that what you do with this would have an ongoing
21 effect on any future matters of this type. We're going of
22 course to encourage our client to communicate with us, and
23 directly to us of any concerns or questions he has, whether
24 they deal with the fundamental issues that the Court began
25 with, and I won't refer to them at this point, but

1 fundamental matters that deal with the client's authority,
2 or strategic matters that deal with the counsel's
3 authority, that those would come through us first and that
4 perhaps we would be responsible to communicate them to the
5 Court if the Court so directed us to, so that you could
6 then determine whether a proceeding of this nature is
7 necessary or not. I don't know, does that make any sense
8 to you?
9 THE COURT: It does, and it's a difficult process to
10 do properly. What I would like to tell Mr. Wood, and I
11 want y'all three to listen to this, I don't want anything I
12 say to you, Mr. Wood, in any way for you to think that when
13 you leave this courtroom that you can't file anymore
14 motions. I don't want you to ever think that you're not
15 permitted to file motions with the Court. You have
16 attorneys. That's their duty. I'm not going to share with
17 you my opinion of whether I think it's advisable for you to
18 file motions without the review and approval of your
19 attorneys. I will not tell you that, but I'm not, and I
20 want the record to be very clear, I'm not foreclosing you
21 from filing motions again with the Court, and if you do,
22 we'll address them. And if they involve these matters
23 that impact attorney/client privilege, we'll have to
24 re-assemble in a similar manner on the record, but
25 privately, without anyone else present. Do you understand

1 that, sir?

2 MR. WOOD: Yes, sir.

3 THE COURT: Is there anything else you would like to

4 say today, sir?

5 MR. WOOD: That's it.

6 THE COURT: I'm sorry?

7 MR. WOOD: That's all.

8 THE COURT: Have you understood what we've done

9 today?

10 MR. WOOD: Yes, sir.

11 THE COURT: And have you understood my comments, that

12 based on my research, there are certain decisions in an

13 attorney/client relationship which the client must make, do

14 you understand that?

15 MR. WOOD: Yes, sir.

16 THE COURT: Whether to waive a jury trial, whether to

17 testify at trial, and other matters of a similar nature, do

18 you understand that?

19 MR. WOOD: Yes, sir.

20 THE COURT: There are other matters which come under

21 the broad category of strategy, and based on what I have

22 reviewed, matters involving strategy are to be made by

23 defense counsel. I'm not asking if you disagree with that,

24 but have heard what I have said in that regard?

25 MR. WOOD: Yes, sir.

1 THE COURT: And I don't believe that I had been
2 appointed this case when the original order of appointment
3 for counsel. I can't remember whether Judge Pyle signed
4 that order, or Judge Patterson perhaps. I cannot recall.
5 MR. MAULDIN: I can't remember, Your Honor. Let me
6 see. I can -- I tell you what, I can look at one document
7 that I've got for our subsequent ex-parte proceedings on
8 funding that might be able to lead us to -- let me see who
9 issued the first order for funding, Your Honor. Well, this
10 Court did issue the first order of funds, December the
11 21st, which was 15 days after the incident.
12 THE COURT: Okay.
13 MR. MAULDIN: So my guess would be that it is just as
14 likely that you did sign that original order as not, but I
15 can't say -- I think you were the administrative judge that
16 six months.
17 THE COURT: I was last year.
18 MR. MAULDIN: All right. So I believe you would have
19 signed it, Your Honor.
20 THE COURT: All right. And Mr. Wood, we may have been
21 down this road before, and I just want you to stand --
22 understand, overall the options available as far as
23 representation goes in a capital case there is specific
24 state law that deals with appointment of counsel. An order
25 has been signed appointing counsel. You have previously

1 requested, and I think we just did this I think last month,
2 seeking to replace Mr. Mauldin and Mr. Bannister with new
3 attorneys. Do you remember that?
4 MR. WOOD: Yes, sir.
5 THE COURT: And I found that you really didn't make a
6 sufficient showing that would entitle you to have these
7 gentlemen discharged and have new attorneys appointed.
8 Under the law there are basically three options, and if we
9 had an initial hearing I would have already addressed this
10 to you. I can't recall so, I'll do it again, just to make
11 sure you understand.
12 You can retain an attorney of your own choosing, or
13 attorneys, if you're able to afford an attorney. If you're
14 not able to afford an attorney, then counsel will be
15 appointed. That's the situation we're in, and have been
16 for some time. And under the law, when counsel is
17 appointed, they must meet certain requirements in terms of
18 experience and qualifications. And at least one of the
19 appointed attorneys must be a representative of the public
20 defenders office. So the appointment made in this case was
21 pursuant and meets that statutory requirement. Any
22 individual, regardless of the crime, always has the right
23 to represent himself or herself.
24 And I just want you to understand those options. And
25 I don't want to make any comment to you that indicates, you

1 know, what your decision should be on various strategy.
2 That's not my role. My role as the judge is to apply the
3 law fairly, and if you think that you need to file
4 something with the Court, if you do, I'll consider it. And
5 I'll handle it in this fashion again, and allow you to have
6 your peace and tell me anything you think is important
7 about that motion.
8 MR. WOOD: Okay.
9 THE COURT: But matters involving strategy, as I have
10 determined from the law, are matters to be made by counsel,
11 after full and careful consultation with you.
12 MR. WOOD: Yes, sir.
13 THE COURT: Do you have any question about that, sir?
14 MR. WOOD: No, sir, I understand.
15 THE COURT: Now, before I issue an order, or deal with
16 this paper that you filed with the Court, since it did
17 involve these Anderson charges and since you do have an
18 attorney that's been appointed to represent you on the
19 Anderson charges, would you like to discuss this matter
20 with your Anderson attorney?
21 MR. WOOD: Before a decision is made?
22 THE COURT: Before I issue a ruling.
23 MR. WOOD: Yes, I would.
24 THE COURT: Okay. Well, in light of that, I'm going
25 to have the State come back in and tell them that there is

1 no motion to address at this time. And I'm going to go
2 back to thinking out loud with you, gentlemen, on how the
3 three of you think we should resolve this. I'm going to
4 contact Mr. Byrholdt. I'm going to require that he meet
5 with Mr. Wood. All right?
6 MR. WOOD: Yes, sir.
7 THE COURT: So you can meet with your Anderson County
8 counsel. At the conclusion of that, I would like something
9 that can be under seal, if necessary, and please understand
10 I'm thinking out loud on how to resolve this. If Mr. Wood
11 wishes to pursue his motion, then that needs to be
12 indicated to me. At that point I'll issue an order that
13 most probably that does fall within the issue of strategy,
14 that he's been fully advised, and the Court withdraws the
15 motion.
16 If Mr. Wood, after consultation with Mr. Byrholdt
17 wishes to withdraw the so called motion, if that could be
18 brought to my attention by way of a document under seal,
19 then I'll just issue an order that it's been withdrawn. If
20 there is another way to approach this -- I just don't want
21 any communication to be filed with the Clerk's office that
22 becomes a public record that somehow can be interpreted
23 and read between the lines as to strategy, because I
24 don't think that's fair, and anything that's going to
25 violate the attorney/client privilege, because there may

1 not be anything that directly hits the bullseye, but
2 anyone with any ability to discern can put pieces together
3 and see what's going on. And I want to protect that
4 zealously.
5 MR. MAULDIN: Your Honor, we would offer -- of course,
6 then -- that John may wish the Court to make this contact
7 with Anderson counsel, we would be more than happy to offer
8 to be at your service to communicate with Mr. Byrholdt,
9 give him a time frame, tell him essentially the postures,
10 ask him to meet with John and submit something
11 confidentiality, either to you or to -- through us to you,
12 however you wan to do it.
13 THE COURT: Yeah, that suits me fine.
14 MR. MAULDIN: Does that suit you, John?
15 MR. WOOD: Yeah.
16 MR. MAULDIN: All right. We will take -- can you give
17 us a time frame, Your Honor?
18 THE COURT: I would like for him to meet with Mr. Wood
19 within a week.
20 MR. MAULDIN: Why don't we -- today is Friday, why
21 don't we ask no later than -- to meet with him and to be
22 prepared to either submit a report to the Court or however
23 you want it done, by next Wednesday. That would allow a
24 couple days for you to formulate a sealed order, if that's
25 the -- what ---

1 THE COURT: Can he do it within that time frame? If
2 he could, that's terrific.
3 MR. MAULDIN: I'll advise the Court if that time frame
4 creates an undue problem for him.
5 THE COURT: Okay. And is that an acceptable way to
6 proceed so that Mr. Byrholdt will speak with you about this
7 issue?
8 MR. WOOD: Yes, sir.
9 THE COURT: Okay. I know this motion is not involving
10 the Anderson County at this point, we're in Greenville
11 County talking about the Anderson charges, but you do --
12 but I understand your desire to speak with him?
13 MR. WOOD: Yes, sir.
14 THE COURT: Very good, sir. We'll proceed in that
15 manner, and I appreciate y'all's patience and working
16 through this. And thank you, Mr. Wood. All right. I'm
17 going to inform -- and y'all just jump in. I'm going to
18 inform the State there's nothing to address at this time.
19 Any objection to that?
20 MR. MAULDIN: No.
21 MR. BANNISTER: No, Your Honor.
22 THE COURT: We're ready to go back on the record, and
23 the in camera proceeding is now concluded. See if the
24 State is ready to come back on the record.
25 THE COURT: And I'm also going to address the cover

1 letter in terms of when the jury is to arrive on that
2 Monday.
3 (The hearing was re-opened to the public.)
4 THE COURT: We're back on the record. I want to thank
5 those who waited outside. I appreciate your patience.
6 There is no other matter to address at this time by way of
7 motion. The only remaining issue was the reporting time of
8 jurors on February the 4th I believe, and it would be my
9 preference to start early in the morning. I don't think we
10 can do that. There are two other terms of court, I think
11 Common Pleas, and that's already been designated for the
12 jury to come in at their normal time of 9:00. I'm not
13 sure how to avoid that with other terms of court going on
14 that week. So with that logistical problem, I think we're
15 left with a 2 o'clock or 2:30 start time. Anything
16 further?
17 MS. STROM: Just one moment, Judge?
18 MR. ARIAIL: What we were talking about is maybe
19 starting at 11:00, and -- I mean at the 2 o'clock, what
20 were going to impact, as far as I'm concerned, would be the
21 trial -- beginning of trials for the court of General
22 Sessions would be one, and I assume the other would be the
23 trials for Common Pleas, and I can handle the General
24 Sessions if we can get consent from the Common Pleas to go
25 ahead, but if we can't do that I would think 11:00. The

1 problem is we just lose -- we end up dragging the thing out
2 just even further, and I'm thinking if we could get
3 started, because generally we're through by 10:30 with the
4 jury panel anyway, having picked what juries we need, but I
5 just throw that out.
6 THE COURT: All right. Thank you very much. That
7 concludes this hearing.
8 - - -END OF TRANSCRIPT OF RECORD- - -
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1 CERTIFICATE

2 I, the undersigned Mary E. Sprague, Official Court
3 Reporter for the Thirteenth Judicial Circuit of the State
4 of South Carolina, do hereby certify that the foregoing is
5 a true, accurate and complete Transcript of Record of all
6 the proceedings had and evidence introduced in the trial of
7 the captioned case, relative to appeal, in the Court of
8 General Sessions for Greenville County, South Carolina, on
9 the 7th day of December, 2001.

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

12

13 June 15, 2002

14 Mary Sprague

15 Mary E. Sprague

16 Official Court Reporter

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3587

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF GREENVILLE

THE STATE OF SOUTH CAROLINA, VERSUS JOHN RICHARD WOOD, DEFENDANT.

01-GS-23-3106

TRANSCRIPT OF RECORD

SEPTEMBER 21, 2001
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN W. KITTREDGE

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

ROBERT ARIAIL, Esquire
Solicitor for the 13th Judicial Circuit

JOHN MAULDIN, Esquire
JAMES BANNISTER, Esquire
Attorneys for the Defendant

DAWN V. KOFFSKEY
COURT REPORTER

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INDEX TO EXHIBITS

NO.	DESCRIPTION	ID.	EV.

(NO EXHIBITS WERE ENTERED INTO EVIDENCE DURING THIS HEARING)

1 **THE COURT:** THIS IS A HEARING IN THE CASE OF STATE VERSUS
2 JOHN RICHARD WOOD. MR. WOOD IS PRESENT. COUNSEL FOR BOTH SIDES
3 ARE PRESENT.
4 IT'S MY UNDERSTANDING THAT THE PRIMARY IF NOT EXCLUSIVE
5 REASON WE ARE GATHERED TODAY IS PURSUANT TO THE STATE'S REQUEST
6 TO EXTEND THE ORDER ARISING FROM THE ANDERSON COUNTY CHARGES
7 REQUIRING MR. WOOD TO SUBMIT TO A MENTAL EVALUATION TO ALSO
8 REQUEST THAT THE EVALUATORS CONSIDER THE GREENVILLE COUNTY
9 CHARGES. AND WHEN I RESPONDED TO A LETTER TO THE SOLICITOR MR.
10 MAULDIN INDICATED HE WANTED A HEARING ON THIS ISSUE.
11 IS THAT A -- I'LL START WITH THE STATE. IS THAT YOUR
12 UNDERSTANDING OF WHY WE ARE PRESENT, YOU WANT THAT EVALUATION
13 THAT IS GOING TO HAPPEN IN ANY EVENT IN THE ANDERSON COUNTY
14 CHARGES TO ALSO INCLUDE THE SAME ISSUES OF THE GREENVILLE COUNTY
15 CHARGES?
16 **MR. ARIAIL:** THAT'S ESSENTIALLY CORRECT. AND LET ME BE A
17 LITTLE BIT -- I WANT TO BE A LITTLE BIT CAREFUL HERE BECAUSE WE
18 -- IN THE LAST COUPLE PROCEEDINGS IN ANOTHER CASE AND ALSO IN
19 PREVIOUS PROCEEDING, WE HAD A SITUATION INVOLVING ANOTHER CASE
20 BEFORE YOU A COUPLE OF YEARS AGO.
21 I DON'T WANT TO CONSTRUE THIS AS A REQUEST BECAUSE IT -- BY
22 THE STATE FOR AN EXAMINATION. WHAT I AM POINTING OUT TO THE
23 COURT IS THAT THERE IS APPARENTLY -- IN THE PROCEEDINGS IN
24 ANDERSON IT'S BEEN BROUGHT TO THE COURT'S ATTENTION UNDER THE
25 APPROPRIATE CODE SECTIONS THAT THERE MAY BE AN ISSUE OR THERE MAY

1 BE SOME EVIDENCE OF INCOMPETENCY THAT THE COURT HAS DECIDED TO
2 DIRECT AN EXAMINATION. AND MY POSITION, SOLE POSITION, IS THAT
3 IF THAT EVIDENCE EXISTS IN REGARDS TO THE ANDERSON CHARGES --
4 MENTAL INCOMPETENCE IS NOT CHARGED SPECIFICALLY. IT'S
5 INDIVIDUALLY SPECIFIC. AND THEREFORE I DON'T KNOW HOW YOU CAN
6 SEPARATE THE TWO. SO MY ISSUE IS, IF YOU HAVE THAT BEFORE YOU, I
7 WOULD REQUEST THAT THE COURT INCLUDE THESE BECAUSE YOU HAVE THE
8 ENTIRE -- JURISDICTION OVER THE ENTIRE CASE. AND THAT PARTICULAR
9 SITUATION, THEN, THE EXAMINATION WOULD COME BACK AS A COURT'S
10 EXAMINATION FOR BOTH PARTIES IN BOTH CASES. THAT'S OUR POSITION.
11 **THE COURT:** ALL RIGHT, SIR.
12 I'LL BE GLAD TO HEAR YOUR POSITION.
13 **MR. MAULDIN:** YOUR HONOR, WE -- WE ACKNOWLEDGE WHAT THE
14 GOVERNMENT HAS STATED, THAT THE GREENVILLE COUNTY SOLICITOR DID
15 NOT COME BEFORE YOU AND REQUEST AN EVALUATION -- HE WAS NOT THE
16 INITIATOR -- THAT THE INITIATION OF THIS PROCESS OCCURRED IN
17 ANOTHER COUNTY. HOWEVER, THE LETTER AT LEAST THAT I HAVE
18 RECEIVED CLEARLY -- HE SAYS IT'S NOT A REQUEST. I MEAN, IT'S
19 ESSENTIALLY A REQUEST. BUT LET IT SPEAK FOR ITSELF. I BELIEVE
20 THE COURT IS FULLY CAPABLE OF MAKING A DETERMINATION ABOUT
21 WHETHER THE GOVERNMENT IS SEEKING SOMETHING OR NOT HERE.
22 THIS IS THE OPENING OF A DOOR THAT CAN BECOME
23 EXTRAORDINARILY COMPLICATED. NOW -- AND WHAT I WANT TO PUT ON
24 THIS RECORD THIS MORNING IS THAT WE OBJECT TO ANY EFFORT THAT
25 WILL BE USED -- WE KNOW IT WILL BE -- IN AN ATTEMPT TO USE THIS

1 PROCESS AS A DISCOVERY TOOL BY THE GOVERNMENT. AND THE REASON WE
2 KNOW THAT IS BECAUSE WE ARE EMBROILED IN ANOTHER MATTER OF
3 SIMILAR CIRCUMSTANCES AND WE SAW THE BEGINNING OF THAT, AND WE
4 NOW KNOW WHERE WE ARE IN THAT CASE. SO WE ARE -- I CERTAINLY
5 HAVE EXPERIENCE IN THE ARENA, AND I AM SAYING ON THE RECORD TODAY
6 THAT TO THE EXTENT THE GOVERNMENT IS GOING TO -- THEY SAY IT'S
7 NOT A REQUEST, BUT TO THE EXTENT THEY WILL NEXT WEEK OR NEXT
8 MONTH ATTEMPT TO USE WHAT YOU DO TODAY AS THE DOOR OPENING FOR A
9 DISCOVERY PROCESS, WE WANT TO MAKE SURE THE COURT KNOWS THAT WE
10 ARE -- AND I USE WITH ALL DUE RESPECT -- WE ARE WARNING THE COURT
11 NOT TO WALK INTO A MINE FIELD THAT IT JUST ESSENTIALLY HAS NO
12 BACK DOOR TO.
13 WE ALSO WANT TO PUT ON THE RECORD THAT TO THE EXTENT A
14 COMPETENCY TO STAND TRIAL EVAL -- SEE, I DON'T KNOW WHAT THE
15 ANDERSON ORDER SAYS OR WHETHER IT'S EVEN BEEN SIGNED YET.
16 **THE COURT:** IT'S BEEN SIGNED, AND THE EVALUATION IS NEXT
17 WEEK.
18 **MR. MAULDIN:** ALL RIGHT. AND I DON'T KNOW -- I'M ASSUMING
19 -- CAN I JUST ASK THE COURT IF IT'S---
20 **THE COURT:** I HAVE NO PROBLEM WITH YOU SEEING THE ORDER.
21 **MR. MAULDIN:** I MEAN, I DON'T -- I HAVEN'T SEEN IT. I
22 DON'T KNOW IF THE GOVERNMENT HAS A COPY OF IT OR WHAT.
23 **THE COURT:** I'M SURE IT'S IN THE COURT'S FILE DOWN IN
24 ANDERSON.
25 **MR. MAULDIN:** YES, SIR. BUT AS YOU ARE AWARE, YOUR HONOR,

1 THERE ARE THE MATTER OF DEFENDANT'S COMPETENCY TO STAND TRIAL AND
2 THEN THERE ARE OTHER MATTERS THAT CAN UPON PROPER MOTION OR
3 WHATEVER BE INCLUDED. I DON'T KNOW WHAT IT IS INCLUDED. SO WHEN
4 THE ISSUE COMES BEFORE THE COURT IS IT GOING TO BE EXPANDED TO
5 GREENVILLE COUNTY, I'M NOT SURE WHETHER OR NOT THAT EXPANSION IS
6 GOING TO AFFECT FIFTH AND SIXTH AMENDMENT RIGHTS, FOR EXAMPLE, OF
7 THE ACCUSED. COMPETENCY WOULD NOT. BUT IF IT'S EXPANDED TO
8 COVER CRIMINAL RESPONSIBILITY OR OTHER MATTERS INVOLVING ISSUES
9 THAT COULD BE THE SUBJECT OF AN EVALUATION, IT MAY EXPAND INTO
10 FIFTH OR SIXTH AMENDMENT PROTECTIONS. AND WE -- WE -- YOU CAN
11 CALL ME PARANOID, I GUESS. I GUESS MAYBE MY LINE OF WORK HAS
12 MADE ME THIS WAY. BUT WHEN THE GOVERNMENT WANTS THE COURT TO
13 THEN PROVIDE FOR CERTAIN ACTIVITY WITH REGARD TO AN ACCUSED IN A
14 CAPITAL CASE THAT BY ITS VERY NATURE INVOLVES EITHER RELAXATION
15 OR LITERAL WAIVER OF CONSTITUTIONAL PROVISIONS, THEN THE
16 GOVERNMENT IS INDIRECTLY GETTING SOMETHING THAT THEY COULDN'T DO
17 DIRECTLY. THEY CAN'T TAKE MY CLIENT'S FIFTH OR SIXTH AMENDMENT
18 RIGHTS AWAY FROM HIM. SO THEY GET THE COURT TO DO IT BY THIS
19 BACK DOOR EVALUATION PROCESS.
20 SO ON THE RECORD, TO THE EXTENT THAT THESE MATTERS THAT COME
21 BEFORE YOU ENDANGER OR JEOPARDIZE OUR CLIENT'S FIFTH OR SIXTH
22 AMENDMENT RIGHTS, WE WANT THE OBJECTION ON THE RECORD TO THAT.
23 ANOTHER MATTER, YOUR HONOR, IS THAT -- THAT I SEEK
24 PROTECTION FOR IS -- OR SEEK PRESERVATION OF OBJECTION IS THE --
25 THIS TWIST -- IF YOU WILL ALLOW ME, YOUR HONOR, THIS TWISTED

1 LOGIC THAT TENDS TO BE LATER DEVELOPED FOR AN ARGUMENT THAT THEY
2 CAN HAVE SOME THIRD PARTY COME IN AND DO AN EVALUATION AND THE
3 FIFTH AND SIXTH AMENDMENT RIGHTS ARE JUST GONE. THAT IS AN
4 EXTRAORDINARILY DANGEROUS REGION FOR THE COURT. SO I ASK THAT
5 THE COURT, WITH ALL DUE DELIBERATION, CONSIDER THESE MATTERS.
6 ANOTHER MATTER, YOUR HONOR, IS THAT ALL -- ALL PRODUCTS OF
7 THIS PROCESS SHOULD BE PLACED UNDER PROTECTIVE SEAL FOR YOUR EYES
8 AND EARS ONLY. IF THE COURT IS -- IF THE GOVERNMENT IS SAYING,
9 "WE'RE NOT REQUESTING THIS," WELL, WE'RE NOT REQUESTING IT
10 EITHER, YOUR HONOR, MAKING REFERENCE TO DEFENSE COUNSEL, THEN
11 IT'S YOU. AND I DON'T THINK THEY ARE ENTITLED TO SEE OR HEAR ANY
12 INFORMATION THAT ARISES OUT OF THIS PROCESS, INCLUDING ORAL
13 COMMUNICATIONS BETWEEN THE STATE HOSPITAL PEOPLE WHO MAY BE
14 PARTICIPATING IN THIS PROCESS. THIS HAS GOT TO BE THE MOST
15 CAREFULLY GUARDED SITUATION. AND SO I'M ASKING THAT THIS COURT
16 IN ITS ORDER ISSUE PROTECTIONS THAT ALL REPORTS, RECORDS,
17 COMMUNICATIONS BE PLACED UNDER SEAL FOR YOUR EYES AND EARS ONLY.
18 ONE MOMENT, YOUR HONOR. (OFF RECORD WITH CO-COUNSEL) AND
19 LET ME -- AND THANK YOU CO-COUNSEL. THE FACT IS WHEN THE SUBJECT
20 OF AN EVALUATION CAME UP -- AND YOU RECALL THE HISTORY, YOUR
21 HONOR. WE WERE ORIGINALLY COUNSEL IN ANDERSON. WE WERE RELIEVED
22 BY ORDER DATED AUGUST THE 9TH. WE WERE NOT CONSULTED ABOUT THAT
23 EVALUATION ABOUT ANY SUBSTITUTE COUNSEL, AND WE WANT THE RECORD
24 TO SHOW THAT. AND -- AND SO, YOU KNOW, WHETHER OR NOT THESE
25 SAFEGUARDS THAT I'M EXPRESSING POUR OVER INTO THE PROTECTION

