

VOLUME SIX OF NINE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

James R. Barber, III, Circuit Court Judge

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S.C. Supreme Court

KEVIN MERCER,

PETITIONER/RESPONDENT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPENDIX

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1 BEEN DIAGNOSED WITH POST-TRAUMATIC STRESS SYNDROME UNTIL SHE
2 DID IT A MONTH OR SO AGO, UNTIL SHE DID IT A MONTH OR SO AGO.
3 SHE SAID HE'S NEVER BEEN TREATED FOR POST-TRAUMATIC STRESS
4 SYNDROME. SHE SAID AMAZINGLY HE'S NEVER BEEN TREATED. WELL,
5 AMAZINGLY IF SHE DIAGNOSED IT, WHY ISN'T SHE TREATING HIM?
6 HE STILL HAS NEVER BEEN TREATED, BUT THEY SAID THEY COULD
7 TREAT YOU. BUT YOU GIVE IT WHATEVER WEIGHT YOU THINK IS
8 APPROPRIATE. AND YOU KNOW WHAT? THE COURT ORDERED AN
9 EXAMINATION BY THE STATE HOSPITAL, AND SHE AGREED WITH THE
10 STATE HOSPITAL.

11 DO YOU REMEMBER THAT THING THAT SAID -- THE HOSPITAL
12 SAID HE HAD AN ANTISOCIAL PERSONALITY DISORDER FOR WHICH
13 THERE IS NO TREATMENT AND YOU CAN NEVER GET OVER IT? SHE
14 SAID, YEAH, HE'S GOT THOSE TRAITS BY ALL THOSE CHARTS Y'ALL
15 PUT UP HERE. NOT PAYING HIS TRAFFIC TICKETS WHICH YOU
16 PROBABLY THOUGHT WAS A MENIAL THING. I'VE HAD TRAFFIC
17 TICKETS - WE ALL HAVE - BUT WHEN YOU DON'T PAY THEM AND THEY
18 KEEP TAKING YOUR LICENSE, SHE SAID THAT'S A TRAIT OF IT, AND
19 ALL THOSE OTHER ACTIVITIES, THE CRIMES HE COMMITTED, THE
20 INFRACTIONS HE COMMITTED, THE THINGS HE DID IN PRISON AND IN
21 JAIL AT THE ALVIN S. GLENN CENTER WHERE THE DEFENDANT'S WIFE
22 WORKS, AT THE LEXINGTON COUNTY SHERIFF'S DEPARTMENT, AT THE
23 DEPARTMENT OF CORRECTIONS -- HE DOESN'T CARE WHERE HE IS.
24 SHE SAYS THAT FITS INTO IT.

25 AND WE ASKED HER THIS: "DO YOU AGREE WITH THIS,

1 DOCTOR? ANTISOCIAL PERSONALITY DISORDER SAYS THE ESSENTIAL
2 FEATURE OF AN ANTISOCIAL PERSONALITY DISORDER IS A PERVASIVE
3 PATTERN OF DISREGARD FOR AND VIOLATION OF THE RIGHTS OF
4 OTHERS THAT BEGINS IN EARLY ADOLESCENCE AND CONTINUES ON INTO
5 ADULTHOOD." SHE AGREED WITH THAT. THAT DOESN'T SOUND LIKE
6 HIM? HE DOESN'T CARE ABOUT OTHER PEOPLE. YOU CAN'T TREAT
7 THAT. YOU CAN'T DO ANYTHING ABOUT IT.

8 HE WAS MEAN IN '99. HE WAS MEAN IN 2001. HE WAS
9 MEAN IN 2004, AND HE'S MEAN TODAY AND HE'S GOING TO BE MEAN
10 WHEN HE LEAVES LEXINGTON COUNTY, WHEREVER THEY SEND HIM, AND
11 HE'S GOING TO DO WHAT HE WANTS, WHEN HE WANTS, TO WHOMEVER HE
12 WANTS, FOR WHATEVER REASON HE WANTS. IF THAT'S MITIGATION,
13 Y'ALL GIVE IT TO HIM.

14 THEN WE HAD A BRAIN SPECT THAT THAT MAN TALKED ABOUT
15 THIS MORNING. IT WAS ORDERED BY DR. SCHWARTZ-WATTS. YOU'LL
16 HAVE IT IN YOUR JURY ROOM. IT'S DEFENSE EXHIBIT NUMBER 5
17 RIGHT HERE. AND THE FELLOW THAT DID THIS BRAIN SPECT, HE'S
18 GOT TO BE QUALIFIED BECAUSE THEY ASKED HIM TO DO IT, AND HE'S
19 GOT TO BE QUALIFIED BECAUSE THEY HAD HIM TO READ IT. AND
20 HE'S GOT TO BE QUALIFIED BECAUSE HE'S THE ONLY ONE OF THE
21 DEFENSE PEOPLE THAT WROTE OUT A REPORT, BUT THEY DON'T LIKE
22 IT. AND YOU KNOW WHY THEY DON'T LIKE IT? IT'S BECAUSE THE
23 FELLOW THAT DID THE TEST -- HIS NAME IS DOWN HERE. THE
24 FELLOW THAT READ THE TEST, PHIL, HE SAID, "THERE'S A
25 QUESTIONABLE ABNORMALITY INVOLVING THE LEFT SUBFRONTAL CORTEX

1 BEST SEEN ON THE CORONAL VIEW ON THE CAMERA CONSOLE ON UP
2 AROUND THE EYES." BUT HE SAID, "THE SIGNIFICANCE OF THAT IS
3 QUESTIONABLE, AND IN PARTICULAR I DO NOT BELIEVE THIS IS AN
4 ADEQUATE ETIOLOGY FOR ANY DEMENTIA OR ANY OTHER SEVERE
5 ABNORMALITY." THEY DON'T LIKE THAT, AND THEY ORDERED IT.

6 THIS GUY SAID THERE AIN'T NOTHING WRONG WITH THE
7 DEFENDANT. IT'S A SMOKE SCREEN WHAT THEY'RE SAYING UP HERE.
8 "SIGNIFICANCE IS QUESTIONABLE, AND I DO NOT BELIEVE THERE IS
9 ADEQUATE ETIOLOGY FOR DEMENTIA OR OTHER SEVERE ABNORMALITY."
10 WELL, FINALLY HE SAID, "WELL, WE DID AN M.R.I. OF HIS BRAIN,
11 AND IT WAS NORMAL. IT WAS ALL RIGHT." BUT IF YOU THINK
12 THAT'S SOMETHING THAT'S BENEFICIAL TO THE DEFENDANT,
13 SOMETHING THAT WOULD JUSTIFY LIFE, SOMETHING THAT WOULD
14 ENCOURAGE YOU TO VOTE FOR LIFE, YOU GIVE IT TO HIM, WHAT YOU
15 THINK IS FAIR, WHAT YOU THINK IS JUST.

16 THEN THEY SAID HE HAD POOR EMPLOYMENT FUNCTION. YOU
17 MEAN HE CAN'T WORK? THAT'S WHAT IT MEANS. HE CAN'T OR WON'T
18 WORK. SOMEBODY UP THERE SAID THAT HE HARDLY WAS EMPLOYED BUT
19 SPORADICALLY. MAMA SAID HE USED TO BAG GROCERIES. WHAT DOES
20 THAT MEAN? GOD, I CAN CUT GRASS EVEN IF I ONLY GOT ONE LEG.
21 NO SENSE. WITH HALF AN ARM YOU CAN WORK.

22 POOR SCHOOL FUNCTION. WELL, THEY SAID HE WAS IN
23 SPECIAL ED. NOW, THAT KIND OF UPSETS ME SAYING THAT SPECIAL
24 ED PEOPLE ARE MURDERERS. IT'S NOT RIGHT. MAYBE HE DIDN'T
25 TRY TO STUDY, BUT SOMEBODY SAID HE HAD AN I.Q. IN THE

1 NINETIES. I THINK THEIR WITNESS SAID THAT: AN I.Q. IN THE
2 NINETIES. BUT HE DOESN'T FUNCTION GOOD IN SCHOOL.

3 NOW, HERE'S A GOOD ONE THAT DR. SCHWARTZ-WATTS SAID:
4 HE USES HORRIBLE JUDGMENT. DUH? HE USES HORRIBLE JUDGMENT
5 BECAUSE HE'S A MURDERER. HE DOESN'T CARE ABOUT PEOPLE. IT'S
6 HORRIBLE TO US BUT NOT TO A MURDERER BECAUSE HE DOES WHAT HE
7 WANTS, WHEN HE WANTS TO, AND TO WHOEVER HE WANTS TO.
8 MITIGATION?

9 IT SAYS HERE THAT HIS FATHER BEAT HIM, AND ON THAT
10 CHART OVER THERE THAT WOMAN SAID THAT THE MOTHER BEAT HIM
11 REAL BAD WITH A BELT, AN EXTENSION CORD, AND ALL KIND OF
12 OTHER STUFF. UNCLE ABUSED HIM. STUDENTS STUFFED HIM IN A
13 TRASH CAN. THEY PUT MY HEAD IN A TOILET ONE TIME; I GUESS
14 I'M MESSED UP, TOO. AND SOME TEACHERS MADE FUN OF HIM. GOD
15 ALMIGHTY. IF THAT'S MITIGATION... AND HE LIVED IN SOME BAD
16 NEIGHBORHOODS. WELL, HE LEFT PHILADELPHIA AND CAME DOWN
17 HERE. BAD NEIGHBORHOODS.

18 AND THEN HIS GRANDMOTHER DIED IN JANUARY OF 2001,
19 AND I'M NOT MAKING FUN OF THAT, FOLKS. THAT COULD HAVE AN
20 EFFECT ON ANYBODY, BUT YOU KNOW SOMETHING? HIS GRANDMOTHER
21 DIED IN 2001, AND IF THAT'S THE CAUSE OF HIM MURDERING TRACY
22 DAVIS -- HE'S ALREADY BEEN CONVICTED OF AUTO TAMPERING AT HIS
23 ALMA MATER, COLUMBIA HIGH SCHOOL. HE'S ALREADY BEEN CAUGHT
24 WITH FIVE OR SIX OUNCES OF MARIJUANA. DO YOU REMEMBER THAT
25 GOOD-LOOKING DEPUTY FROM OVER THERE, THE ONE THAT BLOWS UP

1 THINGS AND BOMB QUAD AND THE DIVER, REAL CUTE LADY THAT WAS
2 THE DEPUTY? SHE STOPPED HIM BECAUSE OF A CIVIL DISTURBANCE
3 DOWN THERE.. HE HAD MARIJUANA AND WHAT ELSE? A PISTOL.

4 THEN I KNOW Y'ALL REMEMBER THIS. I KNOW Y'ALL
5 REMEMBER THE THING THAT HAPPENED OVER THERE AT THE GOODWIN
6 RESIDENCE. DO YOU REMEMBER THAT NICE BLACK LADY WHO CAME IN,
7 THE ONE WHO WAS FRAIL, THE ONE WHO WAS FRAGILE, THE ONE WHO
8 WAS A LITTLE ELDERLY? THAT HE CAME IN WITH A SAWED-OFF
9 SHOTGUN AND BROKE INTO THEIR HOUSE, JERKED HER OUT OF THE
10 BATHTUB, PULLED HER TOWEL OFF, AND HELD A SHOTGUN TO HER HEAD
11 AND WENT DOWN TO HER BEDROOM WITH HER TO TAKE HER \$20. DO
12 YOU REMEMBER THAT? MITIGATION? AND ALL THIS IS JUST
13 HAPPENING BEFORE HIS GRANDMOTHER DIED, BUT IF THAT'S
14 MITIGATION, PLEASE GIVE IT THE MITIGATION THAT YOU THINK HE
15 DESERVES.