1 TOWARD OUR CLIENT'S RIGHTS IN ANDERSON, I HAVE NO CLUE. IT'S
2 KIND OF HARD TO PROTECT HIM IN ONE COUNTY AND NOT ANOTHER, SO I'M
3 ASKING THAT YOU -- IF THEY WANT TO EXPAND IT, LET'S EXPAND SOME
4 PROTECTIONS AS WELL.
5 AND, YOUR HONOR, THE LAST MATTER THAT I WOULD LIKE TO
6 EXPRESS THE COURT'S ATTENTION -- HAVE THE COURT ADDRESS IS THE
7 APPROPRIATENESS OF THE APPOINTMENT OF A GUARDIAN AD LITEM. UNDER
8 THE RULES OF PROFESSIONAL RESPONSIBILITY, IF WE AS COUNSEL HAVE
9 IDENTIFIED OR DETECT AN ISSUE INVOLVING A DISABILITY OF OUR
10 CLIENT, THEN WE -- THEN WE SHOULD UNDER THOSE RULES ASK THAT THE
11 COURT CONSIDER THE APPOINTMENT OF A GUARDIAN AD LITEM. IN THE
12 EVENT THE COURT IS SAYING, "WELL, MR. MAULDIN AND MR. BANNISTER
13 ARE NOT IN FACT MAKING A MOTION," THE GOVERNMENT SAYS, "WE'RE NOT
14 MAKING A MOTION," -- NOBODY'S MAKING A MOTION -- WELL, THEN I
15 BELIEVE THAT THE COURT SHOULD ALSO BE GUIDED BY THOSE RULES. IF
16 THE COURT IS OF THE IMPRESSION THAT OUR CLIENT HAS A DETECTED
17 DISABILITY THAT WOULD WARRANT AN EVALUATION, THEN I THINK YOU
18 SHOULD ALSO APPOINT A GUARDIAN AD LITEM ON HIS BEHALF, AND THEN
19 THE DUTIES AND ROLE OF THAT GUARDIAN AD LITEM WOULD BE UP TO THE
20 COURT TO MAKE THE APPROPRIATE FINDINGS AND WHAT ROLE THAT HE OR
21 SHE MIGHT TAKE FOR THE COURT'S BENEFIT.
22 **THE COURT:** LET ME MAKE A COUPLE OBSERVATIONS AND LET YOU
23 RESPOND TO ME, IF YOU WANT---
24 **MR. MAULDIN:** YES, SIR.
25 **THE COURT:** ---MR. MAULDIN. ONE, IS IT POSSIBLE -- I KNOW

1 YOU WOULDN'T BE A WILLING PARTICIPANT -- BUT TO JUST BRIEFLY LOOK
2 AT IT FROM MY PERSPECTIVE? I'VE GOT A MOTION FROM THE DEFENDANT
3 HIMSELF THROUGH COUNSEL REQUESTING AN EVALUATION.
4 **MR. MAULDIN:** IN THE OTHER COUNTY.
5 **THE COURT:** IN ANDERSON COUNTY. CLEARLY NOT THROUGH YOU OR
6 MR. BANNISTER. AND IT, TO ME, DEFIES LOGIC NOT TO INCLUDE THE
7 COURT ORDERED STATE MENTAL HEALTH REVIEW, BE IT JUST COMPETENCY
8 OR WHATEVER THE EXTENT OF THE PRIOR ORDER WAS, SOUGHT BY THE
9 DEFENSE COUNSEL IN THE OTHER COUNTY. I'M STRUGGLING HOW I CAN
10 JUSTIFY DRAWING A LINE, PARTICULARLY WHEN THE ALLEGATIONS STEM
11 FROM EVENTS ARISING, I BELIEVE, ON THE SAME DAY.
12 **MR. MAULDIN:** WE ACKNOWLEDGE THE AWKWARD -- THE COMMON
13 SENSE TO THAT POSITION, YOUR HONOR.
14 **THE COURT:** THE SECOND THING IS THIS -- AND MAYBE I
15 SHOULDN'T GO HERE, BUT I'M JUST TRYING TO READ THROUGH THE LINES
16 OF WHAT YOU'RE TELLING ME -- IF I FAST FORWARD THIS,
17 HYPOTHETICALLY, TO A TRIAL DATE -- AND SAY THAT MENTAL ISSUES,
18 MENTAL HEALTH STATUS ARE RELEVANT TO SOME DEGREE IN THE TRIAL --
19 I CAN HEAR IT NOW WHEN THE STATE TRIES TO BRING SOMEONE IN.
20 THEY'D BE EATEN UP ON CROSS EXAMINATION. "YOU HAVEN'T TALKED TO
21 HIM." SO YOU WOULD USE THE FAILURE OF A STATE WITNESS AND THE
22 FAILURE OF THE STATE WITNESS' ACCESS TO THE DEFENDANT AS A WEDGE
23 TO THE JURY TO ATTACK THAT WITNESS' CREDIBILITY. DOES THAT MAKE
24 ANY SENSE?
25 **MR. MAULDIN:** WELL, THAT'S A DECISION THAT THE COURT

1 ACTUALLY DOES NOT HAVE BEFORE IT. YOU ARE IN FACT FAST
2 FORWARDING TO A POTENTIAL PROBLEM---
3 **THE COURT:** WELL, I THOUGHT YOU INVITED ME TO BY YOUR
4 COMMENTS.
5 **MR. MAULDIN:** WELL, THE POINT IS, THERE IS A MATTER OF
6 RELIEF -- AND I WOULD SAY -- BEING SOUGHT. I DON'T KNOW REALLY
7 KNOW WHO IT IS BEING SOUGHT BY, BUT THERE IS A MATTER BEFORE THE
8 COURT THAT NEEDS DETERMINATION. WE ENTER AN OBJECTION TO THE
9 EXTENT THAT THIS PROCESS CAN BE USED BY THE GOVERNMENT AS A
10 DISCOVERY TOOL. THAT'S THE OBJECTION. NOW, HOW THEY MIGHT USE
11 IT WILL BE BACK BEFORE YOU, AND AT THAT TIME THOSE DECISIONS WILL
12 BE RULED UPON.
13 **THE COURT:** ALL RIGHT, SIR. I'LL GIVE THE STATE A CHANCE TO
14 RESPOND IF THE STATE WOULD LIKE TO.
15 **MR. ARIAIL:** WELL, I WOULD LIKE TO JUST RECOGNIZE THAT MR.
16 MAULDIN IS CORRECT. I DON'T SEE MY LOGIC AS TWISTED, BUT I DO
17 THINK THAT UNTIL WE REACH THAT STAGE AT SOME LATER POINT WHERE
18 INSANITY OR GUILTY BUT MENTALLY ILL, WHATEVER, WE'RE REALLY
19 TALKING ABOUT TWO ISSUES -- BUT I WOULD JUST REST ON MY PREVIOUS
20 STATEMENT AND JOIN IN -- I JUST SEE IT'S NOT LOGIC. AND I WANT
21 TO MAKE IT CLEAR THOUGH BECAUSE IT MAY BE TWISTED LOGIC BUT IT'S
22 ALSO LEGALLY SOUND, I THINK, OF WHAT WE'RE HEADING FOR. IF THAT
23 ISSUE DOES RAISE ITS HEAD, AS TO INSANITY, WE WILL BE BACK BEFORE
24 THIS COURT ASKING YOU TO GIVE US ACCESS TO AN INDEPENDENT
25 EXAMINATION, SOMEBODY THAT REPRESENTS -- OR WILL WORK WITH THE

1 STATE RATHER THAN THE STATE PSYCHIATRIST, WHO I DEEM TO BE THE
2 COURT'S WITNESS.
3 **THE COURT:** DOES COUNSEL FROM EITHER SIDE HAVE A COPY OF
4 THE RULE -- AND IT'S MY -- AND I DON'T HAVE A COPY OF THE
5 ANDERSON ORDER, BUT I BELIEVE IT COMES UNDER THE STANDARD AND
6 PROVISION IN STATUTE 44-23-410.
7 **MR. MAULDIN:** YES, SIR.
8 **MR. ARIAIL:** YES, SIR.
9 **THE COURT:** I HAVE IT IN FRONT OF ME. WE'LL SIT HERE AND
10 READ IT. BUT DOES THAT STATUTE DIRECT WHERE A COPY OF THE REPORT
11 WILL BE SENT? IS IT JUST TO THE COURT OR IS IT TO COURT AND
12 COUNSEL? I KNOW---
13 **MR. MAULDIN:** I CAN TELL YOU THE CUSTOM IS---
14 **THE COURT:** EVERYBODY GETS IT?
15 **MR. MAULDIN:** YES, SIR. AND THAT IS -- WE ARE ASKING THAT
16 THIS COURT UNDER THESE UNUSUAL CIRCUMSTANCES -- AND DUE TO THE
17 NATURE OF THE CHARGES AGAINST THE DEFENDANT AND DUE TO THE FACT
18 THAT THERE IS REALLY NO MOVING PARTY APPARENTLY -- THAT YOU ASK
19 THAT THAT BE DIRECTED TO YOU FOR YOUR EYES AND EARS ONLY. AND TO
20 THE EXTENT YOU ARE -- WELL, I GUESS YOU ARE CAPABLE BECAUSE
21 YOU'VE GOT JURISDICTION OVER THE CASE. YOU SHOULD PREVENT THE
22 GOVERNMENT -- THE PROSECUTOR IN ONE COUNTY FROM PROVIDING TO A
23 NEIGHBORING PROSECUTOR INFORMATION THAT IS UNDER PROTECTIVE SEAL.
24 YOUR HONOR, AND---
25 **THE COURT:** GO AHEAD.

1 **MR. MAULDIN:** (OFF RECORD WITH CO-COUNSEL) YOUR HONOR,
2 THIS IS A CONSIDERATION. THE SEQUENCE THAT I SEE IN THIS MATTER,
3 AT LEAST IF UNDISTURBED AND UNINTERRUPTED, WOULD BE A TRIAL IN
4 GREENVILLE FOLLOWED BY A TRIAL IN ANDERSON. THAT MAKES THIS SO
5 SIMPLE. AND THANKS TO CO-COUNSEL FOR POINTING OUT THE OBVIOUS TO
6 ME. BY PLACING IT UNDER PROTECTIVE SEAL YOU ARE NOT INTERFERING
7 WITH THE PROCESSES IN ANDERSON BECAUSE THEY'RE NOT GOING TO BE --
8 THEIR CASE WON'T BE TRIED FOR MONTHS LATER. IT PROTECTS
9 GREENVILLE. AND THEN AFTER THE GREENVILLE CASE, IF THEY HAVE A
10 DIFFERENT VIEW AND WISH TO ENTER OBJECTIONS TO IT BEING UNDER
11 SEAL, THEN IT CAN BE RELEASED. SO THERE IS NO HARM DONE THERE.
12 **MR. ARIAIL:** MAY I RESPOND BRIEFLY TO THAT?
13 **THE COURT:** YES, SIR.
14 **MR. ARIAIL:** IF HE'S GOING TO RAISE THE ISSUE OF
15 COMPETENCY, WHICH OBVIOUSLY I THINK HAS BEEN RAISED, THE
16 DEFENDANT HAS RAISED IT DIRECTLY THROUGH HIS APPOINTED COUNSEL.
17 AND TO ME, I HAVE TO AGREE WITH THE COURT. I DON'T KNOW WHERE
18 THE LOGIC IS THAT IT STOPPED AT THE SALUDA RIVER. IF HE'S
19 INCOMPETENT OR THERE IS EVIDENCE OF INCOMPETENCE WHEN HE CROSSED
20 THE SALUDA RIVER, THERE'S EVIDENCE OF INCOMPETENCE ON THE CHARGES
21 ARE THIS SIDE OF THE SALUDA RIVER. THEREFORE, YOU CAN'T SEND A
22 REPORT TO YOU TO JUST LET IT BE DONE IN ANDERSON UNLESS YOU ARE
23 -- WE'RE GOING TO CROSS THE BRIDGE ALSO THAT IF THAT ISSUE IS
24 GOING TO BE RAISED IN GREENVILLE THEN -- IF HE'S GOING TO BE
25 EXAMINED, HE'S GOT TO BE EXAMINED REGARDING THOSE CHARGES ALSO.

1 OTHERWISE, COME FEBRUARY THE 4TH WHEN WE'RE READY TO GO AND ALL OF
2 A SUDDEN INCOMPETENCY POPS UP ON FEBRUARY THE 3RD, THEN WE'RE OUT
3 OF LUCK. YOU CAN RELEASE THE REPORT, BUT IT WOULDN'T APPLY TO
4 ANYTHING EXCEPT GREENVILLE.
5 NOW, I'LL GO THIS FAR AND MAKE IT EASY. I'M NOT INTERESTED
6 IN THIS DISCOVERY STUFF. HE'S ALWAYS PARANOID ABOUT THOSE
7 THINGS. BUT I DON'T CARE ABOUT THAT. WHAT I WANT TO DO IS MAKE
8 SURE MY FEBRUARY 4TH TRIAL DATE IS MET. AND I DON'T NEED
9 DISCOVERY FROM HIM TO PROVE THIS CASE. WHAT I NEED IS NOT TO
10 HAVE A DELAY. IF YOUR HONOR WANTS TO GET A REPORT OF BOTH
11 PARTIES, BOTH CHARGES, KEEP IT SEALED, SIGNED AND DELIVERED, I
12 DON'T CARE ABOUT THAT AS LONG AS ON FEBRUARY THE 3RD I'M NOT GOING
13 TO GET SANDBAGGED OUT OF MY FEBRUARY THE 4TH TRIAL DATE. THAT'S
14 ALL I CARE ABOUT.
15 **MR. MAULDIN:** YOUR HONOR, WHEN I SAY PROTECTIVE SEAL,
16 OBVIOUSLY I AM TALKING ABOUT IN THE PRELIMINARY PROCESSING OF THE
17 INFORMATION WHERE IT COMES BACK TO YOU AND THEY TELL YOU. IF
18 THEY SAY THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL OR
19 INSANE, THEN I DON'T EXPECT YOU TO WAIT UNTIL SUNDAY NIGHT TO
20 TELL THE PROSECUTOR AND ME WHAT -- IN OTHER WORDS, IT WOULD BE
21 DISCLOSED AT THE APPROPRIATE TIME. BUT THE PROBLEM WITH IT IS IF
22 WE DON'T CREATE THAT TYPE OF PROTECTION, THEN DURING THE PROCESS
23 THERE ARE COMMUNICATIONS BACK AND FORTH, THERE ARE MATERIALS
24 PASSED BACK AND FORTH AND IT JUST CREATES A NIGHTMARE.
25 YOU ARE THE ONE ESSENTIALLY WHO IS IN A POSITION OF WANTING

1 THIS INFORMATION. THAT'S AT LEAST THE GOVERNMENT'S POSITION. I
2 ASK YOU TO GET THE INFORMATION YOURSELF, AND THEN WHEN IT IS
3 GATHERED YOU MAKE A DETERMINATION ABOUT WHETHER OR NOT IT SHOULD
4 BE RELEASED TO COUNSEL AND THE CIRCUMSTANCES UNDER WHICH THAT
5 RELEASE WOULD TAKE PLACE.
6 **THE COURT:** I'M GOING TO ASK THE STATE TO PREPARE AN ORDER
7 THAT BASED ON DEFENDANT'S REQUEST THROUGH ANDERSON COUNTY COUNSEL
8 FOR AN EVALUATION THAT THE SAME ISSUES SET FORTH FOR EVALUATION
9 STEMMING FROM THE ANDERSON COUNTY CHARGES WILL LIKEWISE BE
10 CONSIDERED FOR THE GREENVILLE COUNTY CHARGES IN THE SAME
11 EVALUATION. I DIRECT THE DEPARTMENT OF MENTAL HEALTH OR OTHER
12 INDIVIDUAL OR ENTITY RESPONSIBLE FOR THE EVALUATION TO SUBMIT THE
13 MATTER, THE REPORT, DIRECTLY TO ME. AND THAT WOULD BE FOR BOTH
14 COUNTIES. I ASSUME THAT THEY WILL GENERATE ONE REPORT THAT WILL
15 INCLUDE REFERENCE TO BOTH SETS OF CHARGES. AND THEN WE'LL
16 REVISIT THE ISSUE AT THAT TIME AS TO THE MATTER OF DISCLOSURE.
17 I'D LIKE THE PROPOSED ORDER TO BE GIVEN TO MR. MAULDIN AND
18 MR. BANNISTER.
19 THE EVALUATION, I BELIEVE, IS NEXT WEEK, BECAUSE I SIGNED AN
20 ORDER OF TRANSPORTATION. I'M NOT SURE WHICH DAY BUT IT'S FAIRLY
21 -- FAIRLY QUICK.
22 I DON'T KNOW IF ALL OF THAT CAN BE DONE TODAY. IF NOT,
23 THAT'S FINE. IF IT CAN, I'D LIKE TO SIGN IT MONDAY. I WILL BE
24 IN CONWAY HOLDING COURT, AND I WILL TRY TO HAVE MS. PATTERSON
25 KNOW A FAX NUMBER. I CAN SIGN THE ORDER. IT CAN THEN BE GIVEN

1 TO THOSE RESPONSIBLE SO THEY WILL KNOW WHAT THEIR MARCHING ORDERS
2 ARE IN TERMS OF THE EVALUATION.
3 ANYTHING FURTHER ON THIS MATTER AT THIS TIME?
4 **MR. ARIAIL:** I JUST WONDER IF WE NEED TO ADVISE THE PARTIES
5 IN ANDERSON.
6 **THE COURT:** WE'LL SEND THEM A COPY OF THE ORDER.
7 **MR. ARIAIL:** OKAY. THANK YOU.
8 **MR. MAULDIN:** AS TO A GUARDIAN AD LITEM, YOUR HONOR?
9 **THE COURT:** I DECLINE TO DO THAT AT THIS TIME. IT'S
10 WITHOUT PREJUDICE. IF -- I SEE NO BASIS TO APPOINT A GUARDIAN AD
11 LITEM AT THIS TIME. I DO NOT BELIEVE ISSUING AN ORDER FOR THIS
12 EVALUATION EITHER IN ANDERSON AND/OR GREENVILLE NECESSARILY GIVES
13 RISE TO THE APPOINTMENT OF A GUARDIAN.
14 **MR. MAULDIN:** ALL RIGHT, SIR.
15 **THE COURT:** IF I BELIEVE ONE IS NECESSARY AT SOME POINT IN
16 THE PROCEEDINGS, I CAN DO THAT SUA SPONTE. IF YOU BELIEVE THAT
17 ONE IS NECESSARY, YOU CAN FILE AN APPROPRIATE MOTION AND SUBMIT
18 YOUR SUPPORTING LEGAL AUTHORITY.
19 **MR. MAULDIN:** YES, SIR.
20 **THE COURT:** THANK YOU. THAT CONCLUDES THIS MATTER.
21 -----END OF REQUESTED TRANSCRIPT OF RECORD[a1]-----
22
23
24
25

CERTIFICATE

I, THE UNDERSIGNED, DAWN V. KOFFSKEY, OFFICIAL COURT REPORTER FOR THE 13TH 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 GREENVILLE COUNTY, SOUTH CAROLINA, ON THE 21st DAY OF SEPTEMBER 2001.

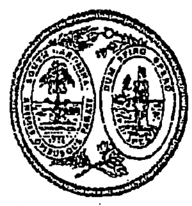
I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JANUARY 3, 2007

DAWN V. KOFFSKEY
COURT REPORTER

3603

State of South Carolina
Solicitor, Thirteenth Judicial Circuit



Telephone: 864-467-8282
Telefax: 864-467-8582

Greenville County Courthouse
305 E. North Street, Suite 325
Greenville, South Carolina 29601-2185

Solicitor
Robert M. Ariail

September 6, 2001

The Honorable John W. Kittredge
Circuit Court
305 E. North St., Suite 213
Greenville, S.C. 29601

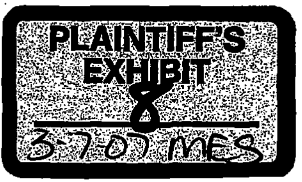
Re: The State vs. John Richard Wood

Dear Judge Kittredge:

I am in receipt of a proposed Consent Order between Bruce Byrholdt, attorney for the defendant in Anderson, and the Solicitor in Anderson, Druanne White. This proposed Order directs the examination of the defendant by the Department of Mental Health pursuant to Section 44-23-410(2), Section 17-24-20 (a), Code of Laws, South Carolina 1976 as amended, and pursuant to the McNaughten test. At present, this Order is limited to evaluation solely to those charges that have been brought against the Defendant in Anderson County. The bifurcation of the trial of these respective offenses has produced yet another complication.

Realistically, if the Defendant is either incompetent to stand trial or insane as it relates to those charges which occurred in Anderson County, he is likely to be similarly situated as it relates to those charges which occurred in Greenville County. Also, the examiners at the Department of Mental Health will likely include as part of the evaluation review of the Defendant's mental state at the time he committed the crimes in Anderson County as well as those that occurred in Greenville County as they are intrinsically related to one another. Accordingly, the examiners report will likely impact and reflect upon the Defendant's charges here in Greenville. If the Department of Mental Health limits their report of the evaluation exclusively to the Anderson charges, numerous complications could arise.

This presents two concerns for my office, which I would like to bring to the Court's attention. First, if the Defendant is evaluated for his competency and sanity as it relates to the Anderson charges, and this evaluation does not specifically include a request for evaluation on the Greenville charges, the Court will nonetheless have to have him evaluated again as it relates to the Greenville charges. §44-23-410(2) specifically requires the Court to submit the Defendant to evaluation if there is any evidence, which suggests to the Court that the Defendant might be incompetent. The same evidence, which prompts the Court to consider evaluation now, is likely to still be of concern in the future.



Moreover, a second duplicitous evaluation would only result in unnecessary delay. Especially in that the Department of Mental Health examiners would likely cover the Defendant's mental condition at the time of the Greenville charges in the evaluation of the Anderson charges as explained above. Furthermore, the most recent information provided to this Office is that the Department of Mental Health is currently scheduling evaluations, which are requested now, for appointments in the end of November to early December. Also, evaluations for persons charged with homicides are usually more lengthy and the number of available evaluation appointments is far more limited. Thus, it is very possible, that this evaluation, and even more probable that a second evaluation, would likely be delayed beyond the anticipated February trial date.

I am also concerned about the possibility for inconsistent evaluations if two evaluations are ordered. The resulting trial complications would be catastrophic if both the defense and State called separate Department of Mental Health examiners as part of their case.

I am not requesting or moving in any way for an examination, as §44-23-410(2) only empowers the Court to order such an evaluation. However, to avoid any type of delay, I would suggest that the Court expand its order to include the Defendant's mental status as it relates to the Greenville charges as well. I would further respectfully submit that the Court include in its Order, a specific date by which the examination should be completed and explanation for the exigency of circumstances.

Thank you for your consideration of these issues.

Yours very truly,

Robert M. Ariail
Solicitor, Thirteenth Judicial Circuit

cc: John Mauldin

3605

DEFENDER CORPORATION OF GREENVILLE COUNTY, INC.
Greenville County Courthouse
GREENVILLE, SOUTH CAROLINA 29601

John I. Mauldin
Public Defender

TEL (864) 467-8522
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September 7, 2001

Hand delivered

The Honorable John W. Kittredge
Greenville County Courthouse, Suite 213
305 E. North Street
Greenville, SC 29601

Re: State vs. John Richard Wood

Dear Judge Kittredge:

This morning, a copy of a letter addressed to you from the Solicitor dated Sept 6th was hand delivered to my office by someone from the Solicitor's office. I request that you schedule a hearing at the first available time so that this matter may be properly considered. Furthermore, I specifically request that any Court Order regarding the evaluation of my client, whether arising from the Anderson or Greenville charges, be held in abeyance until a hearing can be held and all parties to the action in both counties be given the opportunity to be heard.

Yours very truly,

John I. Mauldin

JIM:fg

cc: Robert M. Ariail, Solicitor
Druann White, Solicitor
Jim Bannister, Esquire
Bruce Byrholdt, Esquire

h:\wood\jwk-13

9-13-01

> Clerk of Court
Paul Wickinsimmer

From John Richard Wood
DOB
S

I WouLD Like to request the Court Order a 30 phsc eveluation Columbia and also I request the Court to Appoint new Counsel in my Case as i feel there is earreckensiable difference of opions that can not Be worked out also I ask the Court not to make any decsions concerning wich case will Be tried first until an eveluation is Complete

John Richard Wood

PLAINTIFF'S EXHIBIT 10
3-7-07 MES

3607

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

JOHN W. KITTREDGE
JUDGE

GREENVILLE COUNTY COURTHOUSE
SUITE 213, 305 EAST NORTH STREET
GREENVILLE, SOUTH CAROLINA 29601
Administrative Assistant: Susan B. Patterson
PHONE: (864)467-8593
FAX: (864)467-8596

MEMORANDUM

TO: Robert M. Ariail, Solicitor
John I. Mauldin, Public Defender

FROM: Judge John W. Kittredge

RE: State v. Wood

DATE: September 14, 2001

Mr. Mauldin wants a hearing on the mental evaluation of his client. The hearing on this issue is scheduled for Friday September 21 in courtroom #2 at 10:30. If counsel wants any other matters or motions addressed, that would be fine as long as you provide me advance notice. Thanks

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT

THE STATE	)	
	)	
VS.	)	ORDER OF COMPETENCY EVALUATION AND
	)	CRIMINAL RESPONSIBILITY
JOHN RICHARD WOOD	)	
DEFENDANT	)	
	)	

On August 4, 2001, pursuant to and with the consent of counsel, I ordered that the defendant submit to an evaluation for competency and criminal responsibility as it relates to his charges in Anderson County (copy of order is attached). This defendant is also charged with criminal violations in Greenville County which arose on the same date as the Anderson charges. The Greenville County charges are Murder, and Possession of a firearm during the commission of a violent crime.