16 AND THEN HIS WIFE AND KIDS, NICE-LOOKING LADY, NICE-
17 LOOKING KIDS. BUT WHERE WAS HE ON MAY THE 16TH AT 11:30?
18 WAS HE WITH HIS WIFE? WAS HE PLAYING WITH HIS KIDS OR
19 PUTTING THEM TO BED? WAS HE BUYING THEM SOME MILK AND
20 CHANGING DIAPERS? NO, SIR. NO, MA'AM. HE'S OUT MURDERING,
21 CARJACKING, ARMED ROBBERY, STEALING SO HE CAN GO TO FREAK
22 NEAK IN ATLANTA, AND DOESN'T CARE WHAT THE HELL HE LEAVES
23 BEHIND. AND EXCUSE MY LANGUAGE, BUT THAT'S HOW HE IS. IF
24 THAT'S MITIGATION, IF THAT'S SOMETHING FOR LIFE IN PRISON, IF
25 YOU THINK IT IS, PLEASE DO SO.

1 I TELL YOU WHAT ELSE. WHEN YOU'RE CONSIDERING THIS
2 MITIGATION ABOUT EMOTIONAL AND MENTALITY DISTURBANCE,
3 EVERYBODY ON THAT STAND SAID HE'S NOT MENTALLY RETARDED.
4 EVERYBODY ON THAT STAND AGREES HE'S MENTALLY COMPETENT.
5 EVERYBODY ON THAT STAND SAYS HE KNOWS RIGHT FROM WRONG.
6 EVERYBODY SAID HE KNOWS CRIMINAL RIGHT FROM CRIMINAL WRONG.
7 IF YOU VIOLATE THE LAW, YOU'RE PUNISHED FOR IT AND HE KNOWS
8 IT AND DOESN'T CARE AND HE IS CRIMINALLY RESPONSIBLE FOR HIS
9 CONDUCT. NOT A WITNESS ON THAT STAND -- AND I TOOK ALL THE
10 NOTES AS BEST I COULD. THERE'S NOT A WITNESS ON THAT STAND
11 THAT TESTIFIED THAT WHATEVER MENTAL CONDITION HE MAY HAVE,
12 NONE OF THAT CONTRIBUTED IN ONE WAY TO THE MURDER OF TRACY
13 DAVIS, BUT WE'VE GOT IT IN HERE AND YOU CONSIDER IT. YOU
14 GIVE IT THE WEIGHT THAT YOU THINK IT DESERVES.

15 AND I'VE TALKED ABOUT HIS CHARACTER SO MUCH. YOU
16 KNOW, FOUR BOARDS, THAT'S A LOT OF CONDUCT. THAT'S A LOT OF
17 CRIME. THAT'S A LOT OF PAIN. THAT'S A LOT OF VIOLENCE. BUT
18 IF YOU THINK THAT IS SOMETHING IN MITIGATION, PLEASE GIVE IT
19 THE WEIGHT AND THE CREDIBILITY... YOU CAN PUT THOSE FOUR
20 BOARDS AROUND A TABLE AND LOCK HIM IN ON HIS OWN CRIMINALITY,
21 ON HIS OWN RULES AND INFRACTIONS, ON HAVING SHANKS IN HIS
22 CELL AND HAVING RAZOR BLADES IN THE LIGHT FIXTURE AND TEARING
23 UP A LIGHT FIXTURE TO GET A JAGGED EDGE THAT'S MISSING THAT
24 THEY STILL HAVEN'T FOUND.

25 AND A FELLOW FROM THE SOUTH CAROLINA -- NOT FROM THE

1 SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. HE IS SOMEWHERE
2 ELSE NOW. THE CONSULTANT SAID THAT THE SOUTH CAROLINA
3 DEPARTMENT OF CORRECTIONS, THEY CAN MANAGE ANY INMATE. HE'LL
4 BE AN ANGEL IN PRISON. ONCE HE GETS TO THE SOUTH CAROLINA
5 DEPARTMENT OF CORRECTIONS, HE'S GOING TO FLIP AROUND TO THE
6 GOOD SIDE AND HE'LL BE A GOOD FELLOW. GOOD FELLOW. YOU KNOW
7 WHAT THE GOOD FELLOWS ARE. THEY'RE THE ONES THAT DISH OUT
8 PAIN AND VIOLENCE AND SORROW, AND THAT'S THE STORY OF HIS
9 LIFE.

10 WELL, YOU KNOW WHAT? I'M GLAD THAT FELLOW LOOKED AT
11 ALL THAT STUFF BECAUSE RIGHT ALONG IN HERE HE WAS IN THE
12 DEPARTMENT OF CORRECTIONS. AIN'T BEING TOO GOOD OVER THERE,
13 IS HE? BUT THEY CAN MANAGE HIM, EVEN WHEN HE'S GETTING
14 SHANKS AND KNIVES AND NAILS. HE'S ALREADY LEARNED THE ROPES;
15 HE'S ALREADY THERE. BUT THEY CAN MANAGE HIM.