This matter comes before me today to determine if the Greenville County charges should be included in any evaluation conducted as to the Anderson County charges. The defendant was present with his counsel of record, John Mauldin and Bill Bannister. The State was represented by Solicitor Robert M. Ariail and Deputy Solicitor, Betty C. Strom.

Upon hearing arguments of counsel, I hereby find that based upon the defendant's consent, through his Anderson County counsel, for an evaluation, that the same issues set forth therein would likewise be considered with regards to the Greenville County charges.

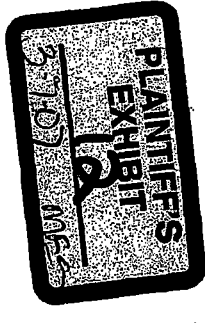
THEREFORE, IT IS ORDERED that the defendant shall be:

(a) Examined and observed at the appropriate facility of the South Carolina Department of Mental Health for a period not to exceed fifteen (15) days relative to his mental capacity to stand trial. (Section 44-23-410 (1) or Section 44-23-410 (2), Code of laws of South Carolina, 1976

And shall be:

(b) Examined as aforesaid to determine whether or not the above-named defendant is criminally responsible pursuant to the McNaughten test for his actions on or about December 6 , 2000, WHICH WOULD INCLUDE CRIMES COMMITTED IN GREENVILLE COUNTY AND ANDERSON COUNTY (emphasis added).

And shall be:



(c) If found responsible pursuant to the McNaughten test, examined as aforesaid to determine whether or not, because of mental disease or defect, the defendant lacked sufficient capacity to conform his conduct to the requirements of the law. (Section 17-24-20(A), Code of Laws of South Carolina, 1976), AS IT RELATES TO GREENVILLE COUNTY AND ANDERSON COUNTY CHARGES.

The ordered examination is presently scheduled for September 25, 2001. The defendant is to be transported to arrive at the examining facility at the time established by confirmed appointment with the staff of the examining facility.

If the examination and observation of a patient committed to the custody of the Department of Mental Health have not been concluded at the end of fifteen (15) days, the defendant may be kept in the custody of the said Department of Mental health for an additional period not to exceed fifteen (15) days, provided the superintendent of the facility so requests in writing the additional period of observance and examination.

JK

1

3609

Within five (5) days of the examination or at the conclusion of the observation period, a written report shall be made to the court pursuant to Section 44-23-420. Code of Laws of South Carolina, 1976, as amended.

If, in the judgment of the designated examiners or the superintendent of the facility the defendant is presently mentally ill and in need of hospitalization, then the said defendant shall be retained in the custody of the Department of Mental health until such time as a hearing, required and provided by Section 44-23-430, Code of Laws of South Carolina, 1976, as amended, may be conducted by this court.

The defendant continues under the jurisdiction of this court. FURTHERMORE, ANY REPORT OR RESULTS REGARDING THIS EVALUATION SHALL BE PROVIDED EXCLUSIVELY TO THE COURT AT THE BELOW ADDRESS. THE REPORT SHALL NOT BE PROVIDED TO ANY COUNSEL OF RECORD OR TO THE STATE UNTIL SUCH TIME AS THE COURT SHALL DEEM IT APPROPRIATE.

AND IT IS SO ORDERED.

Greenville, South Carolina

This 21 day of September, 2001

John W. Kittredge
Presiding Judge
Greenville County Courthouse
305 E. North Street
Suite 213
Greenville, SC 29601

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON)

THE STATE OF SOUTH CAROLINA,)
-VS-)
JOHN RICHARD WOOD, DEFENDANT.)

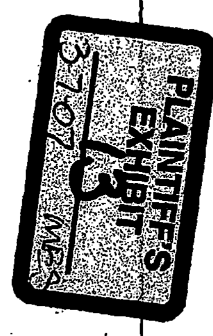
ORDER FOR COMPETENCY EVALUATION (AND CRIMINAL RESPONSIBILITY)

This matter comes before me on motion of Druanne D. White for an order requiring the Defendant, John Richard Wood, charged with Assault With Intent to Kill (6 counts), Resisting Arrest With Use or Threat of Use of Deadly Weapon, Possession of a Firearm During Commission of a Violent Crime (2 counts), Assault and Battery With Intent to Kill (3 counts), and Armed Robbery to submit to a psychiatric examination.

I have considered the showing made in respect to the motion for such an order and am of the opinion that the Defendant should be so examined pursuant to the statutory provisions of this State.

THEREFORE, IT IS ORDERED that the Defendant shall be:

(a) Examined and observed at the appropriate facility of the South Carolina Department of Mental Health for a period not to exceed fifteen (15) days relative to his mental capacity to stand trial. (Section 44-23-410 (1) or Section 44-23-410 (2), Code of Laws of South Carolina, 1976)



And shall be:

(b) Examined as aforesaid to determine whether or not the above-named Defendant is criminally responsible pursuant to the McNaughten test for his actions on or about December 6, 2000.

GENERAL SESSIONS
COMMON PLEAS AND
2001 SEP 11 P 2:19
ANDERSON SC
FILED-CLERK'S OFFICE

JK

And shall be:

(c) If found responsible pursuant to the McNaughten test, examined as aforesaid to determine whether or not, because of mental disease or defect, the Defendant lacked sufficient capacity to conform his conduct to the requirements of the law. (Section 17-24-20(A), Code of Laws of South Carolina, 1976)

The ordered examination shall be requested by the solicitor and scheduled by the examining facility as soon as possible. The Defendant is to be transported to arrive at the examining facility at the time established by confirmed appointment with the staff of the examining facility.

The Defendant continues under the jurisdiction of this Court. If the Defendant is currently free on bond or personal recognizance, such bail is hereby revoked to the extent necessary to carry out the provisions of this Order.

If the examination and observation of a patient committed to the custody of the Department of Mental Health have not been concluded at the end of fifteen (15) days, the Defendant may be kept in the custody of the said Department of Mental Health for an additional period not to exceed fifteen (15) days, provided the superintendent of the facility so requests in writing the additional period of observation and examination.

Within five (5) days of the examination or at the conclusion of the observation period, a written report shall be made to the court pursuant to Section 44-23-420, Code of Laws of South Carolina, 1976, as amended.

JK

B

SEP-21-01 02:01 PM

If, in the judgment of the designated examiners or the superintendent of the facility, the Defendant is presently mentally ill and in need of hospitalization, then the said Defendant shall be retained in the custody of the Department of Mental Health until such time as a hearing, required and provided by Section 44-23-430, Code of Laws of South Carolina, 1976, as amended, may be conducted by this Court.

AND IT IS SO ORDERED.

Anderson, South Carolina

This ~~30th~~ 4 day of ~~August~~ August, 2001.

JOHN W. KITTREDGE
Judge

Judge's Signature

I SO MOVE OR CONSENT:

Druanne D. White
Solicitor

Solicitor's Signature

SCCA 221 (September 1987)

I SO MOVE OR CONSENT:

Bruce Byrholdt
Attorney for the Defendant

Post Office Box 2506
Address

Anderson, S.C. 29622
City, State, Zip

Attorney for Defendant
Signature

John Richard Wood
Defendant

Defendant's Signature

CHRISTIAN HIGH SCHOOL RECORD *Calvary Baptist Church School*

3613

Name *John Richard Wood* Place of Birth ______ Birth Date ______

Parent or Guardian ______ Entered from ______ Date ______

Address ______ Church ______

Left ______ Date ______ Returned ______ Date ______

GRADUATION DATE *5/24/85* RANK *1* IN CLASS OF *6*

COURSE *College Prep* GR. AV. *96.260*

Subject	Grade 9 (81-82)	Grade 10 (82-83)	Grade 11 (83-84)	Grade 12 (84-85)	Credits
Bible	97	99	98	98	4
English	98	97	95	96	4
Speech					
Literature	94	93			2
French					
German					
Latin					
Spanish					
Greek				91	1
Algebra *I*	97				1
Geometry		98			1
Sr. Math.					
Trigonometry					
Algebra II			96		1
Biology			98		1
Chemistry			97		1
Gen. Science					
Physics					
Physiology					
Psychology					
Physical Science	97				1
Economics					
Government *+ Civics*			*	99 (½ yr)	½
Modern History					
U.S. History			* 99 (½ yr)		½
World History	97				1
Geography					
Bookkeeping					
Bus. Math.					
Shorthand					
Typing			91		1
Art					
Clothing					
Foods					
Mech. Drawing					
Shop					
Chorus					
Choir					
Music					
Band					
Phys. Education			99		1
Driver Education					
Semester Credits					
Total Credits	6	4	8	3	21
Days Absent					
Periods Tardy					

96.6667 / 96.7500 / 96.6250 / 95.0000

GPA — 1985 96.2604

HONORS OR AWARDS

Mrs. Lynn Evans
Secretary 2-13-07

GRADE EXPLANATION — GD. PTS.

A – Superior 4
B – Above Average 3
C – Average 2
D – Below Average-Passing 1
F – Failure 0
0 – Circled Grade-No Credit

Signature *Mrs. Peggy Walker*
Date *7/1/85*

FORM NO. 100A

CREDITS SENT TO
PLACE DATE

OUTSIDE CREDITS
SUBJECT PLACE DATE

PLAINTIFF'S EXHIBIT *D14* *3807 MES*

3614

Wood
LAST NAME

CHRISTIAN SCHOOL ELEMENTARY AND JUNIOR HIGH SCHOLASTIC DATA

Name John Richard Wood School CBCS-Correspondence

Entered 6-18-82 Left Returned Graduated

TERM OR YEAR ENDING →	79/80	80/81								
↓ SUBJECT GRADE →	5	6								
Bible	S	S								
Reading										
Phonics										
English	95	97								
Spelling	93	93								
Penmanship										
Literature	95	92								
Speech										
Mathematics	95	96								
Science	91	97								
Health										
Social Studies	92	94								
History										
Geography										
Government										
Homemaking										
Industrial Arts										
General Music										
Band										
Choir										
Orchestra										
Art										
Physical Education										
Effort										
Conduct										
Days Absent										
Times Tardy										
Promoted										
Promoted on Trial										
To Repeat										
TEACHER'S SIGNATURE →										

GRADE EXPLANATION

A – Superior
B – Good
C – Average
D – Below Average
E or F – Unsatisfactory Failing

PUBLISHED BY AND AVAILABLE FROM
THE NATIONAL UNION OF CHRISTIAN SCHOOLS

MISSIONARY ACCELERATED CHRISTIAN EDUCATION
Box 16161-Mobile, Alabama 36616 USA

STUDENT CUMULATIVE RECORD (Grades K-8)

3615

	Last Name	First	Middle	Address	Birthdate Mo. Day Year	Sex
Pupil	Wood	John	Richard	Indiana		
Father or Guardian	Wood	Gary	R.	Indiana	Occupation: Missionary	
Mother or Guardian	Wood	Ruby	M.	Indiana	Occupation:	

TESTS

Gr.	Mo.	Day	Year	Test		Ch. Age	Men. Age	Gr. Plac.
6	8	4	80	Elem	California Achiev	13		7.4

ATTENDANCE AND SCHOLARSHIP

Year						80	81	82	83
Grade	K	1	2	3	4	5	6	7	8
Days on Roll									
Days Present									
Days Absent									
Tardies									
Conduct									
Bible						S	S		
Reading									
Mathematics						95	96		
English						95	97		
Spelling						93	93		
Social Studies						92	94		
Science						91	97		
Phy. Ed.									
Writing									
Art									
Music									
Poetry									
Health-Safety									
Piano									
Inst. (									
Voice									
Organ									
English Lit						95	92		

INTELLIGENCE TESTS

Mo.	Day	Yr.	Test		Ch. Age	Men. Age	IQ

PHYSICAL RECORD

	Test Date	Defect	Correction
Eyes			
Ears			
Teeth			

Immunizations

Date	Type

Height-Weight

Gr.	1	2	3	4	5	6	7	8
Age								
Hgt.								
Wgt.								

Grade Code: A. Excellent, B. Above Average, C. Average, D. Poor, F. Failure
S = Satisfactory; U = Unsatisfactory

Remarks:

SCHOOLS ATTENDED

School(s)	School Address	Grade(s)	Date Entered	Date Left	Principal's Signature (at time of student's leaving)	Date
MACE	P.O. Box 16167	5-6	4-9-79	6-18-81	[signature]	6-18-81

REQUEST FOR TRANSFER OF SCHOOL RECORDS

AUG 31 1981

Aug 13, 1981
Date

I hereby give permission for the release of:

John Richard Wood
Student's Name

school record* to be sent to: TABERNACLE CHRISTIAN SCHOOLS
3931 White Horse Rd.
Greenville, SC 29611

Ruby M. Wood
Parent's or Guardian's Signature

*transcript of grades, attendance, achievement, & I. Q. test scores

3616

3617

ACHIEVEMENT TEST RECORD

NAME OF TEST		DATE	GRADE	CHRON AGE	TEST RESULTS SCORE	M.A.	GRADE EQUIV.	PERCENTILE RANK
CAT		Spring 1981	6	13			7.4	Grade placement
				(forwarded by M.A.C. P.O. Box 16167 Mobile Alabama 36616)				

MENTAL TEST RECORD

NAME OF TEST	DATE	GRADE	CHRON AGE	MEN[illegible] AG[illegible]

PERSONALITY AND APTITUDE TEST RECORD

NAME OF TEST	DATE	GRADE	CHRON AGE	TE[illegible] SCO[illegible]

SOCIAL - PERSONAL CHARACTERISTICS

	P[illegible]

DTP (Diphtheria-Tetanus-Pertussis)

Date	Physician
7/26/67	DPT
9/30/67	DTP
11/29/67	DTP
[illegible]	—
6/8/73	—

Td (Tetanus Diphtheria)

Date	Physician
6/10/77	TD.

ORAL POLIO

Date	Physician
7/26/67	—
9/30/67	—
[illegible]	—
6/8/73	—

MEASLES (Rubeola)

Date	Physician
8/22/68	

RUBELLA (German Measles)

Date	Physician
8/22/68	

MUMPS

Date	Physician
8/22/68	

OTHER (E.g. IPV)

Date	Physician
6/1/72	Sm Px

3618

3619

Recommended Schedule for Immunization *

________	2 mo.	DTP, Polio
________	4 mo.	DTP, Polio
________	6 mo.	DTP
________	15 mo.	Measles, Rubella, Mumps
________	18 mo.	DTP, Polio
________	4-6 years	DTP, Polio
________	Td Booster every 10 years	

* Recommendations can change. Check with your doctor or health department.

SF 23214

IMMUNIZATION RECORD

John Richard Wood — birthday

Name — Birth Date

Gary & Ruby Wood

Parent's Name

A record of immunization is required by law for school entrance and is necessary in case of accident, employment, etc. Be sure to complete any series of immunizations once it is started. One or two doses of a series will not give adequate protection.

INDIANA STATE BOARD OF HEALTH
INDIANA STATE MEDICAL ASSOCIATION

PERMANENT RECORD • RETAIN THIS DOCUMENT

Calvary Baptist Christian School

upon recommendation of the faculty and by authority
of the board of directors awards

John Richard Wood

this

Diploma

in recognition of the completion of the prescribed course of study.

In Testimony Whereof, the signatures of the duly authorized
officers are hereunto affixed at New Bern, North Carolina,
May, 1985.

Administrator

Board Member

Board Member

3621

PROB 14E (3/64)

UNITED STATES DISTRICT COURT
FEDERAL PROBATION SYSTEM

REQUEST FOR EDUCATIONAL DATA

ADDRESS OF PROBATION OFFICE	TELEPHONE NUMBER
P. O. Box 10329 Greenville, SC 29603	(864)235-8527

Calvary Baptist Church
Attn: Steve Cothrell, Administrator
Post Office Box 1089
New Bern, NC 28563

DATE October 21, 1997

Dear Sir:
The person identified below is under investigation by this office. The information requested is needed to complete this investigation. Your cooperation will be greatly appreciated.
Please return this form within three days in the enclosed envelope. No postage is necessary.

Brian T. Bowen
SIGNATURE OF PROBATION OFFICER

NAME OF PERSON BEING INVESTIGATED (Last,First,Middle)
Wood, John Richard

ADDRESS OF PERSON BEING INVESTIGATED
2024 Breazeale Road
Anderson, SC 29621

DATE OF BIRTH	PLACE OF BIRTH	SEX	RACE
	Indianapolis, IN	Male	Caucasian

FATHER'S NAME	MOTHER'S NAME
Gary Wood	Ruby (Berry) Wood

SOCIAL SECURITY NUMBER

Mr. Wood reported that he received a high school diploma in 1985 from your school. He indicated that this diploma was obtained through correspondence/home study. BTB

INFORMATION DESIRED

NAME OF SCHOOL	DATE ENTERED	GRADE ENTERED	DATE LEFT	GRADE COMPLETED	GRADE LEFT
Calvary Baptist Church School	fall / 79	9th	Spring / 85	12	

REASON LEFT SCHOOL
Graduated

PLEASE LIST THIS PERSON'S GENERAL RATING AS A STUDENT (CHECK APPLICABLE RATINGS)

ITEM	GOOD	AVERAGE	POOR	ITEM	GOOD	AVERAGE	POOR
SCHOLASTIC STANDING	✓			LEADERSHIP			
ATTTENDANCE				RELIABILITY			
BEHAVIOR				COURTESY			
COOPERATIVENESS				ABILITY TO GET ALONG WITH STUDENTS			

DID THE STUDENT EVER TAKE ANY MENTAL OR INTELLIGENCE EXAMINATIONS? ? ☐ YES ☐ NO

IF "YES" PLEASE SPECIFY TYPE, DATE, AND RATING

ADDITIONAL COMMENTS INCLUDING HANDICAPS, OUTSTANDING ABILITIES, REPETITION OF GRADES, EXTRA CURRICULAR ACTIVITIES, ETC.

This student attended via correspondence/Home Study
Parents were missionaries.

SIGNATURE OF OFFICIAL	TITLE	DATE
Steph. T. Cothrell	Administrator	10/23/97

IF ADDITIONAL SPACE IS REQUIRED, USE REVERSE SIDE

AUTHORIZATION FOR RELEASE OF RECORDS

RE: John Richard Wood DOB: birthday SSN: SS#

To: Calvary Baptist Church School

Address: P.O. Box 1089, New Bern, NC 28563

Phone: (252) 633-5410

I, John R. Wood, hereby request and authorize the Calvary Baptist Church School to release any and all records, reports, or information concerning myself to my attorney, Jim Brown, or any of its agents/ and or employees to inspect the above captioned records and to make or receive copies of any documents found therein. I understand these records may contain information about drug or alcohol abuse.

John R. Wood

Person Authorizing Release

Please forward all correspondence to:

Law Offices of Jim Brown, P.A.
P.O. Box 592
Beaufort, SC 29901-0592
Phone: (843) 470-0003

If there are any questions concerning the above-mentioned request, please contact this office immediately so that we can supply whatever information is needed.

SWORN TO BEFORE ME THIS 5th day of February, 2007

[signature]

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: Oct. 13, 2013

3623

Right to Revocation:I have the right to revoke this release authorization at any time. The revocation must be in writing and be delivered to James A. Brown, Jr., Esquire/Law Offices of Jim Brown, P.A. The revocation will not apply to records and information that have already been provided.

Expiration: Unless earlier revoked, this authorization will expire upon the termination of the representation by James A. Brown, Jr, Esquire/Law Offices of Jim Brown, P.A.

Patient Rights: I have the right to inspect or copy the information to be disclosed, to inspect and amend my medical records, and to have an accounting of the use and disclosure of my health information and the re-disclosed information may not be protected by federal confidentiality rules.

PHOTOCOPIES OF THE RELEASE ARE VALID AND MAY BE USED IN LIEU OF THE ORIGINAL.

Date: 2/5/07

By: John R. Wood

Authorization For Release of Medical Information
(HIPAA COMPLIANT)

Patient Name.: John Richard Wood

Patient Address: Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472

Patient Phone No.: (803) 896-3700 Social Security No.: SS#

Date of Birth: birthday_ Date of Accident: N/A

The following health provider is authorized to provide medical records and disclose patient identifiable health information:

Name: Calvary Baptist Church School

Address: P.O. Box 1089, New Bern, NC 28563

The above-named health provider is authorized to discuss my medical treatment and health information with my attorney, James A. Brown, Jr., Esquire and/or the agents of the Law Offices of Jim Brown, P.A.

The scope of the health information to be provided or disclosed is as follows:

All medical records for all dates of service to the present for all medical conditions and treatment from the above-named health care provider, as well as all medical records for all dates of service for all medical conditions and treatment from other health care providers and facilities. All billing records regarding the above referenced date(s) of service. All medical release authorizations, notes, memoranda, correspondence, claim forms, reports, and insurance documents regarding the above referenced date(s) of service.

The health information is authorized to be provided to:

Law Office of Jim Brown, P.A.
1111 Bay Street
P.O. Box 592
Beaufort, SC 29901-0592

My attorney (or his agents) is authorized to act on my behalf regarding all insurance and legal matters
The patient identifiable health information received pursuant to this release authorization is to be used for the following purpose:

Limited to the purposes consistent with the case no. 2005-CP-23-4737
Any re-release inconsistent with the purposes is not allowed.

3625

RECEIVED FEB 1 6 2007

Law Offices of Jim Brown, P.A.
1111 Bay Street • P.O. Box 592
Beaufort, SC 29901-0592
Phone: (843) 470-0003 • Fax: (843) 470-0004
jim.brown@scbar.org

Sent 2-13-07
Per your request.

February 7, 2007

Calvary Baptist Church School
P.O. Box 1089
New Bern, NC 28563

Re: School Records involving John Richard Wood

To Whom it May Concern:

I am writing to request information regarding the above mentioned individual. To begin, I represent Mr. Wood regarding a pending legal matter in South Carolina. In that regard, I am requesting any and all school records, test scores, medical records and the like regarding Mr. Wood. I am enclosing with this letter two releases which include Mr. Wood's identifying information. I apologize that I can not provide an accurate indication of his dates of attendance.

Mr. Wood's date of birth is April 8, 1967 and his social security number is SS# Further, he is a white male. If you need any other information, please let me know. Obviously, I will gladly pay any reasonable expense related to this request. Finally, my co-counsel in this matter is Mr. Bill Godfrey of Greenville and my investigator is Carolyn Graham of the McNair-Graham Investigative Firm in Columbia. Please direct a response to my office. Thank you for your assistance.

Sincerely,

James A. Brown, Jr.
Jim Brown

w/ enclosures

cc: E.P. Bill Godfrey, Esquire, w/o enclosures

3626

South Carolina Department of Health and Environmental Control

South Carolina Certificate of Medical Exemption

(From Immunization)

Exemption Valid Until 12/30/81 Month/Day/Year

Section I — Pupil Information

Pupil's Last Name	First Name	Middle Name	Birthdate
Wood	John	R.	[illegible]

Parent's Name	Address	Telephone
Gary R. Wood	A 14 Kampus Kourt	268-6901

Section II — Important Information For Physicians and School Officials

Pursuant to Section 44-29-40 of the South Carolina Code of Laws, 1976, Department of Health and Environmental Control Regulation 61-8, 1980, "a SOUTH CAROLINA CERTIFICATE OF MEDICAL EXEMPTION, signed by an individual licensed to practice medicine, surgery, or osteopathy, may be granted to a child when the physician has determined that a particular vaccine(s) required by this Regulation is not advisable for the child. When it is determined that this particular vaccine(s) is no longer contraindicated, the child will be required to have the vaccine(s). A SOUTH CAROLINA CERTIFICATE OF MEDICAL EXEMPTION may be granted to a child (at time of school entry) who has received at least one DTP/DT/Td, one TOPV, measles and rubella vaccines provided the recommended time interval between the first and second doses or second and booster doses of DTP/DT/Td and TOPV has not elapsed. This type of medical exemption is temporary and shall not exceed 90 days for the interval between the first and second doses of DTP/DT/Td and TOPV and 180 days for the interval between the second and booster doses of DTP/DT/Td and TOPV.

Section III — Immunization Information

Check ☑ the number of doses of DTP/DT/Td and TOPV this child has received and enter the dates when Measles, Mumps, and Rubella were received. For DTP/DT/Td and TOPV only enter the dates the last dose of each vaccine was received.