16 ANTISOCIAL PERSONALITY DISORDER. YOU DON'T GET
17 BETTER; YOU GET WORSE. DO YOU THINK HE'S GOING TO GET
18 BETTER? DO YOU THINK HE'S GOING TO ACT NICE AND OBEDIENT AND
19 LAWFUL WHILE HE'S AT THE DEPARTMENT OF CORRECTIONS? THERE'S
20 ONLY ONE PLACE FOR HIM BY HIS OWN CONDUCT, HIS OWN ACTIONS.
21 THERE'S ONE PLACE FOR HIM.

22 DO YOU REMEMBER WHEN THAT GOOD-LOOKING LADY STOPPED
23 HIM? AND THAT WAS BEFORE HIS GRANDMOTHER DIED. SHE STOPPED
24 HIM WITH THAT MARIJUANA ON DECEMBER THE 12TH OF 1999, AND
25 SHE'S THE ONE THAT SAID IT WAS A JOKE. MERCER GAVE HER THREE

1 OR FOUR DIFFERENT NAMES. WOULDN'T EVEN TELL HER WHO SHE WAS
2 -- WHO HE WAS UNTIL SHE FINALLY GOT SOME IDENTIFICATION
3 SOMEHOW THAT IT WAS KEVIN MERCER. WOULDN'T EVEN TELL HIM
4 (SIC) .

5 AT THE GOODWIN RESIDENCE, ACTING NICE. OTHER PEOPLE
6 HAD BATS. HE HAD THE SAWED-OFF SHOTGUN. SHE PICKED HIM OUT
7 OF A PHOTO LINE-UP AFTER THE CRIME, AFTER THE HORROR, AFTER
8 THE VIOLENCE IN THAT HOUSE. BUT YOU KNOW THE ONE THAT REALLY
9 GETS ME IS DECEMBER 5TH, 2001. DO YOU REMEMBER THAT NICE,
10 NEAT-LOOKING OFFICER WHO USED TO BE A MARINE AND LATER ON
11 WORKING FOR LAW ENFORCEMENT AND LATER ON WORKING FOR THE
12 RICHLAND COUNTY SHERIFF'S DEPARTMENT? AND HE STOPS THE
13 DRIVER. THE PASSENGER IS SCARED TO DEATH. HE'S LOOKING
14 STRAIGHT FORWARD, SOME FELLOW NAMED MOHAMMED GAINES OR
15 SOMETHING, AND HE'S LOOKING STRAIGHT FORWARD AND NOT MOVING.
16 AND HE SAYS: THAT DRIVER, HE'S SCARING ME. HE WAS WORRIED
17 ABOUT THAT DRIVER, CALLED FOR BACK-UP. HE SAID HE AIN'T
18 DOING A LOT OF MOVING, A LOT OF MOVING AROUND, AND THIS AIN'T
19 RIGHT.

20 WHEN HE WALKS UP TO THE BACK OF THE CAR, WHAT DOES
21 HE DO? HE PUTS HIS PALM ON THE TRUNK TO MAKE SURE THAT THE
22 OFFICER'S FINGERPRINTS ARE ON THE TRUNK IN CASE SOMETHING
23 GOES WRONG, SOMETHING GOES BAD. IF SOMETHING HAPPENS, THEY
24 CAN IDENTIFY THE OFFICER THROUGH HIS FINGERPRINTS. AND HE
25 WALKS UP TO THE DRIVER'S SIDE, AND THE DRIVER IS REACHING

1 DOWN BETWEEN HIS LEGS. THANK GOODNESS FOR THE BACK-UP GUY
2 SHINING THE LIGHT IN BECAUSE WHEN HE LOOKS DOWN AND HE'S
3 LAUGHING... THE DRIVER IS REACHING DOWN AND RIGHT DOWN UNDER
4 HIS HAND IS A PISTOL. PISTOL. AND HE SNATCHES HIM OUT AND
5 MERCER IS ON THE GROUND LAUGHING. IS THAT A CHARACTER WORTH
6 LIFE IMPRISONMENT OR IS IT FOR THE ULTIMATE PUNISHMENT?
7 LAUGHING.

8 WHAT ABOUT AFTER MURDERING TRACY DAVIS? OFFICER
9 STAZER STOPS HIM. AND THE INMATE SAYS, "I ASKED HIM, 'AFTER
10 YOU HAD DONE ALL THIS, AFTER YOU PUT THAT SOLDIER ON THE
11 GROUND, AFTER THE SOLDIER GAVE YOU THE KEYS TO HIS NAVIGATOR,
12 AFTER YOU SHOT HIM IN THE BACK OF THE HEAD AND THE COP
13 STOPPED YOU 17 MINUTES LATER, WHY DIDN'T YOU SHOOT THE COP?'"
14 WHAT'S HIS RESPONSE? "IT WAS THE COP'S LUCKY DAY. IT WAS
15 THE COP'S LUCKY DAY."

16 MERCY? LENIENCY? MITIGATION? THE DEATH PENALTY IS
17 FOR THE WORST OF THE WORST AND, FOLKS, YOU HAVE HIM IN THE
18 COURTROOM TODAY, KEVIN MERCER. PAIN. SUFFERING. MURDER,
19 THAT'S WHAT HE'S ABOUT, ON OTHER PEOPLE. AND SO NOW WHEN
20 THEY TAKE HIM OUT OF HIS CELL, THEY HAVE TO PUT HIM IN FULL
21 RESTRAINTS, HANDCUFFS, BELLY CHAINS, LEG IRONS, IN FULL
22 RESTRAINTS TO GET HIM OUT OF THE CELL FOR THE SAFETY OF
23 CORRECTIONAL OFFICERS AND OTHER INMATES. BUT HE'LL BE GOOD
24 WHEN HE GETS IN THE DEPARTMENT OF CORRECTIONS. OH, HE'LL BE
25 SO NICE. HE'LL BE A LITTLE ANGEL.

1 YOU KNOW ONE THING ABOUT HIM? WHEN HE'S INFLECTING
2 HIS PAIN, HIS SORROW, WHEN HE'S INFLECTING VIOLENCE, HE
3 DOESN'T DISCRIMINATE AGAINST ANYBODY BECAUSE HE'S DONE IT TO
4 YOUNG FOLKS AND TO OLD FOLKS. HE'S DONE IT TO WHITE FOLKS;
5 HE'S DONE IT TO BLACK FOLKS. HE'S DONE IT TO MALE; HE'S DONE
6 IT TO FEMALE. HE'S DONE IT TO THE STRONG; HE'S DONE IT TO
7 THE WEAK. HE'S DONE IT TO THE HEALTHY, AND HE'S DONE IT TO
8 THE INFIRMED BECAUSE HE DOESN'T CARE. HE'LL DO WHAT HE
9 WANTS, AND IT DOESN'T MAKE ANY DIFFERENCE WHO IT IS OR WHAT
10 IT IS OR HOW HE DOES IT. WORST OF THE WORST, THAT'S WHAT THE
11 DEATH PENALTY IS FOR.

12 TRACY DAVIS WAS ON A FAST TRACK. WHAT A MAN. DO
13 YOU REMEMBER THE COMMAND SERGEANT MAJOR IN HIS UNIFORM THE
14 OTHER DAY EXPLAINING THE RIBBONS? THERE'S ONE FELLOW,
15 NONCOMMISSIONED OFFICER IN THE UNITED STATES ARMY, THAT'S
16 HIGHER THAN HE IS, AND THAT'S THE HEAD SERGEANT OF THE ARMY,
17 ONE FELLOW HIGHER THAN MR. WELLS. HE SAID, "IF TRACY WERE
18 ALIVE TODAY, HE'D HAVE MY RANK, JUST LIKE ME AND NONE
19 HIGHER." YOUTH CENTERS. HELPING PEOPLE. RUNNING FOR BREAST
20 CANCER, LEUKEMIA, ALL THOSE THINGS. HE DOESN'T CARE. IT
21 DOESN'T MAKE ANY DIFFERENCE TO MERCER. MAKES NO DIFFERENCE
22 TO HIM.

23 MERCER IS LIKE A TICKING TIME BOMB. HE'S BEEN
24 TICKING SINCE BEFORE '96. AND A TIME BOMB THAT'S FRAGILE AND
25 TICKING IS GOING TO EXPLODE. IT EXPLODED IN THE GOODWIN

1 RESIDENCE. THANK GOODNESS THAT LADY IS ALL RIGHT - TO HAVE
2 THAT SAWED-OFF SHOTGUN TO HER HEAD. IT WAS TICKING WHEN
3 OFFICER BROWN PUT HIS FINGERPRINTS ON THE TRUNK. THANK GOD
4 HE'S STILL ALIVE. IT WAS TICKING ON MAY 16TH, 2002, AT 11:30
5 WHEN HE SHOT TRACY DAVIS IN THE BACK OF THE HEAD LIKE THE
6 COLD-BLOODED COWARD HE IS AND IS STILL TICKING, AND IT'S BEEN
7 TICKING SINCE HE WAS IN JAIL, TICKING WHEN HE TRIED TO STAB
8 TERRY BROWN TO DEATH. AND THE CORRECTION MAN SAID, "OH, IT'S
9 JUST A SCRATCH," WHEN HE CUT HIM IN THE FACE. JUST A SCRATCH
10 WHEN IT'S CLOSE TO HIS JUGULAR VEIN. NOTHING TO IT. AND
11 IT'S STILL TICKING. WHEN HE LEAVES THIS COURTHOUSE, IT'S
12 STILL GOING TO BE TICKING.

13 AND YOU KNOW SOMETHING ELSE? HE'S GOING TO DO
14 WHATEVER HE CAN. FEBRUARY 4TH, LEXINGTON COUNTY.
15 FEBRUARY 4TH, 2004, LEXINGTON COUNTY JAIL. DO YOU REMEMBER
16 WHEN THEY WERE RAMMING THAT BED INTO THE WALL? DO YOU
17 REMEMBER THAT'S THE SAME LIGHT FIXTURE THE NEXT MORNING THAT
18 HAD THE RAZOR BLADE IN IT? STILL TICKING. AND YOU KNOW,
19 FOLKS, AFTER ALL OF THIS, AFTER ALL OF THIS UNLAWFULNESS, ALL
20 OF THIS VIOLENCE, EVEN COMING UP FOR TRIAL, HAS HE BEEN GOOD?
21 DO YOU REMEMBER THIS CORRESPONDENCE RIGHT HERE, THAT LETTER,
22 THAT HE PASSED TO THAT LADY ABOUT TWO MONTHS AGO, THE BLONDE
23 LADY? DO YOU REMEMBER THAT?

24 NOW, HE'S ALREADY BEEN SENTENCED. HE'S GOT TWELVE
25 YEARS FOR ASSAULT AND BATTERY WITH INTENT TO KILL. HE GOT

1 FIVE YEARS FOR HAVING THAT WEAPON WHEN HE TRIED TO STAB TERRY
2 BROWN TO DEATH. HE'S CAUGHT MORE TIME OVER IN RICHLAND
3 COUNTY. HE'S GOT FIVE AND A HALF YEARS FOR THE REVOCATION OF
4 THE BURGLARY, FIVE AND A HALF YEARS FOR THE REVOCATION OF THE
5 ROBBERY OVER THERE, THREE AND A HALF YEARS FOR THE DRUGS.
6 HE'S GOT ALL THIS STUFF ON HIM. HE'S GOT EVERY BIT OF IT ON
7 HIM.