VACCINES	Doses Received 1	2	3	4	5+	None	Date Last Dose Administered
DIPHTHERIA, TETANUS, PERTUSSIS *Any combination of DTP/DT/Td*	☑	☐	☐	☐	☐	☐	11-3-81
POLIO (TOPV) *Trivalent, Oral Polio Vaccine*	☑	☐	☐	☐	☐	☐	11-3-81
MEASLES *Rubeola or Red Measles*	☑					☐	11-3-81
RUBELLA* *3-Day or German Measles*	☑					☐	11-3-81
MUMPS *Recommended*	☑					☐	11-3-81

**Rubella vaccine is not required of female pupils after onset of puberty.*

Section IV — Physician's Certification of Immunization Status and/or Exemption

I certify that the immunization information entered in SECTION III above is accurate based upon my health records for this child. Additionally, I certify that a MEDICAL REASON(S) exists whereby this child should be exempt from receiving the vaccine(s) checked ☑ below:
(Check ☑ the vaccine(s) this pupil should not receive because of MEDICAL REASON(S). Indicate whether the MEDICAL REASON(S) is expected to be "Permanent" or "Temporary". If "Temporary" indicate approximate date the MEDICAL REASON(S) will no longer be valid.)

Vaccines	Anticipated Duration of Medical Reason(s)		
☑ DTP/DT/TD Vaccine	☐ Permanent	☑ Temporary	Date no longer valid: 12-30-81
☑ TOPV —(*Trivalent Oral Polio Vaccine*)	☐ Permanent	☑ Temporary	Date no longer valid: 12-30-81
☐ Measles — (*Rubeola*)	☐ Permanent	☐ Temporary	Date no longer valid:
☐ Rubella — (*German Measles*)	☐ Permanent	☐ Temporary	Date no longer valid:

☐ *(FOR TRANSFER STUDENTS ONLY)* 30-Day Exemption from Receiving any Vaccines While Awaiting Arrival of Medical Records From Former Area of Residence.

T. P. VALLEY, M.D.
Type or Print Physician's Name

T.P. Valley, M.D.
Physician's Signature or Stamp

242-6160
Physician's Telephone

11-3-81
Date Certification Issued

1 **ORIGINAL** Record for Parent, Legal Guardian, or person *in loco parentis*. 2 **COPY** Health Department Record 3 **COPY** School Record

DHEC 1127 (4-80)

3627

0.7

PIAT Peabody Individual Achievement Test

INDIVIDUAL RECORD BOOKLET

by Lloyd M. Dunn, Ph.D. and Frederick C. Markwardt, Jr., Ph.D.

NAME Wood, John (last) (first) (middle initial) SEX: (M) F (circle)

SCHOOL ____ (or agency or address)

TEACHER ____ (or counselor or supervisor)

EXAMINER ____

TESTING TIME ____ (min.) GRADE 8 (or phone) CODE ____ (or race or descent)

AGE DATA

[illegible]

TEST SCORES

NORMS RECORDED (Check one) ....▶ ☐ Age ☐ Grade

SUBTESTS	Raw Scores	Equivalents	Percentile Ranks	Standard Scores
Mathematics	51	7.4		
Reading Recognition	65	10.0		
Reading Comprehension	52	7.5		
Spelling	45	4.9		
General Information	51	7.0		
Total Test	264	7.1		

Circle the equivalent and/or percentile rank scores plotted on the profile.

INTELLIGENCE TEST DATA

[illegible]

Adjusted M.A.	Chronological Age	Grade Placement	Mathematics	Reading Recognition	Reading Comprehension	Spelling	General Information	Total Test	Percentile Rank	I.Q. Score
	18-2	13.0								
	17-8	12.5								
	17-2	12.0							99	133
	16-8	11.5							98	130
	16-2	11.0							96	127
	15-8	10.5							94	124
	15-2	10.0							92	121
	14-8	9.5							88	118
	14-2	9.0							84	115
	13-8	8.5							79	112
	13-2	8.0							73	109
	12-8	7.5							66	106
	12-2	7.0							58	103
	11-8	6.5							50	100
	11-2	6.0							42	97
	10-8	5.5							34	94
	10-2	5.0							27	91
	9-8	4.5							21	88
	9-2	4.0							16	85
	8-8	3.5							12	82
	8-2	3.0							8	79
	7-8	2.5							6	76
	7-2	2.0							4	73
	6-8	1.5							2	70
	6-2	1.0							1	67
	5-8	0.5K								
	5-2	0.0K								
	4-8	0.5N								
	4-2	0.0N								
	3-8	Pre-								
	3-2	School								

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A,C,4-130-375 REV.

10-13-82

Jim Cantrell called concerning John Wood stating he was enrolled at Tabernacle.

He is not.

R[illegible]

TABERNACLE CHRISTIAN SCHOOLS
3931 White Horse Road
Greenville, South Carolina 29611
(864) 269-2781 **www. tabernacleministries.org** **Fax: (864)269-0677**

February 16, 2007

Law Offices of Jim Brown, P.A.
1111 Bay Street
PO Box 592
Beaufort, SC 29901-0592

Re: School Records involving John Richard Wood

To Whom It May Concern:

We are sending you the records for Mr. John Richard Wood that you requested in your letter dated February 7, 2007. We appreciate your offer to pay the postage, but that will not be necessary.

If we can be of further assistance, please feel free to contact us again.

In Christ,
Kimberly H. Searcy
School Secretary

3630

TABERNACLE CHRISTIAN SCHOOLS 3931 White Horse Road, Greenville, S. C. 29611 Phone 269-2781

Name Wood, John Richard Birth Date

Address A-14 Kampus Kourt G'Ville Zip 29609 Phone phone number

Date Entered 8/81 Grade 8th Date Withdrawn 11/25/81 Grade 8th

Previous School Attended Missionary (A.C.E.) City Mobile State Ala. Zip 36616

Father Gary R. Employer Bob Jones University Phone 242-5100

GRADUATION HIGH SCHOOL	
DATE	RANK

Grading Scale A (95-100), B (85-94), C (76-84), D (70-75), F 69 & Below; College level C

Year Ending							1981-82																																	
Grade	7th Grade						8th Grade						9th Grade							10th Grade							11th Grade							12th Grade						
	1	2	3	4	Av	Ltr	1	2	3	4	Av	Ltr	1	2	3	4	Av	Ltr	Units	1	2	3	4	Av	Ltr	Units	1	2	3	4	Av	Ltr	Units	1	2	3	4	Av	Ltr	Unit
IBLE							F/55																																	
NGLISH							F/62																																	
ATH. 7																																								
ATH. 8							F/61																																	
LGEBRA I																																								
LGEBRA II																																								
EOMETRY																																								
US. MATH.																																								
EN. SCIENCE							F/57																																	
HY. SCIENCE																																								
IOLOGY																																								
HEMISTRY																																								
EOGRAPHY																																								
MER. HIST.							F/38																																	
MER. GOVT.																																								
/ORLD HIST.																																								
. S. HIST.																																								
YPING I																																								
YPING II																																								
HORTHAND I																																								
HORTHAND II																																								
OOKKEEPING																																								
PANISH I																																								
PANISH II																																								
ATIN I																																								
HY. ED.							C																																	
USIC																																								
PEECH																																								
EADING																																								
NITS—24 needed Grades 9-12																																								
Days Att.																																								
Days Abs.																																								
FFORT																																								
ONDUCT																																								
EPEAT																																								
EACHER'S IGNATURE																																								

* Indicates: 1 Summer School required; 2 Summer School and yearly average combined, if course repeated.

TABERNACLE CHRISTIAN SCHOOLS
3931 White Horse Rd.
Greenville, SC 29611

3631

FOR OFFICE USE ONLY
DATE Aug 13 - 81
REPORT CARD
TRANSCRIPT
TEST RECORD
MEDICAL RECORD
IMMUNIZATION RECORD Need
GRADE FOR YEAR 8th
AMOUNT PAID $20.00

APPLICATION FOR ADMISSION

FULL NAME OF CHILD Wood (last) John (first) Richard (middle)

AGE 14 BIRTH DATE [redacted] SEX M LAST GRADE LEVEL FINISHED 7

HOME PHONE A-14 Kampus Kourt (street) White Oak Road Greenville (city) S.C. (state) 29609 (zip)

HOME PHONE 292-0940

FATHER'S NAME Gary R. Wood MOTHER'S NAME Ruby Wood

PLACE OF WORK B.J.U. PLACE OF WORK The Gospel Hour Inc

BUSINESS PHONE BUSINESS PHONE 244-4725 or 244-44

PREVIOUS SCHOOL ATTENDED Missionary A.C.E.

ADDRESS OF SCHOOL P.O. Box 16167 (street) Mobile (city) Alabama (state) 36616 (zip)

PHYSICAL DEFECTS, i.e., sight, hearing, allergies, etc. NOSE Bleeding headaches

FAMILY CHURCH AFFILIATION Morningside Baptist

IS YOUR CHILD A BORN-AGAIN CHRISTIAN? yes

HAS YOUR CHILD EVER BEEN UNDER PSYCHIATRIC CARE? NO IF YES, EXPLAIN

DOES YOUR CHILD HAVE LEARNING DISABILITIES? NO IF YES, EXPLAIN

DO YOU SEE YOUR CHILD AS AVERAGE, ABOVE AVERAGE, BELOW AVERAGE? Ave.

WHY DO YOU WANT YOUR CHILD IN TABERNACLE CHRISTIAN SCHOOLS? We believe that the parents responsibility to train a child in christian school where they teach the Bible & christian standards

DO YOU PLAN TO USE BUS SERVICE? yes

PLEASE SIGN STATEMENT BELOW:
I have read completely the school handbook, and I am in full agreement with policies and all rules and regulations of the school. I understand procedures for payment of tuition and fees, and I give permission for my child to be disciplined as the Administration deems necessary. Ruby M. Wood

3632

DATE 8-13-81

In a case where the parents can not be reached and the child needs emergency room treatment, I give permission for my child to be treated without Tabernacle being liable.

In case of emergency, who should we contact?

NAME Linda Hillyard PHONE 288-9817

Ruby M. Wood
(Parent's Signature)

John R. Wood
(Child's Name)

Family Doctor DR. Ray Hillyard

Phone 288-9817

3633

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
John Richard Wood, #6005,)
)
Applicant,)
vs.)
)
The State of South Carolina,)
)
Respondent.)

In the Court of Common Pleas
Thirteenth Judicial Circuit

C/A No.: 2005-CP-23-04737

ORDER OF DISMISSAL WITH PREJUDICE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2007 DEC 19 P 12: 31

This matter is before this Court on the Application for Post-Conviction Relief ("APCR") filed by John Richard Wood ("Applicant"), who was convicted of murder and sentenced to death. For the following reasons, this Court denies and dismisses the application with prejudice.

I.

Procedural History

At the May 2001 term, the Greenville County Grand Jury indicted Applicant, John Richard Wood, for murder and possession of a weapon during the commission of a violent crime (01-GS-23-3106). (R. at 2516-17). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Voir dire in the case began on February 4, 2002 before The Honorable John W. Kittredge. Public Defender John I. Mauldin, Attorney James Bannister, and Attorney Rodney Richey represented Applicant at his jury trial. Solicitor Robert M. Arial, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Mindy Hervey were the prosecutors at trial. On February 11, 2002, Applicant's jury convicted him of both charges.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of

the Code of Laws of South Carolina. The sentencing phase of his trial began on February 13, 2002. Judge Kittredge submitted the following statutory aggravating factor to the jury:

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

(R. at 2221-22). Judge Kittredge submitted the following statutory mitigating factors to the jury:

> (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
>
> (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
>
> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
>
> (4) The age or mentality of the defendant at the time of the crime.

(R. at 2223-24).

On February 16, 2002, Applicant's jury found the existence of the statutory aggravating factor and recommended a sentence of death for the murder conviction. That same day, Judge Kittredge sentenced Applicant to death for murder. (R. at 2259).

Applicant filed and served a timely notice of appeal with the Supreme Court of South Carolina. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Indigent Defense, represented Applicant during his direct appeal. On July 22, 2004, Dudek filed a Final Brief of Applicant in which he asserted the following issues on behalf of Applicant:

> (1) Whether the judge erred by excusing Juror Smith for cause, where she testified she could vote for the death penalty, and sign the form imposing the death sentence, since Smith was a qualified juror?
>
> (2) Whether the court erred by refusing to instruct the jury on the law of voluntary manslaughter where there was evidence the trooper engaged in an "aggressive" traffic

> stop which endangered appellant, who was on a motorcycle, while the trooper was in a patrol car, since this created the heat of passion and legal provocation necessary for an instruction on voluntary manslaughter?
>
> (3) Whether the judge erred by ruling South Carolina's death penalty statute was constitutional where it mandated that appellant, seeking the mitigating evidence attendant to pleading guilty, and accepting responsibility, must waive jury sentencing, since this procedure denied appellant his right to present mitigating evidence to a sentencing jury?
>
> (4) Was the court without subject matter jurisdiction to sentence appellant to death, pursuant to Jones v. United States, Apprendi v. New Jersey, and Ring v. Arizona where the indictment issued by the Greenville County Grand Jury did not allege an aggravating circumstance?

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 22, 2004. Dudek followed with a Final Reply Brief of Applicant also dated July 22, 2004.

The Supreme Court of South Carolina held oral argument in the case on October 5, 2004. An opinion was issued affirming the convictions and death sentence on December 6, 2004. State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (S.C. 2004). The court denied a petition for rehearing on January 20, 2005, and a death warrant issued on January 21, 2005.

Applicant filed a stay request with the Supreme Court of South Carolina on January 25, 2005 in order to pursue review by the United States Supreme Court. The State filed a Return to the stay request on February 1, 2005. The Supreme Court of South Carolina granted a stay by Order dated February 2, 2005.

Applicant, through counsel Dudek, filed a Petition for Writ of Certiorari with the United States Supreme Court on April 15, 2005, in which he raised the following issue:

> Whether the South Carolina Supreme Court erred by holding that the trial judge's disqualification of a black juror who stated she could

> impose the death penalty was justified under Wainwright v. Witt, 469 U.S. 412 (1985), since an appeal for a cross-section of the community was not condemned in Wainwright v. Witt, and the trial court did not rule the potential juror was not credible?

The State, through Assistant Attorney General Waters, filed a Brief in Opposition to the Petition for Writ of Certiorari on May 19, 2005. The United States Supreme Court denied the Petition for Writ of Certiorari on June 20, 2005.

Applicant, on July 1, 2005, filed with the Supreme Court of South Carolina a second Petition for Stay of Execution so he could seek his state post-conviction relief (PCR) remedies. The State filed a Return to the Petition for a Stay of Execution on July 11, 2005. By Order dated July 21, 2005, the Supreme Court of South Carolina granted a stay and appointed this Court to preside over the case.

Applicant filed a *pro se* Application for Post-Conviction Relief on July 28, 2005. The State filed a Return dated August 29, 2005. On October 15, 2005, this Court appointed counsel and gave Applicant 120 days to file an Amended Application. Applicant filed no Amended Application. On July 7, 2006, this Court *sua sponte* issued an Order giving Applicant 45 additional days to file an Amended Application. Again, Applicant filed no Amended Application. On September 28, 2006, this Court held a hearing as to the State's motion for summary judgment. While this Court believed the State had good arguments, it declined to grant summary judgment. This Court ruled, however, that no further amendments would be allowed.

As the initial hearing of January 8, 2007 approached, Applicant filed a motion for continuance and motion to amend, which this Court denied. Despite this, Applicant served on the State a First Amended Application for Post-Conviction Relief in which he asserted the following

claims:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that the defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 688 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of

the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 688 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing argument of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

At the hearing on January 8th, 2007, the State indicated it would not oppose the late amendments if a delay of some weeks could be had for the State's case after the Applicant presented his case. This Court agreed. However, as testimony began, Applicant stood up and requested to withdraw his APCR. The Court took a recess for Applicant to discuss this with his attorneys and to place a phone call to his sister. Applicant held firm to this desire, so this Court issued an Order requiring an evaluation of Applicant on his competence to waive his APCR.

Prior to the evaluation, Applicant changed his mind and through counsel indicated he wished to go forward with his APCR. The evaluation proceeded, however, without Applicant's cooperation. The evaluation noted no mental issues.

On February 9, 2007, Applicant filed a Second Amended Application for Post-Conviction Relief in which he raised the following issues:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Application was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of

counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical

providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Ground J.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Burkhart, ___ S.E. 2d___, 2007 WL 80036 (S.C. 2007).

Ground K.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

The Court held an evidentiary hearing in the case from March 6, 2007 to March 8, 2007.

Applicant was present and represented by his counsel Brown and Godfrey, and Assistant Attorney

General Waters represented the State. Applicant called psychiatrist Dr. Thomas Cobb, his sister Connie Jantz, computer expert Jeffrey Naylor, psychiatrist Dr. Donna Schwartz-Watts, Dr. John Steedman, psychologist Dr. Camilla Tezza, social worker Carlos Torres, Investigators Paul Silvaggio and Tim Jones, United States Probation Agent Bryan Bowen, psychiatrist Dr. Pratep Narayan, and the trial attorneys: John Mauldin, Jim Bannister, and Rodney Richey. Applicant also called his Anderson County trial counsel Bruce Byrholdt. The State called no witnesses.

This Court has heard the testimony and reviewed the record and now rules as follows:

II.

Grounds for Relief

None of the Applicant's grounds are sufficient for relief. Appellant raises eleven (11) grounds of ineffective assistance of counsel. Pursuant to the familiar doctrine in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Id. at 689; Burket v. Angelone, 208 F.3d 172, 189-190 (4th Cir. 2000).

The law measures competency by what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996). The court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere

fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the Supreme Court of South Carolina stated the prejudice prong in a capital sentencing proceeding was established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992).

A. Ground A

Applicant's first ground for relief is as follows: LRP

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective in both the guilt and sentencing phases for allegedly failing to examine Karen McCall on her involvement in the crime and failing to introduce a gunshot residue (GSR) test showing round lead particles on the backs and palms of both hands. Applicant contends that Ms. McCall's testimony portrayed her as a victim of his criminal actions rather than a willing co-participant, and that counsel should have dispelled this notion.

1. Facts

Applicant's girlfriend Karen McCall gave a statement to police the night of the shooting. At trial, she testified that she had been in the Jeep following Applicant on I-85 as they were going to Greenville for lunch. When Trooper Nicholson got in between them and blue-lighted the scooter, she thought that Applicant would try to elude the police because he had always said he could. She got off at the Woodruff exit when she saw Applicant come by on the scooter. She quickly followed him to the gymnastics center parking lot where he parked the scooter, jumped in the Jeep, and told her to "drive, now". Karen claimed she only thought Applicant had escaped from the trooper, not that he had killed him. (R. at 1424-25, 1430-34, 1452-53).

Applicant directed Karen to make certain turns, but did not seem upset. He talked to her about vacationing for Christmas in Mexico or Alabama. They stopped at a gas station, where Applicant took their Glock 9mm and put it on the console. As they continued on, Applicant received a call from his sister and made dinner plans. (R. at 1435-40).

Once Deputy Jones got on their tail, though, Applicant's demeanor changed to "cold", "hard", and "possessed". Applicant put his foot on Karen's to mash the gas pedal to the floor, and he told her, "Drive, bitch, drive, I shot the son of a bitch!" Applicant waved the gun at her and forced her to drive. He then reached over, flipped the switch to lower the rear glass window, and began shooting at police. Throughout the drive, he would occasionally reach over and snatch the wheel, saying, "We're going to die today." (R. at 1441-46).

When the jeep simply would not go anymore, Applicant said, "I'm going to get us another vehicle. When I tell you to, get your ass up here and bring that bag." After commandeering the utility truck, Applicant called for Karen, who then ran to the passenger seat and crawled into the floorboard. Eventually, Karen heard Applicant inhale and slump over, and the police ordering her out of the car. (R. at 1447-52).

The State tried and convicted Ms. McCall in Anderson County for her part in the crimes. During her direct appeal, McCall argued for dismissal of the charges based on the doctrine of judicial estoppel, since the State, in Greenville County, elicited her testimony in Applicant's trial during which she testified she was under duress. The trial court and the South Carolina Court of Appeals rejected this claim, with the appellate court finding that even if the doctrine of judicial estoppel applied, McCall could not meet its elements. State v. McCall, 364 S.C. 205, 210, 612 S.E.2d 453, 455 (2005).

At the PCR hearing before this Court, trial counsel Mauldin testified that he saw no strategic advantage to trying to "trash" or "make a liar" out of Karen McCall under the circumstances of this case. Applicant was on trial for murdering Trooper Nicholson and, by all accounts, McCall was not around when the murder happened. Counsel stated he was aware of the information of McCall's

activities in the jeep during the escape attempt, and was aware of the SLED GSR report (introduced at PCR as Applicant's Exhibit #3), but none of that changed his position that attempting to show McCall was more involved in the crime would have done nothing to aid the defense in this case. Trying to "trash" McCall was not what the defense "was trying to do," and counsel Mauldin wanted to reduce the Anderson evidence as much as possible, not discuss it more. He stated he made the decision not to impeach her unless what she stated was entirely inconsistent with the evidence.

Counsel Bannister added that the defense strategy was to go ahead and allow Anderson evidence to come out in the guilt phase to try to lessen its effect in the event of a sentencing phase by putting distance between it and an eventual sentencing decision. Indeed, prior to trial the defense specifically gave notice to the trial court that they wanted to rescind their objection to admission of the Anderson evidence in the guilt phase, and that in the defense's judgment the evidence was fair game for both sides. (R. at 8-9, 997, 1020).

2. Analysis

a. Deficient Performance

Applicant's first claim before this Court - that his counsel was ineffective for not doing a "better" job cross-examining Karen on whether she was assisting him rather than under his dominion at the time of the crime, or for failing to introduce a GSR report with regard to Karen - is without merit. "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to

raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

As to the guilt phase, counsel was not unreasonable strategically in expressly deciding there was nothing of value to be gained in attacking Karen to show she may have been more of a participant in the escape than she claimed on the stand. Even if trial counsel had shown that Karen was more of a willing partner in Applicant's Anderson County escape attempt rather than a person acting under duress, this would do nothing to diminish or remove Applicant's own personal guilt for killing Trooper Nicholson in Greenville County, particularly considering the McCall was not involved in the murder. (R. at 1584). Moreover, even if it could be shown that Karen was more of a willing participant during the escape, the evidence still shows that Applicant was the one who repeatedly fired shots at the pursuing police throughout the chase and that by the end of the chase Karen was huddling in the floorboard of the cab while Applicant continued to drive aggressively and shoot at police. (R. at 1541-43). Further, as the SLED agent testified at trial, having found lead particles on one's hand merely means that one was in the vicinity of a weapon when it was fired and not that the person fired the weapon; thus, the GSR report does not conclusively establish that Karen fired the weapon at any time during the pursuit. (R. at 1622). Counsel made the reasonable strategic decision to allow the Anderson County evidence to be elicited in the guilt phase in order to mute its effect in the event of a later sentencing phase. Their judgment was also reasonable that nothing could be gained by "trashing" McCall where it would not serve to diminish Applicant's guilt by any measurable amount.

Also, counsel used Karen's testimony as part of their strategically reasonable but ultimately unsuccessful defense theory that Applicant's extreme fear of police and belief that he could outrun

the officer on his motorbike led to a situation of voluntary manslaughter, or at least lack of malice, when the officer pulled his cruiser in front of Applicant's motorbike. (R. at 1712-19, 1745-56). See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel."). Counsel elicited from Karen not only Applicant's fear of police and belief that he could outrun the police, but also that he behaved that day in an extremely uncharacteristic manner that was entirely different from the sweet, non-violent man he normally was. (R. at 1456-57, 1467-68, 1474, 1478-80). Counsel Mauldin also testified at PCR that Applicant's paranoia of police and his accompanying perceptions at the time of the stop were part of the justification the defense offered to support its voluntary manslaughter charge.

Although counsel was ultimately unsuccessful in getting a voluntary manslaughter charge, a risk of which they were aware, they still decided it was their best option. Indeed, counsel Mauldin testified that even if the voluntary manslaughter "defense" was unsuccessful, in his view it was worth it in that it might convince at least one juror to hesitate during the sentencing phase decision. Moreover, counsel Bannister used this evidence to make arguments as to lack of malice during the guilt phase (R. at 1745-56), which the trial court noted was particularly clever given there was not much with which the defense could work. (R. at 1838-40). Further, the evidence elicited from Karen about the chase allowed the defense to use a prosecution witness in the guilt phase to set the stage for its mitigation case, which included the theme that a number of factors all combined, "like the blowing of air into a balloon until December the 6th when the balloon exploded," to result in the murder of Trooper Nicholson. (R. at 1858). In deciding to use Karen to their advantage in attempting to show an uncharacteristic crime brought on by a sudden confluence of factors, counsel

was strategically reasonable and not deficient in either the guilt or the penalty phase.