8 AS A MATTER OF FACT, ON MARCH THE 14TH HE CAUGHT THE
9 TWELVE YEARS AND THE FIVE YEARS OF ASSAULT AND BATTERY WITH
10 INTENT TO KILL, AND THE NEXT DAY HE'S HANDING THIS LETTER TO
11 THAT FEMALE CORRECTIONAL OFFICER. WRITE ME. TALK WITH ME.
12 YOU'RE THE PRETTIEST THING I'VE EVER SEEN. ALL YOU GOT TO DO
13 IS SLIP ME SOME NOTES. WE'LL GET TOGETHER. THEY SAY ALL
14 GOOD MEN ARE IN JAIL, SO JUST TO LET YOU KNOW THAT'S WHO YOU
15 ARE LOOKING AT. ALL I WANT TO DO IS SERVE YOU AND LOVE YOU
16 FOR LIFE. LET ME BE YOUR PERSONAL SLAVE. I'M GOING TO GET
17 OUT OF JAIL SOON. I'M GOING TO GET OUT OF JAIL SOON. THAT'S
18 THE DAY AFTER HE'S GOT TWELVE YEARS ON ONE CHARGE AND FIVE
19 YEARS ON ANOTHER ONE.

20 DID POST-TRAUMATIC STRESS SYNDROME CAUSE THAT, YOU
21 THINK? DO YOU THINK HE'S GOING TO BE STAYING IN HIS CELL
22 WHEREVER HE GOES IDLY PASSING THE TIME WITHOUT TRYING TO FIND
23 RAZOR BLADES, WITHOUT TRYING TO FIND SHANKS, WITHOUT TEARING
24 UP LIGHT FIXTURES, AND WITHOUT THINKING ABOUT ESCAPE? IT'S
25 IN THE EVIDENCE. HE TRIED IT AT LEXINGTON. SENT THAT LADY

1 THAT NOTE THE DAY AFTER HE GOT TWELVE YEARS AND FIVE YEARS ON
2 TOP OF THE STUFF FROM RICHLAND COUNTY. I'M GOING TO BE
3 GETTING OUT OF JAIL SOON.

4 MITIGATION? LIFE? IS THAT WHAT THIS PERSON
5 DESERVES? IS THAT THE SENTENCE THAT FITS THE CRIME AND THE
6 SENTENCE THAT FITS THE MURDERER? THERE'S ONLY ONE SENTENCE.
7 THERE'S ONLY ONE SENTENCE.

8 TRACY DAVIS WAS PROUD OF THAT NAVIGATOR. THE LAST
9 PICTURE TAKEN OF HIS FAMILY HE USED THAT NAVIGATOR TO TAKE
10 THEM TO DISNEY WORLD. DO YOU REMEMBER THE DAUGHTER? EVEN
11 HIS EX-WIFE, THEY'RE STILL GETTING ALONG. HE TOOK HER AND
12 HER SON THAT'S NOT HIS. STILL BUYING HIM GIFTS. THE LAST
13 PICTURE.

14 KEVIN MERCER TURNED THIS INTO THIS. THAT'S KEVIN
15 MERCER RIGHT HERE. THAT'S HIS HANDIWORK. THAT'S HIS
16 CHARACTER. THAT'S HIS MENTALITY. THAT'S WHAT HE LIKES.

17 TRACY DAVIS SURPRISES HIS DAUGHTER. THIS ONE WAS
18 FOR EASTER. YOU HEARD HIS MOM SAID HE WOULD JUST SHOW UP.
19 WITH HIS DAUGHTER ON EASTER. SURPRISES HER FOR HER SIXTH
20 GRADE PROM. HE'S HER DATE. HE SHOWS UP. NOT THERE FOR THE
21 EIGHTH GRADE PROM. NOT THERE FOR SWEET 16. THE YOUNG GIRL
22 WITH ALREADY NEARLY 30 COLLEGE CREDITS. WON'T BE THERE FOR
23 GRADUATION. WON'T BE THERE FOR COLLEGE, MARRIAGE, KIDS,
24 BECAUSE THIS BRAVE SOLDIER -- NAMED A BUILDING AFTER HIM AT
25 FORT JACKSON WITH HIS NAME IN ALL THE ROOMS. AWARDS. KEVIN

1 MERCER TURNS THIS INTO THIS.

2 MERCY FOR MERCER? DID HE SHOW MERCY WHEN TRACY WAS
3 ON HIS KNEES? DID HE SHOW MERCY WHEN TRACY GAVE HIM THE
4 KEYS? DID HE SHOW MERCY WHEN HE PULLED THAT TRIGGER? AND
5 WAS HE MERCIFUL WHEN HE WAS CAUGHT AND THE FIRST THING HE
6 ASKED DEPUTY STAZER WAS, "OFFICER, DID I DO ANYTHING WRONG?
7 OFFICER, DID I DO ANYTHING WRONG?" AND THIS IS WHAT HE LEFT
8 BEHIND. THIS TO THIS. AND HE HASN'T DONE ANYTHING WRONG.
9 NOTHING.

10 YOU KNOW, HIS FAMILY MEMBERS LOVE HIM. NOT A ONE OF
11 THEM ASKED FOR MERCY. NOT A ONE OF THEM ASKED FOR MERCY.
12 WHEN I GET THROUGH, THE DEFENSE MAKES THE LAST ARGUMENT. THE
13 DEFENDANT WILL GET TO SAY SOMETHING TO YOU. HE'LL PROBABLY
14 ASK YOU FOR MERCY. HE'LL PROBABLY SAY, "GIVE ME MERCY." AND
15 WHEN HE DOES, THINK ABOUT HIM HOLDING THIS BAZOOKA-LOOKING
16 PISTOL. LOOK AT HIS HANDS AND YOU WILL KNOW THAT THOSE HANDS
17 ARE THE ONES THAT HELD THIS PISTOL, AND THESE ARE THE BULLETS
18 AND FRAGMENTS TAKEN FROM TRACY DAVIS' HEAD THAT CAME OUT OF
19 THE END OF THIS GUN WHEN KEVIN MERCER PULLED THE TRIGGER AND
20 17 MINUTES LATER SAID, "OFFICER, DID I DO ANYTHING WRONG?"
21 WHEN HE ASKS FOR MERCY, YOU THINK ABOUT TRACY DAVIS ON HIS
22 KNEES DRAWING THE LAST BREATH OF LIFE, AND IF THAT'S LIFE FOR
23 NO REASON AND A MERCY VERDICT, THEN WRITE IT OUT IN BOLD FOR
24 ALL OF US TO SEE.

25 THAT TIME BOMB IS STILL TICKING, AND SOMEBODY ELSE

1 IS GOING TO TAKE A LICKING JUST LIKE TRACY DAVIS AND JUST
2 LIKE SOME OTHER ONES. YOU'RE GOING TO SEND HIM TO THE SOUTH
3 CAROLINA DEPARTMENT OF CORRECTIONS AND PUT HIM THERE TO BE
4 AROUND CORRECTIONAL OFFICERS AND OTHER INMATES WITH THAT TIME
5 BOMB TICKING, AND YOU DON'T THINK HE'S GOING TO THROW SOME
6 MORE LICKINGS AND LOOKING TO ESCAPE? THAT'S THE DEATH
7 PENALTY, FOLKS. THAT'S WHAT THIS IS FOR. IT DOESN'T DESERVE
8 IT; IT CRIES OUT FOR IT.

9 DO YOU REMEMBER SERGEANT O'GARRO, THE RUNNER? HE
10 SAID, "YEAH, I CAN MAKE IT ABOUT TWO MILES, BUT TRACY, YOU
11 KNOW, HE DID THAT TEN-MILE RUN." HE SAID, "MAN, I CAN'T DO
12 THAT." BUT WHO TOOK TRACY'S PLACE IN WASHINGTON, D.C., AT
13 THE TEN-MILE RUN? O'GARRO. THE MOD SQUAD. AND YOU KNOW HE
14 SAID THAT HE SPOKE FOR TRACY OVER AT FORT JACKSON, WHEN THEY
15 HAD THAT CEREMONY FOR HIM AND THAT C.D., WHAT TRACY MEANT TO
16 THEM. AND THEY WERE DOWN IN MIAMI AT HIS FUNERAL AND O'GARRO
17 SAID, "WHEN I WAS AT FORT JACKSON, I USED TRACY'S NAME,
18 T-R-A-C-Y, AND SAID SOME THINGS ABOUT HIM." HE DIDN'T KNOW
19 THAT TAY, HIS DAUGHTER, HAD DONE THE SAME THING FOR HER
20 FATHER'S FUNERAL. "OUR LOVE" THE SONG WAS.

21 O'GARRO TALKED ABOUT ALL THE THINGS THAT TRACY HAD
22 DONE AND EVERYBODY HE TOUCHED. AND THEN RIGHT HERE THEY HAD
23 A ROLL CALL. COMMANDER SERGEANT MAJOR WELLS? HERE.
24 MAGWOOD? HERE. SERGEANT O'GARRO? HERE. SERGEANT DAVIS.
25 NO ANSWER. SERGEANT DAVIS. NO ANSWER. MASTER SERGEANT

1 TRACY L. DAVIS. HE CAN'T ANSWER. KEVIN MERCER HAS MADE SURE
2 OF THAT. STRICKEN FROM THE ROLLS.

3 YOU'RE GOING TO HAVE A ROLL CALL IN A LITTLE WHILE
4 THIS AFTERNOON, AND IT'S GOING TO BE ON THIS FORM. THERE'S
5 GOING TO BE 12 LINES. A ROLL CALL FOR YOU. WILL YOU SPEAK
6 UP WHERE TRACY DAVIS CAN'T? IF YOU DON'T, IT WILL BE A
7 BLIGHT ON THIS FINE SOLDIER'S MEMORY.

8 MR. LITTLEJOHN: MAY IT PLEASE THE COURT? COULD I
9 HAVE JUST A MOMENT TO TAKE THE CHARTS DOWN?

10 THE COURT: YES, SIR.

11 MR. LITTLEJOHN: IF IT PLEASE THE COURT?

12 THE COURT: YES, SIR.

13 MR. LITTLEJOHN: MR. MYERS. MR. FOREMAN, LADIES AND
14 GENTLEMEN, SOLICITOR MYERS IS VERY PERSUASIVE IN THESE KIND
15 OF CASES. I SPEAK FROM EXPERIENCE. I USED TO SIT AT THE
16 TABLE OVER THERE WITH HIM MANY, MANY YEARS AGO, AND HE HAS
17 QUITE A KNACK FOR TUGGING ON YOUR HEART STRINGS AND BRINGING
18 OUT THE EMOTIONAL ASPECTS OF THESE CASES. AND IT IS A --
19 IT'S AN EMOTIONAL THING. THIS KIND OF PROCEEDING IS ALWAYS
20 EMOTIONAL. IT'S EMOTIONAL BECAUSE YOU'VE GOT A VICTIM IN
21 THIS CASE, SERGEANT TRACY DAVIS, WHO APPARENTLY WAS A GOOD
22 GUY, A GOOD FAMILY MEMBER, A GOOD SOLDIER. IT'S EMOTIONAL
23 BECAUSE YOU'VE GOT KEVIN MERCER'S FAMILY AND HIS LIFE ON THE
24 LINE. SO IT'S THE KIND OF THING THAT WE CAN'T HELP BUT BE
25 TOUCHED BY, AND SOLICITOR MYERS IS VERY GOOD AT TOUCHING YOUR