Counsel's strategic decisions were reasonable and not deficient. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); United States v. Lively, 817 F. Supp. 453, 462 (D. Del. 1993) (mere criticism of a strategy or tactic is insufficient for relief).

c. Prejudice

There was no possible prejudice in this case. First, Applicant never called Karen to testify at PCR and engaged in the cross-examination he asserts counsel should have done; thus, his claim is speculative and he has not met his burden of proof. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Regardless, there is no prejudice even assuming that some headway as to her participation could have been made with Karen had counsel gone on the attack with cross and the GSR report. The evidence of Appellant's guilt was overwhelming in this case, and, as noted before, whether Karen was more of a participant in the subsequent Anderson County pursuit does nothing to reduce Applicant's legal or moral guilt for killing the trooper. As such, Applicant could not have been prejudiced in the guilt phase with regard to such a legally insignificant issue. See generally Reed v. Norris, 195 F.3d 1004, 1006 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the

alleged error in failing to disclose or pursue it cannot be prejudicial); Bell v. Evatt, 72 F.3d 421, 427 (4th Cir. 1995) (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible sentencing outcomes).

For similar reasons, there was no prejudice in the penalty phase. In the sentencing phase, Applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson. Applicant's subsequent wild chase, however, provides an incredible amount of further aggravation. The Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record, having served time in prison. The victim impact evidence in this case was particularly moving, especially from Trooper Nicholson's widow and his partners on the Highway Patrol. Compared to this there was limited mitigation with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense itself. There was evidence in rebuttal that Applicant was anti-social.

Given these circumstances, trying to show that McCall was a little bit more involved in Applicant's crimes than she claimed on the stand would have done little if anything to reduce the extremely aggravated nature of this crime. Indeed, trying to attack Karen might be just as likely to

offend the jury in that it displayed an attempt to shift blame or limit responsibility when Applicant clearly was the reason these crimes occurred.

The issue is without merit and is denied.

B. Ground B

Applicant's second allegation is as follows:

> Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, U.S. 668 (1984).

Applicant contends that counsel was ineffective for failing to produce testimony that alleged Trooper Nicholson conducted the traffic stop other than in accordance with law enforcement guidelines to support the claim that Applicant was only guilty of voluntary manslaughter.

1. Facts

As noted before in the Statement of Facts, evidence suggested Trooper Nicholson conducted an "aggressive" stop by pulling in front of Applicant's scooter to force him to stop when Applicant initially refused to comply. The defense requested a charge on voluntary manslaughter, contending that the trooper mistakenly believed the scooter was illegally on the highway, and that the trooper's cutting Applicant off at the curb was sufficient legal provocation. The trial court rejected this argument, finding that the officer did what was reasonable and necessary when Applicant fled the lights and siren, and that the officer's legal action could not constitute sufficient legal provocation. (R. at 1712-17).

Applicant raised this issue on direct appeal, contending the trial court's denial of the charge

was error. The court recognized Applicant's claim that the trooper's action in cutting off Applicant's moped meant that Applicant was forced to avoid hitting either the trooper's car, the curb, or the bushes, but still found the case inappropriate for voluntary manslaughter. Unlike State v. Lindler, 276 S.C. 304, 307-308, 278 S.E.2d 335, 337 (1981), where the court found a voluntary manslaughter charge was appropriate because the defendant alleged the officer knocked his motorcycle to the ground with a patrol car and then came out firing, the court in this case reasoned "there was no evidence that Trooper Nicholson acted in an unlawful manner in discharging his duties" and no evidence that Nicholson bumped Applicant's scooter or fired on Applicant. See State v. Wood, 362 S.C. 135, 142-143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that the defense tried to show an unlawful and aggressive stop of the scooter to support their voluntary manslaughter claim. Mauldin saw Applicant's Exhibit 4, a police report reflecting that the tag on the scooter belonged to a different vehicle, and Applicant's Exhibit 5, which reflected witness statements referring to an "aggressive stop" and the patrol car "cutting the person off." Mauldin testified he would have had these reports in his file.

Counsel Bannister testified that he thought the testimony from the prosecution's eyewitnesses at trial as to the aggressive stop was very favorable to the defense. Bannister was asked about his assertion to the trial court during argument for a voluntary manslaughter charge that there was no evidence in the record the tag was illegal (R. at 1712-13) when in fact the trial court pointed out there was in fact evidence from Karen the tag on the scooter did not belong to it. (R. at 1459, 1483). Bannister testified that in making his argument for a charge he was relying on the fact that the inferences should be considered in his favor.

2. Analysis

The specific claim raised to this Court in the Application is that counsel failed to introduce evidence the stop was not conducted in accordance with guidelines promulgated by law enforcement. Applicant produced no evidence at the hearing to support this claim, and thus has failed in his burden of proof. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (PCR Applicant has the burden of proving his claims by a preponderance of the evidence).

Moreover, Applicant at the PCR hearing presented no additional evidence about the circumstances of the stop that would call into question this result or add a new factual element that would require reassessment of the voluntary manslaughter decision. While the police reports referred to witness statements calling the stop "aggressive," or stating the trooper cut Applicant off, that type of information was more than sufficiently presented at trial. (R. at 1265-66, 1274-75, 1289-90, 1294-96, 1300-01, 1306, 1310, 1338, 1353). See generally Jones, 332 S.C. 329, 338 (no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial). The Supreme Court of South Carolina has already ruled as a matter of law that these facts simply do not rise to the level of voluntary manslaughter.

As to the evidence the tag was illegal, if Applicant in PCR is merely criticizing counsel Bannister for stating there was no evidence the tag was illegal when in fact there was such evidence in the record, that provides no assistance in proving any claim for relief. Even if counsel was mistaken about one particular fact in his argument as to voluntary manslaughter, this is of no moment as counsel's supposed misstep during argument does not add any new facts to the calculus in a record that the Supreme Court of South Carolina has already held was insufficient to require a charge on voluntary manslaughter. The trial court considered the issue and the Supreme Court of

South Carolina found the issue preserved and considered it on appeal, and there was nothing about counsel's one possible misstep during argument that was fatal to the issue. This decision was fact driven, and counsel's argument cannot change the facts.

Indeed, whether or not the tag was illegal would not be determinative of this issue anyway as there was no evidence Trooper Nicholson called in the tag and then attempted to stop the scooter because the tag came back illegal; the only evidence was that Trooper Nicholson believed the scooter itself was not highway-legal in the first place. (R. at 1076-77). See generally Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) ("[I]f there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial.").

Since Applicant has offered no additional evidence of proper police procedures or any other unpresented facts that might change the binding decision already made by the Supreme Court of South Carolina, then Applicant has failed his burden of proof and there was neither deficient performance nor prejudice. See generally Bassette v. Thompson, 915 F.2d 932, 940-941 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony).

C. Ground C

Applicant's third ground for relief is as follows:

> As an alternate ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

As an "alternative" to the preceding ground, Applicant contends his counsel was ineffective for failing to concede guilt during the first phase of the trial. Apparently, Applicant is contending that counsel was unreasonable in even attempting the voluntary manslaughter "defense" at all, if this Court concludes that counsel was not ineffective in the manner in which they asserted that defense. Applicant asserts that counsel set forth a "he didn't do it" defense during the guilt phase, and followed that with a "he is sorry he did it" mitigation presentation, which Applicant asserts is deficient.

1. Facts

At PCR, counsel Mauldin testified that he specifically chose to not concede guilt as he wanted to challenge the jury and make them "work" to find all the elements of murder. Counsel hoped that even if the efforts were unsuccessful in the guilt phase, at least making the jurors think about Applicant's guilt of murder in first phase would be beneficial in the sentencing phase inasmuch as it might create residual doubt or cause a juror to hesitate. When asked if his defense at trial was a "he didn't do it" defense, counsel stated the defense was that Applicant was not guilty of *murder*. Counsel Mauldin stated that he is aware of the "healthy debate" among the defense bar of the wisdom of conceding guilt, but pointed out he has his own opinion on the subject.

On cross, counsel confirmed that his opinion on the stratagy of conceding guilt was that it was not the correct way to handle things. Regardless, counsel Mauldin added that based on his conversations with Applicant, he did not believe he could concede guilt in the case.

Counsel Bannister echoed similar sentiments on the defense strategy in this case, stating that if they could not achieve a lesser-included offense, they might at least get the jury thinking about it during the sentencing phase. Counsel Bannister stated the defense fully consulted Applicant during

discussions of the defense strategy.

2. Analysis

This Court finds the claim to be without merit, and finds counsel's decision not to concede guilt to be neither deficient nor prejudicial. This claim can only be directed to the sentencing phase because the failure to concede guilt could by no means be deficient or prejudicial in the first phase since the jury convicted Applicant.

First, Applicant's apparent objection to concession of guilt precludes counsel from being deficient in mounting the "voluntary manslaughter" guilt phase defense. As noted before, counsel Mauldin testified that based on his conversations with Applicant, he did not believe he could concede guilt. It is true that in Florida v. Nixon, 543 U.S. 175, 188-189, 125 S.Ct. 551, 561-562 (2004), the Court held that the Florida Supreme Court erred in finding automatically deficient and prejudicial counsel's decision to concede guilt without the capital defendant's express consent. In Nixon, counsel attempted to consult with his client about the strategy of conceding guilt in the first phase, but the defendant there was purposefully nonresponsive. Id. at 189.

Nixon first noted that while an attorney has a duty to consult on "important decisions" and questions of "overarching defense strategy," counsel does not have to obtain the defendant's consent for every tactical decision. Id. at 187. Similarly, Rule 1.4 of our South Carolina Rules of Professional Conduct require counsel to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and the Comment to that rule notes that some tactical decisions are so important that the consultation must occur prior to action. Undoubtedly, something as significant as conceding guilt to a capital crime is one of those important decisions that requires prior consultation. See Rule 1.4(a)(2), Rule 407, SCACR. See also Nixon, 543 U.S. at 189

("[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.").

Nixon next noted, though, that the client has ultimate authority "to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Nixon, 543 U.S. at 187. Our South Carolina Rules of Professional Conduct also codify virtually these same points. Rule 1.2(a), Rule 407, SCACR. Despite this latter provision, though, Nixon held that the Florida Supreme Court erred in concluding that counsel's decision to concede guilt in the first phase of a capital trial with the express permission of the defendant amounted to a guilty plea for which the client had absolute control. Id. at 188. The Court noted that unlike a guilty plea the defendant did in fact have his jury trial. Id. Moreover, it concluded that in the two-phase context of a capital trial, a decision to concede guilt in a case of overwhelming evidence and focus instead on the penalty phase did not amount to a "failure to function in any meaningful sense as the Government's adversary." Id. at 190. Given that avoiding execution might have been the only realistic expectation possible, counsel reasonably decided to focus on the sentencing phase and avoid the credibility issues in the sentencing phase that might come with attacking the prosecution's overwhelming case in the guilt phase. Id. at 190-92.

However, there is a difference between a situation where a defendant is purposefully nonresponsive to counsel's consultation, and a situation where the defendant expressly objects to such an important decision as whether to admit guilt before the jury to an offense carrying the death penalty. While Nixon commands that situations in which counsel concedes guilt over a nonresponsive defendant should still be subjected to the normal deficiency and prejudice analysis of Strickland, nothing in Nixon supports the view that counsel can concede a defendant's guilt to

capital murder over that defendant's express objection. Nixon notes that the lawyer "was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon." 543 U.S. at 189. Other post-Nixon decisions have noted that it would be ineffective (and perhaps unethical) for counsel to concede guilt over a defendant's express objection. See, e.g. United States v. Thomas, 417 F.3d 1053, 1060 (9th Cir. 2005) (Fletcher, J., concurring) (it is "entirely inappropriate" for a lawyer to concede guilt without prior consultation to give the client the opportunity to object; unlike the situation in Nixon, where the defendant is cooperative, counsel should obtain express consent before conceding guilt); Sleeper v. Spencer, 453 F.Supp.2d 204, 220 fn. 8 (D. Mass. 2006) (noting that "[c]ourts have found that where a trial counsel openly concedes guilt over a defendant's objections, such actions may amount to a constitutionally deficient performance"); Frascone v. Duncan, 2005 WL 1404791, *2 (S.D.N.Y. 2005) (defendant bears the burden of showing he objected to counsel's strategy of concession to a lesser offense and his will was overborne by counsel). Cf. People v. Arko, 159 P.3d 713, 723 (Colo. Ct. App. 2006) (decision to request a lesser nonincluded offense is akin to conceding guilt, and the decision whether to submit such a charge and create additional exposure to culpability should rest with the defendant). Indeed, while a number of cases have wrestled with the ineffectiveness of counsel's decision to concede guilt in a capital trial, this Court is unaware of any decision faulting counsel for refusing to concede his client's guilt for a crime that might subject him to the death penalty.

Here, without deciding whether or not a lawyer would be *per se* ineffective (and in violation of the Rules of Professional Conduct) for overruling his client's wishes against a strategy of conceding guilt, this Court does find that counsel here was not deficient for honoring his client's apparent decision that guilt not be conceded to a capital offense. Since after conversations with

Applicant about the case Mauldin believed he could not concede guilt, he was not deficient in proceeding with the voluntary manslaughter "defense".

However, even if counsel could permissibly concede guilt in the first phase over the objection of the defendant, or even if Applicant had not objected or was incommunicative, counsel's decision to mount a guilt phase defense in this case was still not deficient. Applicant cites a law review article that was quoted in Nixon to support the Court's conclusion that a lawyer can reasonably decide to concede guilt in the first phase and focus instead on the penalty phase: "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." See Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991) (quoted in Nixon, 543 U.S. at 191).

However, in this case, counsel Mauldin declined to characterize the defense as a "he didn't do it" defense, but stated rather they were attempting to prove Applicant was not guilty of *murder* when he killed Trooper Nicholson. Of course, in this case there was overwhelming evidence of identity, but counsel did not challenge it; counsel never contended "he didn't do it." Instead, counsel sought a lesser-included offense and ultimately challenged mental state, which is almost always inferential and leaves more room for argument regardless, or even in spite of, how strong the evidence of identity is. Thus, even if the Mercer Law Review article is now the gold standard *requiring* lawyers to concede guilt in capital cases whenever evidence of identity was overwhelming, that is precisely what the defense did, never once contending Applicant was not the shooter.

Unlike that suggested by Applicant in his citation of the law review article, counsel thought their guilt phase and sentencing phase presentations dovetailed nicely, and making the jury think

about the mental state necessary for murder might have worked to their advantage when adding the mitigation presentation on Applicant's mentality from Dr. Schwartz-Watts, Jeffrey Youngman, and Jim Aiken. This Court agrees, as set forth earlier in the discussion of Ground A regarding counsel's use of Karen's testimony to set up Applicant's extreme fear of police and uncharacteristic behavior on the day of the incident. Moreover, this Court finds counsel's strategic judgment reasonable that making the jury "work" on the elements of murder in the guilt phase might have had a beneficial effect in causing a juror to hesitate before giving the death sentence in the penalty phase.

Thus, this Court finds counsel's strategic performance was intelligent and professional in view of the difficult hand dealt. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with alibi defense). See also Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack).

Moreover, this Court finds no prejudice under Jones's recitation of the standard for prejudice in alleged sentencing phase errors. Given the extremely aggravated nature of the murder of Trooper Nicholson and the subsequent escape, and the limited mitigation that was available in this case, it simply cannot be said that there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death had counsel just conceded guilt of murder in the first phase rather than conceding Applicant was the shooter but

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continuing to argue mental state.

The issue is denied.

D. Ground D

Applicant's fourth ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain a jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to agree to the trial court's offer to instruct the jury he wished to plead guilty but under the law has to plead not guilty to obtain jury sentencing.

1. Facts

In a pretrial motion, Appellant moved to quash the state's death penalty notice on the basis that he could not plead guilty and receive jury sentencing. Applicant argued that this denied him equal protection and due process inasmuch as it was "fundamentally unjust and results in undue pressure on the Defendant to seek a trial." (R. at 2510). The State filed a response in which it generally asserted that the court had previously rejected jury sentencing after a guilty plea and that the United States Supreme Court had upheld judge-sentencing capital schemes. (R. at 2511-12).

At a pretrial hearing, Appellant argued that pleading not guilty to receive jury sentencing forces the defendant into an "obvious untruth" that destroys the defendant's credibility. The defense also complained that the jury would penalize Appellant for his failing to accept responsibility. The judge ruled that the statute was constitutional. (Supp. R. at 11-12).

The judge subsequently issued a written order in which he "appreciate[d] the practical

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considerations," but noted that the defense cited no authority supporting a constitutional violation. The court noted that it was willing "to address these concerns during jury *voir dire* if Defendant so requests." (R. at 2513-14).

At trial, the defense re-raised the issue as it went through pre-trial motions. The following then occurred:

> **Mr. Mauldin**: All right. The next one, your Honor, was motion filed in November the 21st where we requested a quashing of the death notice where the Defendant- - under statutory scheme the defendant was required to enter a plea of not guilty and the sentence - - do you remember that motion?
> **The Court**: I do.
>
> **Mr. Mauldin**: All right.
>
> **The Court**: And I also remember either I told you on the bench or put it in a footnote in the order that that struck me as a very sound argument. I don't believe it's constitutionally infirm to have - -
>
> **Mr. Mauldin**: I'll hand you my note, your Honor. What I wrote you said, and I think that's exactly what you said.
>
> **The Court**: It doesn't rise to a constitutional violation. But from a practical standpoint I can understand the benefit a party would seek to obtain by that initial admission on the front end in the inability to plead guilty to a Judge and then submit sentencing to a jury.
>
> **Mr. Mauldin**: Yes, sir.
>
> **The Court**: And I offered from the bench and/or in writing to address that and to handle that during jury selection if defense counsel so desired.
>
> **Mr. Mauldin**: Yes, sir.
>
> **The Court**: So I was willing to tell the jury that the individual wished to plead guilty, but in order to submit the sentencing issue to them we would go through the process of a trial first. And then if you had desired that, we would have had long discussions of how we could approach that with the jury and things of that nature.
>
> **Mr. Mauldin**: Yes, sir.

The Court: I specifically remember that one. It struck a chord with me.

Mr. Mauldin: Yes, sir. And the way our statement is set up is just the way it's set up. But we don't believe that it's appropriate the way it's set up where it requires - - well, I'm not going to through and rehash the argument.

The Court. Right. My ruling stands on that.

Mr. Mauldin: Yes, sir. The next motion, your Honor, that would be appropriate at this time which was held in abeyance, if I'm not mistaken. At the time of the hearing, was the sequestration of witnesses.

(R. at 1004-1006).

On direct appeal, Applicant contended the South Carolina statutory death penalty scheme was unconstitutional inasmuch as it requires a defendant to plead not guilty if he wants a jury to sentence him. He asserted the scheme denied him the mitigating evidence of an admission of guilt, and that he had a right to jury sentencing pursuant to the intervening decision of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). The Supreme Court of South Carolina rejected this issue, finding Ring inapplicable to South Carolina's death penalty procedure. See State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that he was "shocked" he did not take up the judge's offer to charge on the necessity of pleading not guilty in order to get jury sentencing and stated he wanted the trial court to instruct it and it was error for him to have not ensured the trial court gave the instruction. On cross, however, Mauldin admitted he would not have wanted the charge as the trial court ultimately phrased it - that "the individual wished to plead guilty, but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first." (R. at 1005). As noted before in the discussion of the preceding ground, counsel Mauldin also testified that after

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conversations with Applicant he did believe he could not concede guilt, that in his opinion conceding guilt was not good strategy, and that he preferred to make the jury "work" on the mental elements during the guilt phase in the hopes that it would cause hesitation in the event of a sentencing phase. The defense vigorously challenged the mental state element throughout trial and sought the lesser-included offense of voluntary manslaughter. Applicant's other trial counsel testified that Mr. Mauldin handled this issue.

2. Analysis

This Court finds that counsel was neither deficient nor Applicant prejudiced with regard to this issue. Admittedly, counsel stated he was shocked he did not ask for the instruction, but the trial court did not offer the instruction Mauldin wanted. Mauldin's requested instruction would be to the more "passive" effect that in order to have a jury sentence him, a capital defendant must plead not guilty. The specific charge the trial court offered, that Applicant "wished to plead guilty but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first," is different, and Mauldin was clear he would not want this charge as it definitively states Applicant wanted to plead guilty. As noted in the discussion of the previous ground and incorporated here, the defense could not and did not plead guilty or concede guilt, based not only on counsel's reasonable strategic judgment to challenge guilt of murder in the first phase, but also based on Applicant's own representations that precluded such a concession or plea. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would

have conflicted with alibi defense).

In any event, Applicant offers no authority that requires such a charge, and this Court is unaware of any. Cf. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (the portion of the death penalty statute addressing what happens when a sentencing jury is hung is addressed to the trial judge only and "need not be divulged to the jury"). There is no mandatory legal requirement that the trial court give the charge as Mauldin would phrase it as opposed to the way the trial court phrased it. This alone is sufficient to defeat Applicant's claim because there is no legal rule requiring such a charge and thus no denial to Applicant of anything to which he had a right. Since the only charge offered by the trial court was one unacceptable to the defense strategy, and Applicant had no legal right to a differently phrased charge, then counsel could not have been deficient or Applicant prejudiced from either the declination of the offered charge or the failure to request the desired one. See, e.g. United States v. Roane, 378 F.3d 382, 399 (4th Cir. 2004) (counsel could not have been ineffective for failing to seek an instruction that the jurors must be unanimous as to the five people supervised in a continuing criminal enterprise, because the law did not require such unanimity on that issue); Nichols v. Scott, 69 F.3d 1255, 1288 (5th Cir. 1995) (counsel not ineffective for failing to request a charge on a point that was not yet clearly required by federal or state law).

Indeed, the only allegation expressly raised to this Court in the Second Amended Application is a claim that counsel failed to take the trial court's version of the charge. Since that charge expressly stated Applicant wanted to plead guilty, and counsel stated he would not want that charge because it was entirely inconsistent with the defense presented during the guilt phase, then counsel could not have been deficient for refusing it. See Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with

alibi defense).

Finally, there can be no prejudice. This issue only goes to the sentencing phase, as the failure to have the judge tell the jury Applicant wanted to plead guilty by no means could be deficient or prejudicial in the first phase where the jury convicted Applicant anyway. Again, Jones commands this Court to assess whether there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.. 332 S.C. at 332-333 (citing Strickland, 466 U.S. at 694). If the trial court gave the charge it offered, it would have actually been prejudicial to Applicant as it would have been directly contradictory to the defense Applicant mounted at trial. Indeed, a jury might be more likely to have credibility problems with the defense that continued into the sentencing phase if told Applicant wanted to plead guilty but then the defense team challenged his guilt.

This Court is not convinced that the Jones standard for sentencing phase prejudice is met even if Mauldin's version of the charge is considered. Telling the jury that a defendant is forced to plead not guilty to get jury sentencing in a case where the defense vigorously seeks a lesser-included offense or argues against malice would either be of no effect or it would be prejudicial to the defendant in that it still suggests he is engaging in an extensive charade before the jury during the guilt phase. However phrased, the charge is simply not congruent with the defense's chosen strategy in this case. Regardless, given the extremely aggravated nature of Applicant's crime spree and the limited mitigation, this Court concludes that the charge, given in any form, would not create a reasonable probability of a different result pursuant to Jones.

The issue is denied.

E. Ground E

Applicant's fifth ground for relief is as follows:

> Applicant was denied effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to use of the competency and criminal responsibility evaluation in sentencing.

1. Facts (events at trial)

Submitted at the PCR hearing before this Court was a transcript from September 21, 2001 hearing before the trial court in this case. At the hearing, the State requested that the competency and criminal responsibility evaluation to take place for the Anderson County charges also be available for the same issues in the Greenville County case.

The defense responded that the Greenville solicitor had not moved for an evaluation, and that the defense had concerns the evaluation process would open the door to the use of the information as a discovery tool by the government. The court noted that the Anderson County court already signed the order directing an evaluation and it was taking place the following week. The defense then contended that the State was, by a "back door," getting the Applicant to waive his Fifth and Sixth Amendment rights, and getting support for a later request for an independent examination by a State expert. (9/21/01 R. at 3-7).

Next, the defense requested placement of any evaluation report and communications or

records obtained for the evaluation under seal and provided only to the court. Defense counsel specifically wanted to put on the record that the court relieved them as Anderson County counsel on August 9th and Anderson County counsel did not consult them about the evaluation. Finally, defense counsel argued that if the court was ordering an evaluation based on detecting a mental disability in Applicant, then it should appoint a guardian *ad litem*. (9/21/01 R. at 3-7).

In response, the court noted that it received from Applicant personally a written *pro se* motion in Anderson County for an evaluation, and that Anderson County counsel had also sought an order for the evaluation.[1] The court pointed out that it did not understand the logic of preventing usage of the evaluation at the county line for events that happened on the same day. The court also had concerns that if mental issues in fact arose at trial, lack of access to the Defendant would disadvantage the State. The defense responded that at the present juncture they were simply objecting to any use of the process as a discovery tool for the Government. (9/21/01 R. at 7-10).

As the conversation continued, defense counsel again asked that since there was no moving party in Greenville for the evaluation, that the court make the results of it for the court's "eyes and ears only," and prevent the Anderson County prosecutor from disclosing the report to the Greenville prosecutor. The defense noted this would not interfere with the process in Anderson since the trial in the Anderson case was not for several months. The State responded that it did not understand how evidence of incompetence could "stop at the Saluda River." The prosecutor assured the judge he was not interested in discovery; he just wanted to make sure a previously undisclosed mental health issue did not delay the trial at the last minute. The prosecutor had no objection to a sealed report as long

[1] Anderson County counsel consented to the evaluation order. And, in September 2001, Applicant also personally wrote the Greenville Clerk requesting that new counsel be appointed and that he receive a mental evaluation. Applicant described "earreckensiable [sic] difference of opinion [with counsel] that can not [sic] be worked out."

as he was not sandbagged the day before trial. The defense responded that the court should decide about release of the information. (9/21/01 R. at 10-13).

The court then ordered that "based on the defendant's request through Anderson County counsel" for an evaluation, any result from that evaluation would also be considered in the Greenville case. The court also directed that the Department of Mental Health submit the report directly to the court "for both counties," and that the parties would revisit later the matter of disclosure. (9/21/01 R. at 14).

The record reflects that the court's psychiatrist tasked with determining Applicant's criminal responsibility and competence to stand trial called the judge prior to trial to express his frustration that the defense refused to respond to his request for consent to get Applicant's updated medical records from the jail. The defense responded to this by telling the trial court they have been objecting to the evaluation process since the beginning, and did not want to give their file information to the doctor. The court noted it would find out from the doctor, Dr. Narayan, what he needed to complete his evaluation. (R. at 720-23).

After a break, the trial court noted that he had talked to the doctor, who was concerned that he would be unable to give an opinion as to competency because he could not get any information or cooperation from the defendant. The judge noted he simply told the doctor he would have to do the best he could, as the judge did not feel like he could order family members to talk to the doctor or order blood tests of the defendant. (R. at 723-24).

Prior to the competency hearing, the trial court noted it did receive Mauldin's letter stating Applicant would not meet with the designated examiner, Dr. Narayan. (R. at 950). At the competency hearing, Dr. Narayan was examined by the trial court. During the examination the court

specifically noted that it "want[ed] to limit our discussion to the issue of competency." Dr. Narayan testified that he interviewed Applicant on two prior occasions, that he advised Applicant of his Miranda rights each time, and that Applicant waived them after reciting them back in a paraphrased form. Applicant also signed the waiver of rights form on two separate occasions. (Tr. Ct. Ex. 16). Applicant also indicated his understanding that information gained from him could be used in determination of sentence.

Dr. Narayan believed Applicant understood those rights and was competent to stand trial at the time of his evaluations. The court noted Dr. Narayan's report included findings placed under seal and filed with the clerk. However, Dr. Narayan was unable to give an opinion as to competency at the time of the hearing because he had no access to the defendant or information about him since those initial interviews. (R. at 952-62).

Under examination by the solicitor, Dr. Narayan noted that during their earlier meetings Applicant told him that he was not on nor had he ever been on any psychiatric medications. Dr. Narayan said he could not render as opinion as to the present time because they received information that Applicant's psychiatric situation may have changed because detention staff had told Dr. Narayan that a doctor hired by Applicant had placed him on medication. Dr. Narayan requested further information about that but had no access by Applicant to his records or to Applicant himself. (R. at 963-66).

On cross by the defense, Dr. Narayan reiterated that in light of information that the situation may have changed, he was simply unable to give an opinion at the present time. Dr. Narayan noted that he called the jail and received the information about the medications, but no information was received from Applicant or his lawyers. Dr. Narayan noted he had no access to the detention records.

Dr. Narayan stated, however, that at the time of the initial evaluation, Applicant, after being advised of his rights, still agreed to a release of his medical information. During the cross-examination, counsel Mauldin showed medical records to Dr. Narayan that he had not seen with the specific reservation that he was not disclosing it to the State through the examination. The defense requested that Dr. Narayan make them a copy of his entire file, and the trial court ordered it.

As the examination continued, Dr. Narayan noted that during their conversation on October 29, Applicant told Narayan that he was planning on firing his Greenville attorneys and having his Anderson counsel represent him in both jurisdictions. Applicant also indicated he had written a letter to the Clerk of Court attempting to fire Mauldin and Bannister. Dr. Narayan noted he had contact with the Anderson County lawyer, Bruce Byrholdt. (R. at 965-83).

At the conclusion of cross, the defense made a motion for every piece of paper relating to Applicant at the State Hospital. The court agreed. The solicitor then requested that he receive a copy, but the court denied that without prejudice, ruling instead that the court should receive a copy. (R. at 982-83, 990-92).

During reexamination by the trial court, Dr. Narayan noted that no one from the defense team called him and offered to assist in the evaluation, although that has happened in the past. Dr. Narayan noted that he felt he had plenty of information to find Applicant competent at the prior time, and described Applicant's waiver of rights prior to the interviews. (R. at 981-86).

A psychologist named Dr. Tezza also testified about Applicant's decision to execute the waiver of rights at the prior interviews, including the declination to have his attorney present. (R. at 986-89).

The trial court then found Applicant competent to stand trial. The court noted that Applicant

had the burden, and there was no real effort to challenge competence. The court also noted that it might have to revisit the issue of providing the mental health information to the State. (R. at 993-95). Moreover, the court made part of the record letters reflecting Dr. Narayan's attempt to get further information from Applicant and his attorneys, as well as the letter from defense counsel in which the defense declined to allow such access. (R. at 995-96; Tr. Ct. Ex. 17).

Following Applicant's cross-examination of Karen McCall during the guilt phase on Applicant's fear of police, headache, and uncharacteristic behavior on the day of the incident, the State again requested that it receive Dr. Narayan's full report from his evaluation of Applicant at the State Hospital and moved for an independent mental health examination. The solicitor argued that capacity had been made an issue before the jury by the cross, and he contended that there were statements by Applicant in the report that the State should be allowed to use.

The trial court denied the motion, responding that there was no notice of insanity or a GBMI defense. The solicitor complained that the defense was attempting to use his mental condition to support a lesser-included offense, but the trial court did not yet think they had arrived at the point where it would require full disclosure of the state psychiatrist's report. The solicitor complained that he was at a disadvantage because the defense was barring him access to any mental health records, and the court noted it would not allow the defense to introduce mental health issues through the "back door" with an attack on intent. (R. at 1490-97).

At the close of the State's guilt phase case, the defense stated it had no intention of calling any psychiatric witnesses. Accordingly, the trial court ordered the State's mental health expert to leave the courtroom pursuant to the sequestration order and also denied the State's renewed request to see the rest of Dr. Narayan's file or for an independent mental health examination. (R. at 1662-

65). The State then raised that under state law diminished capacity is never a defense to murder. The defense replied all they were going to do was call lay witnesses to describe the defendant at the time of the offense. (R. at 1679-81).

During pre-sentencing phase motions, the State again renewed its request that it receive Dr. Narayan's entire report rather than just the redacted portion. The State also again asked for an independent examination, asserting the defense's scenario in guilt phase argument that Applicant reacted with such fear and panic put mental issues in play. The solicitor noted he was not going to call Dr. Narayan in his case-in-chief, but may call him in reply, put him up, subpoena the jail records the defense would not provide, and let Dr. Narayan look at them on the stand. (R. at 1822-27).

The defense responded that it had objected to the evaluation all along, and that criminal responsibility and GBMI were already "out of the way" with the guilt phase verdict. The defense argued it did not ask for any mental health instructions nor did it bring any mental health testimony before the jury in the guilt phase. (R. at 1827-29).

The court responded that it was likely the defense would present some mental health expert in the sentencing phase, and it would be unfair to allow the defense to do so with its hired experts without the State being able to look at Dr. Narayan's report that might have contrary information. The court noted it was trying to be fair to both sides, but if the defense called a mitigation expert to support some of the mental health mitigators, then the State was only entitled to be privy to possibly contradictory information in the report. (R. at 1830-31).

The defense responded that the evaluation was only for criminal responsibility and competency, and there was no authority to order the defendant to submit to an evaluation if he was merely claiming entitlement to mitigators in the sentencing phase. (R. at 1831-33).

The trial court then noted that the defense's recitation of the procedural history was not accurate, and that the State had no way of knowing what the defense had represented to the trial court in *ex parte* funding requests and other communications. The court simply believed that if Applicant made a statement to Dr. Narayan after a waiver of rights, it simply was not fair for the State to be unaware of it, given the factual scenario the defense attempted to elicit from Karen McCall. (R. at 1833-34).

With regard to funding requests, defense counsel noted that he has his clients evaluated for mental health issues in every single capital case. The defense stated that the State's position would essentially allow for preemptive evaluations just based on the likelihood that the defense was going to present mental health mitigation.

Ultimately, the court decided that it was not going to disclose the report at the time, and it would wait until the defense presented its case to reassess the decision. (R. at 1836-38).

In opening during the sentencing phase case, the defense argued it was going to present evidence of "mental impairment," and of "a spiral pattern of acts and circumstances ... almost like the blowing of air into a balloon until December the 6th when that balloon exploded." (R. at 1858).

As its second witness, the State called Dr. Narayan. The defense objected, arguing again that Blair issues were already decided and Dr. Narayan had no relevance. The State contended that the defense's opening argument clearly put mental impairment into play, and that Dr. Narayan told the solicitor that there are things in the report Dr. Narayan needs to use to support his opinion that have not been disclosed to the solicitor. The court sustained the objection to Dr. Narayan's report, finding argument is not evidence, and stating again that the defense presentation needed to occur first to finally decide the issue. (R. at 1871-75).

During its sentencing phase case, the defense called social worker Jeffrey Youngman, who testified: (1) Applicant's social and emotional functioning was affected by his family's dysfunction; (2) his social environment played a role in his level of functioning; (3) his behavior is consistent with someone suffering from mental illness; and (4) he has no significant prior history of criminal convictions involving violence. (R. at 1975). Later, Youngman theorized Applicant had paranoid personality disorder. (R. at 1988). On cross, Youngman admitted he reviewed the state mental health evaluation as part of his opinion in the case. (R. at 1992-93, 2016-17).

The solicitor then asked to review all documents upon which Youngman relied in forming his opinion. Defense counsel noted that it had been objecting to disclosure from the beginning, but conceded:

> On the other hand, if Mr. Youngman, who said that it was part of the material he looked at, I really don't think an objection is appropriate, quite frankly, Judge.

(R. at 1997-98). The judge noted he appreciated defense counsel's candor, and stated, "[W]hen an expert says he or she relied on certain documents, the rules unequivocally permit cross examination on the sources of the expert's opinion." (R. at 1998).

Defense counsel then asserted that there should be a distinction between statements merely contained within a report the expert reviewed and statements actually relied upon by the expert. The court noted that potential hearsay information in reports is not offered for the truth of the matter asserted but only for the jury's consideration as to the adequacy of the expert's opinion, and suggested a limiting instruction might be in order. (R. at 1999-2001).

Youngman then returned to the courtroom with the state hospital report, and the State then had the opportunity to review Dr. Narayan's report in its entirety. (R. at 2002-03). Following an

examination of Youngman outside of the presence of the jury, the court overruled the defense objection to examination on certain statements relied upon by Youngman, but gave a limiting instruction that examination on statements relied upon by the expert were only to be considered as to the assessment of the expert's opinion, not for the truth of the matter asserted. (R. at 2003-15). The solicitor then examined Youngman on the state mental health report, including inconsistencies in the two stories Applicant told the examiners on separate occasions. (R. at 2017-19).

The defense also called former warden James Aiken, who testified that Applicant would be adaptable to prison, that he would not be a danger to staff or other inmates, and that he in fact would be at the mercy of the prison predator population. (R. at 2037-44).

Following Aiken's testimony, the solicitor advised the court that since he had now had a chance to review the entire evaluation report, it was his intention to discuss the previously redacted portions with Dr. Narayan and Dr. Crawford from Department of Mental Health. The court declined, stating that for the moment the prior ruling remained in effect until the court could see the entire "parameters of the defendant's effort in mitigation" and until the court has had an opportunity to discuss with the defense what mitigators they think the evidence supports. The solicitor then noted that he would need expert help to assist him with cross-examination of the defense's mental health expert the following day, and the court stated it would give the solicitor the necessary time if needed. (R. at 2045-49).

The next day, Applicant called his mental health expert, Dr. Schwartz-Watts. Dr. Schwartz-Watts testified that the results of Applicant's neurological exam were completely normal. (R. at 2066). Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070).. She noted that bipolar disorder is only "a problem

with the way you feel," although she claimed Applicant has hallucinated. (R. at 2071, 2077). Dr. Schwartz-Watts also testified that since Applicant had been on medication that she prescribed, he was more stable, less grandiose, and "able to process things" in a slower and more deliberate fashion. (R. at 2087).

After direct examination of Dr. Schwartz-Watts concluded, the parties discussed the parameters of cross-examination. Ultimately, the court instructed the witness that while the solicitor was going to ask general questions about Applicant's alleged grandiosity or hallucinations, the witness was not to mention Applicant's claim that God told him to blow up the Pentagon, which Karen McCall told to Dr. Narayan. (R. at 2094-2102).

During cross, Dr. Schwartz-Watts testified that she reviewed Dr. Narayan's report and absolutely agreed that Applicant was not only competent to stand trial but also criminally responsible for the murder. (R. at 2118-21). At the end of cross, the solicitor asked and the court agreed for time to review the notes. (R. at 2124).

In reply, the State called Dr. Narayan, who testified to a reasonable degree of medical certainty that Applicant was not only competent to stand trial but also criminally responsible. (R. at 2146-48). Dr. Narayan disagreed with the defense doctor's diagnosis, though, and said Applicant only had antisocial personality disorder. (R. at 2148-51). Dr. Narayan also noted that there was no evidence of Applicant displaying any abnormal behavior. (R. at 2152-53). Dr. Narayan stated that his diagnostic impression, confirmed by psychological testing, was that Applicant began to malinger his supposed symptoms. (R. at 2157-58).

During the examination, the defense objected and the court sustained the objection to questioning about Dr. Narayan's attempt to get further information in the case. The court gave a

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curative instruction on the defendant's right to remain silent. (R. at 2141-43). Dr. Narayan did note, however, that he had recently had the opportunity to review information from Dr. Schwartz-Watts' file. (R. at 2151).

At the close of reply, the defense requested the mitigators referring to mental or emotional disturbance, substantial impairment of the defendant to appreciate the criminality of his conduct or to conform his conduct with the law, and the age or mentality of the defendant at the time of the crime. (R. at 2176).

During closing, defense counsel repeatedly argued that Applicant had a mental illness, and that his capacity to conform to the law was substantially impaired. (R. at 2202-05, 2207, 2209-10). The trial court charged the jury on the statutory mitigating circumstances that refer to "mental and emotional disturbance," "substantial impairment of the capacity to conform," and the "age and mentality of the defendant at the time of the crime." The court also charged the jury on its right to consider any non-statutory mitigating factors. (R. at 2223).

During deliberations, the jury requested that the court play back the testimony of defense psychiatrist Dr. Schwartz-Watts and court's psychiatrist Dr. Narayan. Defense counsel reasserted its objection to the reference to Appellant's right to remain silent during Dr. Narayan's testimony and requested direction of a life sentence. The court denied the motion. (R. at 2236-40).

As the jury continued to deliberate, counsel Mauldin put on the record his contention that the decision of Anderson counsel to consent to the evaluation was *per se* ineffective assistance of counsel because it led to the sentencing phase testimony of Dr. Narayan that the jury asked to rehear. The judge noted that while it did not intend to rehash the issue yet again, Applicant personally through his Anderson counsel had requested an evaluation, "which started the process." The judge

then went on to say that his own dealings with Applicant at the August 2000 hearing and Applicant's letters to the Clerk's Office in both counties "convinced me that absent the initiation by Mr. Wood himself I would have been duty bound to require a state evaluation as to competency." The court noted that subsequent *ex parte* communications with Greenville counsel and Dr. Schwartz-Watts "confirmed" this conclusion because they told the court the defendant needed to be treated for mental illness. The judge finished by noting his "firm judgment" that ordering the evaluation was "the appropriate thing to do," which he would have done *sua sponte* had Applicant not requested it. (R. at 2250-52).

2. Facts (evidence at PCR)

At the PCR hearing before this Court, counsel Mauldin testified on direct by Applicant that he was very opposed to the evaluation of Applicant from the beginning. He testified he did not attend the evaluation, stating he could not recall why but it may have been his other commitments. Admitted into evidence during Mauldin's testimony were a copy of Applicant's *pro se* request for an evaluation, dated September 13, 2001, a memorandum from the trial judge setting a hearing on the request, and the Anderson County order setting the evaluation. Mauldin stated he requested the hearing on the evaluation prior to it taking place, as already described above.

On cross, Mauldin stated that one of the major disagreements he had with Applicant was whether to have an evaluation done. He strongly advised Applicant not to go and talk to any state mental health officials. As to whether he personally advised Applicant of his rights, counsel was adamant that he told Applicant that he did not want Applicant to do the evaluation and that it would be used against him. Counsel admitted he simply could not remember why he did not attend the evaluation. Discussed during Mauldin's testimony at this point was Court's Exhibit 16 from the

trial, which was the advice of rights form executed by Applicant prior to his evaluation at the South Carolina Department of Mental Health (DMH).

Mauldin also testified that, subsequent to the conducting of the evaluation, they considered the danger of the State being able to use what was in the report. However, they decided to go forward anyway with their own mental health testimony from Dr. Schwartz-Watts and Jeffrey Youngman.

Counsel Bannister testified that the defense did not want any DMH testimony introduced at the trial. Initially, the court appointed he and Mauldin on the Anderson case as well, and the defense team was ready to go inasmuch as it looked like the Anderson solicitor was going to try that case prior to the death penalty case in Greenville. However, Applicant insisted he wanted an evaluation. Mauldin and Bannister refused, and on cross by the State Bannister testified the defense specifically advised Applicant that in their judgment nothing good for the defense could come of the evaluation process. However, since Mauldin and Bannister would not agree to the evaluation, Applicant had them relieved in Anderson County.

Anderson County counsel, Bruce Byrholdt, testified at the PCR hearing as well. He stated that he consented to an evaluation of Applicant for criminal responsibility and competency, but that he did not recall advising Applicant on his right to remain silent. On cross by the State, Byrholdt stated that after the release of John Mauldin as Anderson counsel, he met with Applicant who advised Byrholdt that he wanted an evaluation. Moreover, Byrholdt testified that his observations of Applicant and Applicant's behavior warranted an evaluation.

Dr. Narayan from DMH testified that he had Applicant execute an advice of rights form prior to any session of an evaluation. Court's Exhibit #16 was the advice of rights form signed by Applicant prior to his evaluation. Dr. Narayan testified he normally gives the form to the subject,

requests that the subject read it, and then asks the subject if he has any questions.

3. Analysis

Applicant's contention with this ground for relief is that his counsel "failed to object to the testimony from medical providers of the South Carolina Department of Mental Health." Applicant argues that counsel was "unaware" information from the evaluation could be used since no issue as to criminal responsibility or competency was raised at trial, and further asserts that counsel "failed to object to the presentation of this evidence outside of the limited purpose for which the evaluation was ordered."

Of course, this record is clear that Greenville counsel objected to the evaluation process throughout the proceedings, both to their client in private and the judge at various hearings, because of their expressed concern that the information would ultimately be used in aggravation against Applicant. Since Greenville counsel objected to the evaluation process from the start both to their client and the judge, Applicant's claim really starts at the decision of Anderson counsel to agree to Applicant's repeated demand for an evaluation for criminal responsibility and competency to stand trial.

However, as an initial matter, this aspect of the claim is not even proper for consideration in the present action. First, of course, this is not the pled claim. Applicant filed this PCR action in Greenville County challenging his murder and possession of a weapon convictions from Greenville County, for which only Mauldin, Bannister, and Richey were appointed. Indeed, in section 16 of his Second Amended Application, Applicant only lists Mauldin, Bannister, and Richey as the counsel who represented him at trial, and the text of the present allegation only refers to what "trial counsel" or "capital trial counsel" did or failed to do. Thus, Applicant has only expressly alleged a claim

against his Greenville counsel. Applicant filed this Second Amended Application long after missing two deadlines of this Court for Final Amended Applications, and the State requested and this Court was clear that only the pled allegations would be before the Court at the hearing. Moreover, the State was adamant throughout the hearing that it was not trying anything by consent. Accordingly, inasmuch as the present allegation attacks the decisions or actions of Anderson counsel, this Court finds it is not pled properly and timely.

Even if it was properly and timely pled, however, it is still questionable whether an allegation against Anderson counsel is proper in this Greenville case. As has been repeatedly set out, this Greenville PCR challenges actions of Greenville counsel in an attempt to seek relief from Greenville convictions, and it was Greenville counsel who objected to the evaluation process from the start. The fact of the matter is Anderson counsel never represented Applicant in the Greenville case. This procedural impediment prevents a claim of ineffective assistance of counsel on this ground. See generally Comm. v. Carpenter, 725 A.2d 154, 164 (Pa. 1999) (question of whether guilty plea was knowing and voluntary for a prior conviction in a different county used as aggravation in a capital trial was not properly before the post-conviction court for the capital trial); Poyner v. State, 720 N.W.2d 194 (Iowa Ct. App. 2006) (since claim of ineffective assistance of PCR counsel only related to counsel's performance in a different case, the claim was without merit).

Thus, if a claim against Anderson counsel is improper in this action, Applicant's claim in reality would have to be that the *judge* erred in allowing the evaluation ordered for Anderson County be "transferred" to Greenville over Greenville counsel's objection. This is a freestanding claim that, even if pled properly, is not proper for PCR but rather is for direct appeal. See, e.g. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or on direct

appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

However, even if a claim against Anderson counsel for consenting to the evaluation is proper in this action, it is without merit. As noted before, Applicant himself requested the evaluation, and Anderson counsel testified that, after speaking with Applicant and observing his behavior, in counsel's judgment he believed Applicant should be evaluated. This Court finds no reason to question Anderson counsel's judgment on this point. Indeed, ultimately Anderson counsel's decision to consent to the evaluation is of no consequence, because the trial court specifically noted on the record that had Anderson counsel not consented, the court would have been duty bound to order the evaluation based on Applicant's conduct and communications. See S.C. Code Ann. §44-23-410 (2002) (noting the judge "shall" order an evaluation whenever a judge "has reason to believe" a person facing a criminal offense is not fit to stand trial).

Since there is no viable issue with regard to the decision to proceed with the evaluation in the first place, the issue next turns as to counsel's handling of the information at trial. Applicant contends that trial counsel was "unaware" that the information was to be used at sentencing, and "failed to object to the presentation of this evidence outside of the limited purpose for which this evaluation was ordered." However, the record is clear that counsel was *very* aware and very concerned that the evaluation would ultimately be used by the State for purposes other than competency or criminal responsibility.

As exhaustively set forth in factual description, Greenville counsel strongly advised their client against evaluation until the point that he had them removed from the Anderson case; Greenville counsel then objected at a hearing prior to the evaluation in an attempt to prevent it from being used in the Greenville proceedings; Greenville counsel prevented Dr. Narayan from getting

further information about Applicant from the jail after Applicant went to see the evaluators against Greenville counsel's advice; Greenville counsel successfully prevented the State from reviewing the complete report throughout much of the trial despite the State's repeated request to do so; Greenville counsel objected to admission of statements made by Applicant to his wife and achieved a limiting instruction from the judge; and Greenville counsel successfully prevented Dr. Narayan from testifying during the State's sentencing phase case despite claims that the defense had crossed the line into arguing mental health. It was only after the defense in the sentencing phase presented mental health information from experts who admitted they had reviewed Dr. Narayan's report in its entirety that the court allowed the State to review the report in its entirety and communicate freely with Dr. Narayan as to the findings.

Thus, the only viable issues with regard to Greenville counsels' handling of this issue were the decision to proceed with their own mental health presentation despite the risk that it could open the door to the State's use of the evaluation report and the ultimate concession that the defense had no valid objection once their own expert admitted he had reviewed the report. Once counsel proceeded with their mental health mitigation no further objection to the State's use of the report was valid, and counsel's decision to proceed despite this fact was reasonable and made with full knowledge of this risk.

Of course, in Estelle v. Smith, 451 U.S. 454, 462-463, 101 S.Ct. 1866, 1873 (1981), the Court held that it was a violation of the Fifth Amendment privilege against self-incrimination for a state doctor to be allowed to testify as to future dangerousness in a sentencing phase where the defendant was not advised at the competency evaluation of his right to remain silent and that any statements could be used against him. The Court also found a violation of the Sixth Amendment

right to counsel, inasmuch as counsel were not notified in advance the evaluation would encompass the issue of future dangerousness, and thus the defendant was denied the opportunity to consult with counsel about whether to submit to examination. Id. at 469-470. Importantly, the Court expressly did not decide whether there was any right for counsel to be present at the examination, noting that the lower court had recognized such presence might be disruptive. Id. at 470 n. 14. Moreover, the Court pointed out that a "different situation" would exist "where a defendant intends to use psychiatric evidence at the penalty phase," noting the question was left open whether a defendant could introduce his own psychiatric evidence without being subject to an examination by a State psychiatrist. Id. at 466 n.10, 471.

Along these lines, in Buchanan v. Kentucky, 483 U.S. 402, 422, 107 S.Ct. 2906, 2917-2918 (1987), the Court specifically noted that "if a defendant requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." The Court in Buchanan found no Fifth or Sixth Amendment violation where the defense joined in the motion for an evaluation, and the "entire defense strategy was to establish the 'mental status' defense of extreme emotional disturbance." Id. at 423-24. In addressing the Sixth Amendment claim, the Court specifically pointed out that the focus was the opportunity for consultation with informed counsel about the scope and nature of the proceeding, not the ultimate use to which the prosecution was to put the information. Id. at 424.

In Powell v. Texas, 492 U.S. 680, 683-686, 109 S.Ct. 3146, 3149-3150 (1989), the Court held that a defendant did not waive his Sixth Amendment right to notification by putting up psychiatric evidence of insanity, particularly where the Sixth Amendment right to notification was violated in the first place because the examination took place without notice to counsel or the

defendant that the examination would encompass the issue of future dangerousness.

In Hudgins v. Moore, 337 S.C. 333, 337-338, 524 S.E.2d 105, 106 (1999), the Supreme Court of South Carolina held that it was error under state law for the court to permit the prosecutor to impeach the defendant during guilt phase on answers he gave to the state psychologist during testing for the competency evaluation. Defense counsel did not object, and thus was ineffective. Id. at 338. The court, while finding no constitutional violation because voluntary statements obtained in violation of Miranda or the Sixth Amendment right to counsel are still admissible for impeachment, nevertheless found a violation of State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951), which held that confessions made to examiners at the State Hospital would not be permitted to be revealed over objection of the defendant. Id.

In the present case, the fact that testifying defense experts reviewed it and relied upon it placed the complete report in play. Of course, Rule 705, SCRE, provides that an expert may be required to disclose during cross-examination the underlying facts and data upon which he or she relied. Once defense expert Jeffrey Youngman admitted on cross that he had read and relied upon the State evaluation in forming his opinions, defense counsel conceded there was no further valid objection to the State being privy to the report. The court agreed, noting the rules clearly allowed exploration of the bases underlying the expert's opinion. (R. at 1997-98). Defense psychiatric expert Dr. Schwartz-Watts also testified she reviewed and relied on the report in preparing her opinions offered in mitigation.

This Court finds no deficiency on the part of defense counsel in conceding that no further valid objection could be made to the State's review of the evaluation report following the defense expert testimony. As noted in State v. Slocumb, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App.

1999), Rule 705 allows the cross-examiner "to ask the expert to reveal otherwise inadmissible underlying information to the jury," and also permits counsel to cross-examine the expert "with respect to material reviewed by the expert but upon which the expert does not rely." Slocumb, 336 S.C. at 628 (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 705.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1999) and 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 13, at 56-57 (John William Strong ed., 4 ed. 1992)., respectively). Slocumb held that the trial court did not err in allowing the prosecution to cross-examine the defense's mental health expert on reports of misconduct in DJJ, where the expert testified he had reviewed DJJ reports in forming his opinion and they were relevant in allowing the State to explore the basis for the expert's opinion of insanity. Id. at 631-632. Moreover, Slocumb held the reports were not inadmissible character evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), as they were not admitted to prove propensity but rather elicited as part of cross-examination on an expert opinion. Slocumb, 336 S.C. at 632.

The same or similar justification exists here given the defense presentation from Youngman and Dr. Schwartz-Watts. Since the cross-examination using the full evaluation report was permissible, then counsel could not have been deficient nor Applicant prejudiced from the concession or failure to object. See Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001) ("ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test," as it was neither deficient nor prejudicial).

Similarly, there was no valid objection with regard to the solicitor's presentation of Dr. Narayan in reply after the defense case in mitigation. Once Applicant's mitigation expert testified on

direct that Applicant did not have anti-social personality disorder, and that he was not malingering his symptoms of mental illness, it was permissible for the state to rebut this mental health presentation with the contrary opinions of Dr. Narayan without any violation of the Fifth Amendment. Moreover, there could be no violation of the Sixth Amendment right to counsel based on notification as Greenville counsel was expressly aware and concerned that the State could ultimately use the evaluation report for sentencing and told Applicant that as they futilely attempted to prevent him from agreeing to the evaluation. The applicant personally requested the evaluation, and he was made aware by Dr. Narayan of his rights and the consequences of speaking.

No further objection to Dr. Narayan's testimony was proper, as seen in the language from the United States Supreme Court in Estelle and Buchanan, but there are quite a number of cases from other jurisdictions that have sustained use of such evidence in similar situations. See, e.g. Schneider v. Lynaugh, 835 F.2d 570, 577-578 (5th Cir. 1988) (defendant who requests evaluation and then puts his mental state into issue with psychological evidence cannot then use the Fifth Amendment as a bar to State rebuttal, even though State was using evaluator to rebut on issue of rehabilitative potential; also, there was no Sixth Amendment notification violation where the prosecution was merely rebutting defense evidence); Coffey v. Messer, 945 S.W.2d 944, 948 (Ky. 1997) (Kentucky Rules, which are based on Federal Criminal Procedure Rules specifically crafted to protect defendant's rights under Estelle v. Smith, are not unconstitutional, as since the State can only use the evidence in rebuttal, defendant can prevent introduction of such evidence by declining to call mental health evidence itself); Evans v. State, 725 So.2d 613, 686-689 (Miss. 1997) (no Fifth Amendment error in allowing State to use competency evaluator in rebuttal, because, in part, the defense called a mental health expert, and since the defendant did not testify, there was no other way for the prosecution to

rebut the defense presentation; there likewise was no Sixth Amendment violation of "notification" even though the evaluation order specified that the information could not be used in sentencing, where the defense intended to introduce psychiatric evidence and obviously could anticipate the use by the prosecution); See also State v. Davis, 506 S.E.2d 455, 476-479 (N.C. 1998) (no Fifth Amendment error in allowing State to cross-examine defense expert on information from State competency evaluation, even though this was a different purpose for which the evaluation was ordered, where defense expert testified at trial he relied on the information in forming his opinion; no Sixth Amendment error, where defendant had the opportunity to discuss the evaluation with counsel, and counsel should have anticipated that the State would attempt to use the report if the defense put on a mental status defense).

Here, this Court finds Greenville counsel vigorously pursued this issue as well as any lawyer could. Ultimately, as counsel Mauldin testified, they eventually made the strategic choice that it was better to proceed with their own mental health defense despite the fact that this would likely open the door for the State with the DMH information. This Court finds this strategic decision was reasonable, especially given the difficult hand counsel were dealt in this case, with an extremely aggravated crime and limited mitigation. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack). This Court finds it hard to imagine what more Greenville counsel could have done to keep out the DMH information; counsel kept it away from the State as long as possible. Ultimately, the evaluation took place on Applicant's own motion and the agreement of his Anderson counsel, and this could hardly be attributed as constitutional fault to Greenville counsel who opposed it from the start. Applicant's

own personal and repeated efforts at obtain a competency evaluation place the consequences of having the evaluation done in the first place upon him and him alone.

The issue is without merit and is denied.

F. Ground F

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Unites States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends counsel was ineffective for failing to "deny access" of the Department of Mental Health to Applicant.

As noted before in the discussion of facts in the preceding subsection and incorporated here, Applicant insisted on a psychological evaluation over the objection and against the advice of Greenville counsel, to the point where Applicant had Greenville counsel removed from the Anderson case and new counsel appointed. Anderson counsel consented to Applicant's evaluation request, and the trial counsel issued an order for the evaluation. The evaluation result was "transferred" to the Greenville County case over the objection of trial counsel. However, after the initial evaluation report issued finding Applicant competent and criminally responsible, and as trial approached, counsel sent a letter in February 2002 precluding further access of DMH to Applicant and his jail records. This led to Dr. Narayan complaining immediately before trial that he could not update his conclusions for the Blair hearing. Ultimately, the trial court told Dr. Narayan to do the best he could,

and Dr. Narayan simply testified that at the time of his evaluation he had no concerns about Applicant's competency or criminal responsibility.

Applicant complains that if counsel could have prevented DMH access prior to February 2002, then they were ineffective for not preventing access prior to February 2002. For many of the reasons discussed in the preceding ground and incorporated here, this allegation is without merit. First, since Applicant wilfully sought an evaluation over the strenuous objection of Greenville counsel to the point where Applicant had Greenville counsel removed, Applicant cannot now blame Greenville counsel for that evaluation. Second, as set forth in the ruling on the previous ground, even if a claim against Anderson counsel was procedurally proper in this action, Anderson counsel was not ineffective for consenting to the evaluation based on his observations of Applicant. The trial court stated it would have been duty bound to have ordered the evaluation even if Anderson counsel had not consented. There was nothing more Greenville counsel could have done to "prevent" DMH access when an evaluation occurred based on Applicant's personal request, the reasonable judgment of Anderson counsel, and the trial court's independent view, despite Greenville counsel's best attempts to prevent it at every turn.

Obviously, after the evaluation came back with an "unfavorable" result to Applicant and the death penalty trial approached, Greenville counsel and Applicant came back to terms, and counsel was able to send out the letter precluding further access after the defense hired mental health experts who met with Applicant at the jail in anticipation of a mitigation case. The fact that counsel was able to send out the letter at this point does nothing to establish that they could or should have sent out the letter earlier. Indeed, Applicant cannot show prejudice because such a letter earlier would have been fruitless given that Anderson counsel and Applicant himself were cooperating with the

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evaluation.

The issue is without merit and is denied.

G. Ground G

Applicant next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to "expose" that no evidence allegedly supported the diagnosis of the DMH examiners that Applicant has anti-social personality disorder, or ASPD.

1. Facts

As noted before, at the sentencing phase defense expert Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070). Counsel asked her, on direct, to define ASPD, and then asked whether the diagnosis of ASPD depended on information from childhood. Dr. Schwartz-Watts testified that one had to have a pattern of antisocial behavior before age 16 to meet the criteria, and then asserted that Applicant did not have such a history at a young age. She asserted there was "no history before he was 16 of being in trouble;" denied that Applicant was ever in a boy's home noting he was only there because his parents worked there; and stated that, according to his sister, the only fight Applicant had ever been in was when he finally stood up to an older boy who was picking on him. Dr. Schwartz-Watts continued:

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> So he certainly . . . has antisocial traits. He had a pattern of breaking the law as an adult. He has - certainly, he has been in prison a few times. He's been a thief. He had done fraudulent things in terms of the Wal-Mart check scam and that sort of thing. But he does not meet the criteria [of ASPD].

In reply, Dr. Narayan disagreed with the defense doctor's diagnosis of paranoid personality disorder, finding only one of the seven criteria when three were needed. Dr. Narayan said Applicant only had ASPD. (R. at 2148-51). Dr. Narayan noted that the psychiatrist who saw Applicant five days after the crime also diagnosed him as a sociopath, which "is pretty much what [ASPD] is." (R. at 2151-52).

On cross, defense counsel Mauldin asked Dr. Narayan if one of the "absolute necessities" for ASPD was that there had to be a conduct disorder prior to age 15, and then asked Dr. Narayan what evidence he had that Applicant had such a conduct disorder prior to the age of 15. Dr. Narayan testified that Applicant said he shoplifted and destroyed property as a child. After a discussion of whether Dr. Narayan considered this self-reporting reliable, defense counsel pointedly asked Dr. Narayan if he had heard the prior witnesses say there was no prior juvenile history. At this point, Dr. Narayan pointed out that the evidence of conduct disorder did not have to include "adjudications, legal charges, arrests or any kind of sentencing." Defense counsel then asked if Dr. Narayan had Applicant confused with his mother, and Dr. Narayan answered no. (R. at 2170-73).

At PCR, Applicant first called Dr. Thomas Cobb, a psychiatrist who treated Applicant on death row beginning in 2002 or 2003. Dr. Cobb stated that while some of Applicant's diagnoses of bipolar disorder, depression, intermittent explosive disorder, and others were treatable, the only treatment for anti-social personality disorder was incarceration. He stated that over the years as he has treated Applicant, Applicant has improved on medication but deteriorated when not on

medication. In Dr. Cobb's opinion, these differing reactions showed Applicant was responding to the medical treatment.

On cross, Dr. Cobb admitted that mental condition could be fluid and new problems could develop, and indeed that a sentence of death and placement on death row at Lieber Correctional Institution could cause new psychological problems. Dr. Cobb admitted that intermittent explosive disorder could be part of ASPD. Counsel showed Dr. Cobb various SCDC medical records over recent years that he conceded repeatedly mentioned the diagnosis of ASPD by the treatment teams for Applicant.

Later, Applicant called other witnesses who were involved in the DMH evaluation of Applicant. Dr. John Steadman testified that he relied on the patient (Applicant) for the report that he shoplifted as a child. Dr. Camilla Tezza testified that Dr. Narayan advised her that he had evidence of conduct disorder behaviors prior to the age of 15, but she did not have those reports in her notes. She admitted she was relying on self-reports. Social worker Carlos Torres testified that he obtained a social history including the legal history, but could not recall activity prior to age fifteen. United States Probation Agent Bryan Bowen testified that he prepared the pre-sentence report for Applicant's federal convictions. He spoke with Applicant's older sister, Connie Jantz, for a personal history, and ultimately provided this report to the solicitor's office. He also interviewed Applicant as part of his report. His report did not reflect any convictions or adjudications prior to age fifteen.

Connie Jantz also testified at PCR. She generally described aspects of Applicant's life growing up, including the inconsistent education and "abysmal" parenting of Applicant's mother. She noted their mother would shoplift and believed their mother lost a job for stealing from one of her employers. According to Jantz, the only trouble Applicant got into as a child was when he stole a

toy gun from K-Mart, possibly when he was younger than 10. She stated Applicant had learned shoplifting from his mother.

Ms. Jantz stated that she first learned of Applicant's arrest from a reporter who contacted her in Harper's Ferry, WV. According to Ms. Jantz, her sister used her as a reference on a rental agreement. She testified that she never heard from any member of the defense team until PCR counsel contacted her.

However, on cross, Ms. Jantz admitted: (1) that when she moved to Harper's Ferry she did not want her mother to know where she had gone; (2) that she was living in Harper's Ferry when the trooper was murdered; (3) that she then moved to Knoxville, Maryland, and she did not like to give out her address because of the threat of her mother finding out where she was; (3) that she did not talk to her family about the case and only talked to Betsy a little about the case the day after the murder; (4) that she did not even know when Applicant was convicted until she later found news articles; (5) that she did not attempt to contact Applicant in prison; (6) that her only correspondence with Applicant was a few years later while he was in custody; and (7) that while they were not on speaking terms, her sister Betsy knew she was in Maryland and their mother could have contacted her through family. On redirect, Ms. Jantz stated that she in fact had moved after Applicant's arrest, but on recross, Ms. Jantz admitted she never contacted the defense team or Applicant because she was just in shock after the arrest.

Dr. Donna Schwartz-Watts testified at PCR that she never spoke to Ms. Jantz, but that she remembered defense counsel Mauldin unsuccessfully tried to contact Jantz. She never met with Applicant's parents but did meet once with Applicant's sister, Betsy Martinez. She noted, as she testified at trial, that she had concerns that Applicant did not meet the criteria for ASPD because of

the lack of a childhood history of conduct disorder. She conceded that Applicant clearly has antisocial traits. She further noted that Applicant would not cooperate with her interview, would not allow a video, and admitted he faked symptoms of mental illness. She stated it was very difficult to get a history from Applicant. Finally, she agreed that she had reviewed the SCDC mental health records, which also contained diagnoses of ASPD.

On cross, Dr. Schwartz-Watts noted she worked with Mauldin before, and that he was very organized in preparing a mitigation investigation. She stated there were periodic meetings that would include her, the defense team, and the mitigation investigator, Paige Tarr. She also agreed that she had plenty of notice and time to prepare, but that it was difficult to find family members despite the fact that the mitigation investigator and Mauldin tried.

Trial counsel Mauldin testified about efforts made to locate and contact Connie Jantz. He stated that no response came to letters sent to the Harper's Ferry address and that the phone there was not in service. In seeking assistance, the defense team advised Betsy Martinez that they were unable to contact Jantz. Moreover, counsel advised Paige Tarr to contact all mitigation witnesses she could.

On cross, Mauldin testified that his defense team included both co-counsel, a private investigator, the social worker Jeffrey Youngman, attorney Jeff Bloom for jury selection, and Paige Tarr for mitigation investigation. Mauldin testified that he had worked with Paige Tarr before and she was very experienced and competent.

Mauldin stated he was aware as a capital litigator of the need to develop the defendant's history, but he was concerned at the difficulty they were having in locating such a history despite the effort being made. Mauldin did not recall why they did not call Applicant's sister Betsy Martinez as a witness. As far as subpoenaing Jantz, Mauldin did not think that sort of measure would be

effective in obtaining a favorable witness for the defense, as "dysfunctional" as the family was.

Jim Bannister testified that despite their investigative efforts, they knew they were "slim on mitigation" as trial approached. Bannister recalled one sister did not want to participate, and the defense could only get in touch with one of the other sisters. He also stated that if Betsy was the sister in the courtroom during trial, they made a specific decision not to put her up on the stand as they did not think she would be favorable.

Rodney Richey testified that in his experience working with Mauldin and Dr. Schwartz-Watts, they worked well together and were on the same mission, and that Paige Tarr was an experienced and very good mitigation investigator.

Finally, Dr. Narayan from DMH testified at PCR. He first noted that while the DSM-IV TR does require evidence of a conduct disorder prior to age fifteen, the DSM-IV expressly states that it is not a "cookbook" with regard to individual criteria. According to Dr. Narayan, in the clinical setting what the expert is really looking for is a pervasive pattern of anti-social behavior, which Applicant clearly evidenced.

Dr. Narayan stated he received information from Applicant himself that he had engaged in stealing as a child. Moreover, he had information from Applicant's wife Karen McCall to that effect as well. Dr. Narayan noted that actual adjudications or convictions were not necessary, and that only one instance or symptom was necessary to meet the criteria because there were likely other instances in which the subject was not caught or charged. He noted that had Connie Jantz testified (as she did at PCR) about the one instance of shoplifting at Kmart, this would have been enough to support a conclusion of conduct disorder prior to age fifteen. Dr. Narayan was unpersuaded that his diagnosis of ASPD was incorrect or unsupported, and, like Dr. Schwartz-Watts at trial and in PCR, noted that

regardless of whether Applicant technically met the criteria for ASPD or not he clearly evidenced a personality disorder with antisocial traits.

2. Analysis

This Court finds counsel was neither deficient nor Applicant prejudiced with regard to their handling of the ASPD issue.

To start this analysis, we must first incorporate the discussion in the preceding subsection to the effect that Applicant insisted on an evaluation over the repeated objection of Greenville counsel, and, had Applicant listened to Greenville counsel, there would not have been a diagnosis by Dr. Narayan of ASPD. Thus, even if we assume Applicant suffered any prejudice with regard to this allegation, it was not because of any deficiency of counsel but is chargeable to Applicant based on his own conduct. Applicant does not get to ignore his counsel's advice on an issue and then achieve a windfall in PCR on the very same issue.

Regardless, counsel was not deficient inasmuch as counsel at trial elicited from Dr. Schwartz-Watts her contrary opinion on ASPD and flatly challenged Dr. Narayan on evidence supporting the existence of a conduct disorder at an early age. Counsel raised the very point of which Applicant now complains with not only the presentation of his own expert's contrary opinion on the issue of conduct disorder prior to age 15, but also cross-examination of the State's expert on the fact that other witnesses stated there was no such evidence. Counsel cannot "force" an expert witness to testify to a particular opinion, and even in PCR Applicant did not get Dr. Narayan to abandon his view that Applicant exhibited ASPD. This Court finds that even if counsel could have done more to present evidence or cross-examine Dr. Narayan on this issue, what counsel did do was more than adequate to be above the standard for constitutional deficiency. See generally Kavanaugh v. Berge,

73 F.3d 733 (7th Cir. 1996) (finding no deficiency in the failure to exhaustively cross-examine expert on his use of leading questions when interviewing the victim, where counsel presented an expert to testify generally on the subject and argued the issue extensively in closing).

Moreover, counsel was not deficient with regard to obtaining information from Applicant's sister, Ms. Jantz. This Court finds that Ms. Jantz was attempting to avoid contact with her mother by hiding her whereabouts, and, despite being aware that Applicant was in trouble, Ms. Jantz made no effort to contact Applicant or the defense team. This Court finds counsel's efforts to contact Ms. Jantz were reasonable given that they attempted phone calls, letters, and contact through Applicant's other sister, Ms. Martinez. The trial court record supports this, as defense social worker Youngman admitted on cross that while they think Ms. Jantz lived in Maryland, the defense could not contact her. He said, "[N]obody could locate her. None of the family knows where she's at." (R. at 1991-92). When asked if he could have subpoenaed Ms. Jantz, counsel responded that he would question what of value he could have gained by subpoenaing a reluctant family member in the hopes that family member would provide mitigating evidence. This Court agrees, and overall finds counsel made reasonable and constitutionally sufficient efforts to obtain Ms. Jantz's help that were frustrated by Ms. Jantz's own unwillingness to have contact with her family at the time and be involved in the defense of her brother. See. e.g. Timberlake v. Davis, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

As far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand. Applicant has presented nothing to call this decision into question. Indeed, Applicant presented no testimony from Ms. Martinez about any testimony she could have offered or

even if she was willing to testify; thus, Applicant has failed to meet his burden of establishing both deficiency and prejudice. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

However, even if counsel was somehow constitutionally deficient in not doing more than counsel did to challenge Dr. Narayan's view on ASPD, this Court finds no prejudice. Despite the evidence presented in PCR, Dr. Narayan held firm that his diagnosis of ASPD was correct. This Court finds credible Dr. Narayan's testimony that the DSM IV is not to be a "cookbook", and that in the clinical setting the practitioner is looking for a pervasive pattern of antisocial behavior that Applicant clearly exhibited. Dr. Narayan's testimony also persuades the Court that he received information from Applicant himself as well as Applicant's wife as to the commission of crimes or wrongs by Applicant prior to the age of fifteen, and, as Dr. Narayan pointed out, the evidence does not need to involve convictions, charges, or adjudications since Applicant may not have been caught, charged, or convicted on a particular incident. Dr. Narayan pointed out that Ms. Jantz's description of a shoplifting incident was enough to meet the criteria precluding the possibility of any prejudice on the issue from the failure to find and talk her into testifying.

Although Dr. Cobb testified as to his treatment of Applicant once Applicant entered SCDC under a death sentence, he also admitted that one's psychological makeup is fluid and can change, that being sentenced to death and incarcerated could trigger new psychological problems that did not exist before, and that in any event the medical records from SCDC contained repeated references to

the diagnosis of ASPD. Thus, this Court finds that sufficient evidence supports the diagnosis of ASPD. There is enough to support it that this Court cannot say it is an "incorrect" diagnosis.

Given the examination of both the defense expert and the state expert on this very issue at trial, and that this Court finds Dr. Narayan credible in his continued diagnosis of ASPD despite the testimony in PCR, this Court cannot find Applicant's presentation at PCR creates a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Even if Applicant had succeeded in convincing this Court (or the jury) that the diagnosis of ASPD was "incorrect" based on the lack of evidence of a conduct disorder at an early age, Applicant's experts conceded he still had antisocial traits, namely "personality disorder not otherwise specified with antisocial traits." This Court concludes that the difference between ASPD and antisocial traits is not such that it would create a reasonable probability of a different result in sentencing.

Applicant has not met his burden of proof and the issue is denied.

H. Ground H

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Applicant contends that his counsel was ineffective for failing to present pleas of mercy from family members or other information that Applicant would be of emotional value to others.

1. Facts

At trial, no family members testified on Applicant's behalf. During the defense case in sentencing, social worker Youngman testified that in doing his investigation he talked to Applicant's sister Elizabeth (or "Betsy") and Applicant's wife Karen McCall, but he did not talk to Connie. When asked why, Youngman testified that he thought Jantz lived in Maryland, but no one could locate her because "none of the family knows where she's at." Youngman admitted that Applicant's mother and Betsy were both codefendants with Applicant in the federal fraudulent checks case. (R. at 1991-92). As cross proceeded, Youngman admitted he had not actually talked with the mother, but relied on information passed on to him from the mitigation investigator. (R. at 1996-97).

On redirect, Youngman testified under questioning by defense counsel that because of the frequency of moves in the Wood family, the home schooling, and the lack of meaningful relationships, it was "virtually impossible" to obtain documents and find people to interview. (R. at 2021). On recross, Youngman admitted that he relied on the mitigation investigator because Applicant's mother would not make herself available to him. (R. at 2024).

Defense investigator Richard Kearns introduced into evidence a picture of Applicant as a young child. He noted Betsy Martinez had brought the picture to him yesterday. (R. at 2054).

During her direct examination, Dr. Schwartz-Watts testified that she made "numerous attempts" to speak with Applicant's parents, but after they spoke with the mitigation investigator, they changed their phone number and refused further contact with the defense. Dr. Schwartz-Watts did meet with Betsy and Karen McCall. (R. at 2067-68).

As noted in the previous subsection, Applicant's sister Connie Jantz testified at PCR. She described the upbringing she and Applicant had, including frequent moves, inconsistent messages

from their mother who shoplifted on one hand but professed strict Christian beliefs on the other, the lack of education Applicant received from home schooling or private religious schools, the fact that Applicant's mother was very conniving, and some of the extended family history including alcoholism and depression. Jantz testified that she never heard from the defense team and that if she had been called, she could have asked the jury to spare her brother's life, and to consider the value of her brother to his child.

As noted before, Jantz admitted on cross that when she moved she was trying to prevent her mother from knowing where she was; that she did not talk to the family about the case except for Betsy a little bit the day after the incident; that she did not even know of Applicant's conviction or sentence until she later searched for news articles; that she did not attempt to contact her brother while he was in custody; that her only contact was a couple of years after the trial; that her sister Betsy knew she was in Maryland but that she was not on speaking terms with Betsy; that her mother could contact her through family; and that her sister had the P.O. Box in Maryland. Jantz stated that she was "in shock" after the arrest, but never attempted to contact the defense team.

As set forth in the previous subsection more fully and incorporated here, Dr. Schwartz-Watts testified at PCR that Mauldin tried to contact Jantz but was unsuccessful, that the attorneys tried to conduct a mitigation investigation with plenty of time but it was simply difficult to find family members, and that Applicant was not forthcoming as to history. Mauldin noted that no response was made to the letters sent to Jantz's last known address, that the phone was not in service, and that Betsy had no success enlisting Jantz's help despite defense requests that she try. Mauldin also noted he had worked with the mitigation investigator before and she was very experienced and competent.

Bannister testified that one sister did not want to participate in the defense efforts, and the

defense team made a strategic decision not to call to the stand the sister who was at trial. Richey noted that Mauldin and Tarr were very experienced in mitigation investigation.

Given these facts, this Court reiterates its earlier finding, set forth in full in the prior subsection, that counsel was not deficient with regard to seeking family help for background and possible testimony in mitigation. The fact is that for the most part the family was uncooperative. Based on the above detailed testimony from defense team members both at trial and in PCR, this Court finds that despite reasonable efforts of counsel and the defense investigators, Jantz was nonresponsive because of her desire to avoid contact with her family and her desire not to be involved with Applicant's case. Moreover, counsel cannot be faulted for not subpoenaing Jantz and seeking mitigation testimony from her against her will. See, e.g. Timberlake, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

Further, this Court finds no prejudice from the fact that Ms. Jantz did not testify. Much of the background to which she testified was set forth at trial during the testimony of Youngman and Dr. Schwartz-Watts. Given the introduction of much of the background at trial and the extremely aggravated nature of this crime, this Court is not persuaded that Jantz's request to the jury to spare her brother's life and her mention of the fact that he has a child would create a reasonable probability that the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Again, as far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand, and Applicant presented nothing to call this decision into question. Applicant presented no testimony from Ms. Martinez as to what she could have offered or

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even if she was willing to testify; thus, Applicant failed to meet his burden of establishing both deficiency and prejudice. Similarly, with regard to any other possible family or other mitigation witnesses who did not testify at PCR, Applicant failed to meet his burden of proof. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

The issue is without merit and is denied.

I. Ground I

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to aspects of the prosecutor's argument.

1. Alleged burden shifting argument

Applicant first contends counsel was ineffective for failing to object to the solicitor's guilt phase closing when he allegedly made a burden shifting argument.

In closing during the guilt phase at trial, the solicitor argued that since he did not have final argument, he had to anticipate what the defendant would argue. He noted that he believed the defense would assert that Applicant did not have the requisite intent because of his fear of police, the

legitimacy of the scooter on the highway, and the alleged "aggressive" stop by the trooper. The solicitor went on to argue that such a contention was not consistent with the law, but also continued that it was not supported factually either. After arguing that there was no evidence Applicant knew Trooper Nicholson was stopping him for having the scooter on the highway, the solicitor continued:

> The point is that the defendant had no knowledge of why he was being stopped. So to assert that defense to you based on those facts has absolutely no factual support, and that's what you're looking for. You're looking for factual support to support any suggestion he didn't have the requisite intent.

(R. at 1735-39). A few paragraphs later, the solicitor went on to say that the defense position was "an effort to divert you from the facts and create something in your mind related to intent, that we haven't proved that this individual . . . had the reckless intent." The solicitor pointed out that "the only intent we [the State] have to do is show the intent to raise his arm and fire the gun." (R. at 1738). The solicitor later argued that defense "suggestion to you he lacked intent is nothing more than an effort to escape responsibility." (R. at 1740). Finally, the solicitor argued that "he's presenting to you in an effort to escape responsibility one more time, and I urge you to act in accordance with the evidence and recognize that for what it is." (R. at 1741). The trial court repeatedly and properly instructed the jury on the State's burden of proof.

Attorney Bannister testified that since he gave the guilt phase closing, it would have been his job to object, but that it was not a hard and fast rule. When asked about the allegedly offending passage, Bannister responded that what the solicitor was saying was in fact exactly what he was asking the jury to do.

This Court finds neither deficiency nor prejudice. It is true that our state supreme court has looked with disfavor on jury instructions to "seek the truth" as potentially burden shifting. See State

v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000). However, Aleksey ultimately held there was no denial of due process because in the context of the entire charge there was no reasonable likelihood the jury applied the "seek" language to the detriment of the charges on the State's burden of proof beyond a reasonable doubt. Id. at 28.

Moreover, our state appellate courts have held improper, as a comment on the right to silence, prosecutorial argument that evidence was "uncontradicted" when only the non-testifying defendant could have contradicted the evidence. See, e.g. State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000). However, such a violation does not necessarily mandate reversal, and a defendant must show the argument denied him a fair trial. Id. The comments also must be viewed in the context of the entire record. Id.; See also State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so).

Indeed, in order for a solicitor's comments to warrant a new trial, the defendant must show that the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). "[I]t is not enough that the remarks were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). In Darden, the Court found no due process violation under the Donnelly test because (1) the prosecutor's comments were an invited response to the defendant's argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence. State v. Tubbs, 333 S.C. 316, 321 fn. 2, 509 S.E.2d 815, 818 fn.2 (1999) (citing Darden, 477 U.S. at 181). Here, this Court finds that taken in the context of the entire record, the

argument was not burden shifting. The solicitor was clear that he was simply anticipating the defense theory of the case, as he had to since he did not have final argument, and contending that there was no evidence or factual support in the record to support the defense theory, which defense counsel conceded at PCR was aimed precisely at what they did contend to the jury in argument. As noted in the facts, the solicitor not but a few paragraphs later referred to the necessity of the State proving intent (R. at 1738). The fact that the passage in isolation *might* be possibly construed as burden shifting is at odds with the context of the rest of the solicitor's argument and simply not enough to find error. See generally Donnelly, 416 U.S. at 643 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). See generally State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 444 (2003) (solicitor's comments did not refer to defendant's right to remain silent but merely were a comment on the evidence presented by the prosecution).

Moreover, even if the comment was improper, this Court simply cannot find a denial of a fair trial. This is because of the overwhelming evidence in this case, the minimal and brief nature of the reference in the context of the entire record, the solicitor's subsequent clear reference to the State's burden to prove intent, and the trial court's correct instructions on the burden of proof. Cf. Sweet, 342 S.C. at 349 (finding error not harmless where the State's evidence was not overwhelming). Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. However, because of the relatively timid nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from a fair trial. Moreover, the trial court refused to charge voluntary manslaughter, a decision affirmed on direct

appeal. Thus, the reference was hardly prejudicial to any legally valid theory. Whether in the context of due process or in the context of ineffective assistance of counsel, this Court cannot say that the comment denied Applicant a fair trial or that a timely objection would have raised a reasonable probability of a different result.

The issue is denied.

2. Cop killer in prison

Applicant next contends counsel were ineffective for failing to object to prosecutorial argument in the sentencing phase that Applicant, as a "cop killer," would be well-regarded by other inmates in the prison if he received a life sentence.

In arguing against the defense evidence from former warden James Aiken, the prosecutor asserted that since the most despised thing to an inmate in prison is the "cop that put him there," Applicant would be a "king" or "leader" in prison, and would rise in the hierarchy of inmates. (R. at 2189-92).

Of course, a solicitor in argument must stay within the record and its reasonable inferences. Huggins, 325 S.C. at 107 (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so). Here, the solicitor's argument was within the evidence and inferences. During the defense sentencing phase case, Applicant elicited from their prison expert, James Aiken, that "there is nothing that would indicate [Applicant] would ever be allowed into an unofficial hierarchy in a prison setting." (R. at 2043). Obviously, the solicitor was merely raising his own contrary inference in response to this defense evidence, by arguing the point that a "cop killer" might very well be highly regarded by his fellow criminals, of which all of whom most likely have had their freedom taken away by the actions of law enforcement.

See generally, e.g. State v. New, 338 S.C. 313, 320-321, 526 S.E.2d 237, 240-241 (Ct. App. 1999) (solicitor's argument that testifying accomplice was credible and had nothing to gain by testifying as he would be considered a "rat" in prison was permissible and based in the reasonable inferences of the record, and was a matter of common knowledge within the permissible bounds of advocacy). See also Darden, 477 U.S. at 182 (rejecting claim of improper argument in part because it was invited response to defendant's argument). Since the argument was permissible, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See generally Hough, 272 F.3d at 898 ("ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test," as it was neither deficient nor prejudicial).

Even if the comment was error, this Court finds neither a due process violation nor ineffective assistance from the failure to object. This one comment in the context of an entire sentencing hearing for an extremely aggravated crime with limited mitigation would not have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. Considering the brief nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from receiving a fair trial.

The issue is denied.

3. Susan Smith reference

Applicant finally complains about the prosecutor's argument that Applicant was not like Susan Smith, who would have to spend the rest of her life in prison worrying about the fact that she

killed her own two children.

During the sentencing phase opening argument, defense counsel argued:

> DEFENSE COUNSEL: I've heard people say that life without parole is perhaps a more punishing penalty. You know, like the girl over in Union that drowned her two children? Every day she lives with that guilt in her miserable imprisoned life. And John Wood, every day for the rest of his life when he looks in the mirror and sees the scar on his face, the mark of sin emblazoned on his own face.

(R. at 1856). At this point, the State objected, but the court agreed to give the defense some latitude.

During the State's closing argument in the sentencing phase, the solicitor argued that Applicant was "no Susan Smith," and that Applicant was not going to be sitting in prison "worrying about having killed her two children." The prosecutor pointed out that Applicant had called Trooper Nicholson a "SOB", and argued that Applicant would not be worrying or thinking about what he did if he received life in prison. (R. at 2190).

Even assuming that the argument was somehow objectionable, the prosecutorial argument was made in direct response to the defense argument on the very same point. Given the overwhelming evidence and the responsive nature of the argument, this brief reference did not deny Applicant a fair trial. Tubbs, 333 S.C. at 321 fn. 2 (citing Darden, 477 U.S. at 181) (no due process violation under the Donnelly test because (1) the prosecutor's comments were an invited response to the defendant's argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence). For the same reasons, counsel was not deficient nor Applicant prejudiced from the lack of an objection to this argument.

The issue is denied.

J. Ground J

Applicant's next ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Burkhart, ___ S.E. 2d___, 2007 WL 80036 (S.C. 2007).

Applicant contends that counsel were ineffective for failing to object to the prosecution's introduction of evidence of conditions of confinement in the sentencing hearing of this case.

For context, the following is a summary of the relevant facts to this issue from both the trial and the PCR.

1. Facts

During the defense opening statement in the sentencing phase, defense counsel Mauldin argued that "people say that life without parole is perhaps a more punishing penalty," and reminded the jury of the "girl over in Union who drowned her children," pointing out that "every day she lives with that guilt in her miserable imprisoned life." Defense counsel then related that to the guilt Applicant would suffer, arguing he would "every day . . . see . . . the mark of sin emblazoned on his own face." (R. at 1856).

During the State's sentencing phase case, the solicitor indicated his intent to call Jimmy Sligh from the South Carolina Department of Corrections. The solicitor noted that Sligh would be called to testify as to "what life in prison without parole means," as well as "the difference between life in prison without parole versus the punishment of death." The solicitor argued the evidence was relevant since the United States Supreme Court had held the jury needed to know a life sentence was

without parole, and concluded:

> SOLICITOR: And so if Your Honor's position is that [the Sligh testimony is] premature at this point because it's been raised in opening, only raised in opening, there's no evidence of that, there is a distinction there about difference.

(R. at 1876).

The court then inquired of the defense whether it had an objection. After a brief discussion with the court, the transcript reflects that defense counsel had an off-record conversation with co-counsel. Lead counsel Mauldin then told the court:

> DEFENSE COUNSEL: If our understanding of the summary proffer is that a Department of Corrections personnel will testify as to conditions of life without parole, if that's what this really is being offered as, then we're not going to enter an objection at this point to that witness.

(R. at 1876-77).

The solicitor then called Jimmy Sligh. On direct, Sligh testified about custody levels, security classifications, the prison cafeteria, the prison laundry, work opportunities, the daily routine, recreational opportunities, cell sizes, visitation and communication with the outside world, religious opportunities, violence in prison, the more limited opportunities on death row, and the lesser amount of violence on death row. (R. at 1878-1904).

On cross, the defense elicited that, if sentenced to life, Applicant would be in a high security environment with the inmates convicted of violent crimes. The defense pointed out Applicant would not be allowed to work outside the facility, and that he would always be classified at the highest level of security. Sligh testified that there are gangs in prison, that life in general population is "a tough place with tough people," that there was no assurance one would wake up in morning, and that prison officials are authorized to use deadly force on inmates. (R. at 1905-10). On redirect, the

solicitor elicited that deadly force is typically reserved for attempts to breach the security of the prison and that most guards carry batons. Sligh testified that corporal punishment is not used as a control means, that rehabilitative opportunities do exist in the prison, that most inmates make it through without being harmed by other inmates, and that they take body size in account when making room assignments. (R. at 1911-18).

During its sentencing phase case, the defense called former SCDC Warden James Aiken, who in many respects traveled down the same road as Mr. Sligh. Aiken testified that he had no concerns about Wood and stated to the jury that Wood was not likely to be a predator in prison. Aiken stated that death row was a far more preferable and safer place to be than general population, because a death row inmate has his own cell and does not have to worry about security threats from other inmates. He noted there were a lot of "predator groups" in general population, that prison was a very dangerous place, and theorized that Applicant would be more likely to be subjected to violence in prison from predators given his smaller size and older age. Aiken concluded that SCDC would have no problem safely containing Wood for the rest of his life. Finally, Aiken saw nothing that would indicate Applicant would ever rise in the *de facto* hierarchy among inmates. (R. at 2033-44). The solicitor had no cross.

In closing, counsel argued that prison was not "soft;" that Applicant would die in prison after spending the rest of his life in a small cell under the highest security classification, and that prisons contain violent, dangerous people. (R. at 2206-08).

In PCR, defense counsel Mauldin initially testified on direct by the Applicant that he thought Sligh was only going to testify as to the specific adaptability of Wood personally, and that Sligh surprised him by venturing down the road of conditions of confinement.

However, on cross by the State, Mauldin was shown the transcript reflecting the defense was clearly aware Sligh was going to testify to conditions of confinement, but expressly decided on the record not to object after an off-the-record discussion among the defense lawyers. Mauldin then stated he could not recall what he and the other attorneys were discussing during the off-the-record moment, and could not recall the strategic basis for the decision not to object to evidence on conditions of confinement. Mauldin admitted, though, that the defense lawyers would have been discussing whether as a strategic matter to object or not during the off-the-record conference.

Defense counsel Jim Bannister testified that the sentencing phase case was primarily the responsibility of Mr. Mauldin. He likewise could not specifically remember what the defense lawyers were discussing during the off-the-record conference, but also agreed they would not have been discussing baseball or some other irrelevancy. They would have been discussing whether to object or not to Sligh's testimony on conditions of confinement. Richey's testimony was similar to Bannister's in that he could not recall the discussion, but it would have involved whether or not to object as a strategic matter.

2. *Plath*, *Bowman*, *Burkhart*, and *Bryant*

The reason this issue is problematic stems from four South Carolina cases - one that was in existence prior to this case and three that were handed down after Applicant's trial.

In State v. Plath, 281 S.C. 1, 11-12, 313 S.E.2d 619, 625-626 (1984), the court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at Central Correctional Institute, and called life imprisonment "a form of slavery", a statement that the Supreme Court of South Carolina concluded was used "to

demonstrate the permanence and deprivation entailed in life imprisonment". Id. On cross, the State asked about another inmate's escape, which the court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Id. at 12.

After also rejecting a claim that the State improperly crossed a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy," or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss." Id. at 14. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment," and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection .... Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Id. at 14-15.

In Plath, 281 S.C. at 15, the court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not, a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671. Only in the context of justifying this distinction, Plath stated:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

281 S.C at 15.

Despite these admonitions, the Plath Court returned to how the State's challenged questioning was the only proper response to what that court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16 (emphasis added). See also State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades later, the Supreme Court of South Carolina decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). The State argued that the questioning about prison conditions was not preserved because the issue was not raised before the trial court nor was there a contemporaneous objection. The court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison, and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the

> State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Bowman, 366 S.C. at 498-99.

Subsequent to Bowman, the Supreme Court of South Carolina addressed a case where the *solicitor* preemptively called a witness who testified extensively to the conditions of confinement for an inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Id. at 487. Justice Waller joined by Justice Moore, who wrote the opinion of the court. Id. at 482. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. Id. at 487. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Id. at 487-488. Justice Moore noted that while trial of the case at issue was before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime." Id. at 488. Thus, Justice Moore concluded that the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. §16-3-25(C)(1) (2003). Id. at 488-489.

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under §16-3-25(C)(1)." Id. at 490. Justice Pleicones saw no

prejudice component once a statutory violation was established. Id.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. Id. The Chief Justice concluded that both sides fully joined the issue and the defendant used the issue to his advantage. Id. at 491. Finally, the Chief Justice noted that the standard in §16-3-25(C)(1) was merely a recitation of the Eighth Amendment standard, which is subject to a harmless error analysis. Id. at 492.

Subsequent to Burkhart, the Supreme Court of South Carolina decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, the defense called an expert that testified in great detail as to the "dismal conditions of prison life in general." Bryant, 372 S.C. at 317. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject. Id. at 318.

3. Applicability of a *Strickland* prejudice analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland prejudice analysis applies to this claim. Unlike Burkhart, Bowman, or Bryant, this case is in PCR, and in such a collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) ("Issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel."). The familiar standard in Strickland that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice, or a reasonable probability of a different result at trial. 466 U.S. at 689, 694.

In Jones v. State, 332 S.C. 329, 333, 504 S.E.2d.822, 823-824 (1998) (citing Strickland, 466

U.S. at 695), the Supreme Court of South Carolina stated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Accord Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997) (quoting Strickland, 466 U.S. at 700) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.").

There are only limited exceptions presuming prejudice; none of them apply here. In Nance v. Ozmint, 367 S.C. 547, 551-552, 626 S.E.2d 878, 880 (2006), the Supreme Court of South Carolina outlined these limited exceptions:

> In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The court in Nance pointed out that these situations of presumed prejudice are rare, and concluded

with this instruction:

> Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552.

These limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Cronic, is Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), where in the 1930s black youths in Alabama were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under the guard of soldiers. Id. at 53. Only on the day of trial did the court appoint a lawyer, who was not only unprepared but also was from a different state and unfamiliar with local procedure. Id. Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception of Nance, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is Nance itself, where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. Nance, 367 S.C. at 553. The lawyers only interviewed one family member in preparation, and the mental expert received none of his requested background information. Id. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase, during which they elicited prejudicial information; counsel failed to qualify their expert; and counsel called the sister at the last minute without any preparation. Id. at 554. The defense

sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, instead describing him as a "sick" man who did "sick" things. Id. at 554-58.

Such a woeful description is of course nothing like the aggressive representation that Applicant received in this case. He had three highly qualified and active lawyers, one of whom is among the most experienced capital defense litigators in the State. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, any alleged individual mistakes are properly adjudged through Strickland's normal process, including the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite the Supreme Court of South Carolina's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. During collateral attack concerns of finality are of "profound importance." See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the Supreme Court of South Carolina held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial. Franklin, 346 S.C. at 570-571. Franklin noted

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the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74. Finally, the court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*." Id. at 575 n.8 (emphasis in original).

That last statement precisely raises the final point of why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. Burkhart phrases its issue as a statutory one in that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. §16-3-25(C)(1). Applicant in PCR raises a *constitutional* issue by stating that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission. Applicant must filter his statutory claim through the constitutional one; as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, the overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis just like any other constitutional claim. 346 S.C. at 575 n.8.

4. There was no prejudice

This Court finds counsel were deficient for not objecting to the evidence. This deficiency does not warrant reversal, however. In the sentencing phase, Applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - 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." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson; however, Applicant's subsequent wild chase provides an incredible amount of further aggravation. Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record and had been in prison before, and the victim impact evidence in this case was particularly moving. Compared to this, there is limited mitigation, with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense. There was evidence in rebuttal that Applicant was anti-social.

As to the conditions of confinement evidence itself, the defense was able to score as many points if not more as the prosecution. Counsel apparently believed they could score more points on the issue as they made the decision not to object. Through cross of Sligh and presentation of James Aiken, the defense elicited how tough prison is, how Applicant would be far more susceptible to danger in general population than on death row, and how Applicant would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age. Both sides fully joined the issue and both sides were able to make headway.

Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State's and defense's evidence of conditions of confinement does not establish Strickland prejudice. Since evidence from both sides came before the jury,

argument on the subject was proper as within record, and the fact that both sides made argument on this issue does not change the calculation.[2]

The issue is denied.

K. Ground K

Applicant's final ground for relief is as follows:

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the Untied States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel were ineffective for failing to lodge an equal protection violation as to the aggravator regarding the murder of a law enforcement officer during or because of the performance of his official duties.

Such an aggravator does not violate equal protection as it acts as a deterrent from killing those who risk their lives daily for public protection, fosters respect for an officer's authority and arrest powers even from those who might otherwise be committing crimes, and recognizes the greater punishment needed for a crime that displays such a complete lack of regard for that law and social order, beyond the act of murder itself, that is inherent in the murder of one of her enforcers. Thus, counsel could not have been deficient nor Applicant prejudiced from the failure to raise this

[2] It should be noted that it would be inappropriate to claim, as trial counsel Mauldin did on the stand, that had he objected and the trial court overruled his objection, the case would have been reversed on appeal and thus prejudice is established. Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law," and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like." 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id. Although the trial court here found the evidence relevant, that was only *after* defense counsel expressly chose not to object on the record. This Court must presume that had counsel made an objection based on Plath, and articulated the issue as it was subsequently done in Bowman, that the judge would have ruled correctly and excluded the evidence.

issue.

The issue is denied. See Commonwealth v. Travaglia, 723 A.2d 190 (Pa. Super. Ct. 1998) (rejecting a similar equal protection claim); Ex parte Cade, 521 So. 2d 85 (Ala. 1987). See generally Williams v. Illinois, 399 U.S. 235, 243 (1970) ("there is no requirement that two persons convicted of same offense receive identical sentences").

III.

For the foregoing reasons, the Court denies and dismisses with prejudice the Applicant's APCR.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This 19 day of December, 2007.

Larry R. Patterson
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

3727

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
COUNT ONE – MURDER
COUNT TWO – POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on MAY 8, 2001 the Grand Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That JOHN RICHARD WOOD did in Greenville County, on or about the 6th day of December, 2000, unlawfully and with malice aforethought kill Eric Nicholson by means of shooting him, and that Eric Nicholson died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT TWO – POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME

That JOHN RICHARD WOOD did in Greenville County, on or about the 6th day of December, 2000, possess or visibly display a pistol during the commission or attempted commission of a violent crime, to wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

3728

WITNESSES

INV. PAUL SILVAGGIO /S

GCSO

2/09/00

ARREST WARRANT NUMBER

G 453839

G 453840

ACTION OF GRAND JURY

TRUE BILL

FOREMAN GRAND JURY

oreperson of Grand Jury

VERDICT

Count I Guilty

Count II Guilty

Dorma Blitts 2-11-02

oreperson of Petit Jury Date:

DOCKET NO. 2001-GS-23-BCS003106

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2001

THE STATE

GUILTY

vs.

JOHN RICHARD WOOD

Indictment for

0116 MURDER
VIOLATION § 16-3-10
0549 POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE ATTEMPT TO COMMIT A VIOLENT CRIME
VIOLATION § 16-23-490

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A Certified Copy
Paul B. Wickensimer Clerk of Court C.P. & G.S.
Ex-Officio Clerk County Court
Greenville County, S.C.
Dated 4/1/03