1 EMOTIONS.

2 BUT, YOU KNOW, WHAT WE AS LAWYERS SAY IS NOT
3 EVIDENCE. WHAT WE SAY IS SAID TO HELP YOU LOOK AT THE
4 EVIDENCE AND TO ARRIVE AT WHAT IS THE CORRECT VERDICT, AND
5 THAT'S WHAT YOU HAVE TO DEAL WITH IS THE EVIDENCE. AND I
6 WISH YOU COULD LOOK AT THAT EVIDENCE AND GO BACK INTO YOUR
7 JURY ROOM AND DELIBERATE AND BRING BACK A VERDICT THAT WOULD
8 MAKE TRACY DAVIS ALIVE AGAIN. I WISH YOU COULD DO THAT, BUT
9 YOU CAN'T. AND WHAT YOU HAVE TO DEAL WITH IS THE LIFE OF
10 KEVIN MERCER.

11 NOW, I'M NOT GOING TO TAKE A GREAT DEAL OF YOUR TIME
12 MYSELF. MS. KIMBROUGH IS GOING TO FOLLOW ME, BUT THERE'S
13 SOMETHING THAT I NEED TO TALK TO YOU ABOUT THAT THE STATE
14 DIDN'T MENTION, BUT IT'S A PART OF THIS CASE THAT YOU'RE
15 GOING TO HAVE TO DEAL WITH. AND JUDGE FEW IS GOING TO TELL
16 YOU BEFORE YOU GET READY TO DELIBERATE ABOUT TWO LEGAL
17 PRINCIPLES, TWO FINDINGS THAT YOU MUST MAKE BEFORE YOU CAN
18 EVEN CONSIDER IMPOSING THE DEATH PENALTY IN THIS CASE. AND
19 THE FIRST ONE IS THAT YOU MUST FIND BEYOND A REASONABLE DOUBT
20 THAT THE MURDER OF TRACY DAVIS WAS COMMITTED BY KEVIN MERCER
21 WHILE IN THE COMMISSION OF AN AGGRAVATING CIRCUMSTANCE, AND
22 IN THIS CASE THAT AGGRAVATING CIRCUMSTANCE IS ARMED ROBBERY.

23 NOW, I'M NOT GOING TO SIT HERE AND TELL YOU THERE
24 WAS NO ARMED ROBBERY. YOU HAVE ALREADY DELIBERATED. YOU
25 HAVE ALREADY FOUND HIM GUILTY OF ARMED ROBBERY. THERE IS NO

1 DISPUTE. YOU LOOKED AT THE EVIDENCE. YOU LOOKED AT IT
2 FAIRLY. YOU TALKED ABOUT IT FOR NEARLY TWO HOURS, AND THAT
3 WAS YOUR VERDICT AND WE DON'T QUIBBLE WITH THAT. WE DON'T
4 ARGUE WITH THAT.

5 BUT THERE'S A SECOND LEGAL REQUIREMENT THAT THE
6 JUDGE IS GOING TO TELL YOU, AND THAT REQUIREMENT IS THAT
7 UNLESS YOU FIND BEYOND A REASONABLE DOUBT THAT THE STATE HAS
8 PROVEN TO YOU THAT KEVIN MERCER WAS THE MAN WHO PULLED THE
9 TRIGGER, THAT HE WAS THE MAN WHO ACTUALLY FIRED THE GUN,
10 UNLESS YOU FIND THAT, YOU CAN'T IMPOSE THE DEATH PENALTY.
11 YOU HAVE TO BE CONVINCED BEYOND A REASONABLE DOUBT THAT HE IS
12 THE ONE THAT PULLED THE TRIGGER AND NOT SOMEBODY ELSE AND NOT
13 MARCUS THOMPSON.

14 I DON'T KNOW WHETHER YOU DECIDED THIS ISSUE OR NOT.
15 THE JUDGE OBVIOUSLY INSTRUCTED YOU AT THE CONCLUSION OF THE
16 FIRST PHASE OF THIS TRIAL ON THE LAW OF THE HAND OF ONE IS
17 THE HAND OF ALL, AND UNDER THAT PRINCIPLE YOU CAN FIND THAT
18 IF TWO PEOPLE ENTER INTO A CRIMINAL VENTURE THAT IS A FELONY
19 AND SOMEONE IS KILLED OR MURDERED DURING THE COURSE OF THAT
20 CRIMINAL VENTURE, THEN BOTH PEOPLE ARE RESPONSIBLE. YOU MAY
21 HAVE APPLIED THAT PRINCIPLE IN ARRIVING AT YOUR VERDICT; I
22 DON'T KNOW. OBVIOUSLY YOUR DELIBERATIONS ARE SECRET, AND
23 THAT'S THE WAY IT SHOULD BE. IF YOU FOUND THAT KEVIN MERCER
24 WAS GUILTY BASED ON THAT - THE HAND OF ONE IS THE HAND OF ALL
25 - AND NOT THAT HE PULLED THE TRIGGER BECAUSE YOU WEREN'T

1 CONVINCED BEYOND A REASONABLE DOUBT, THEN I SUBMIT TO YOU THE
2 INQUIRY STOPS THERE, AND YOU WOULD HAVE TO RETURN A VERDICT
3 FOR LIFE IN PRISON.

4 AND I WOULD SUGGEST TO YOU THAT GIVEN SEVERAL
5 FACTORS, SEVERAL ITEMS OF EVIDENCE AND ITEMS OF EVIDENCE THAT
6 WEREN'T PUT BEFORE YOU, THAT THERE IS A SUBSTANTIAL DOUBT AS
7 TO WHETHER KEVIN MERCER WAS THE GUY THAT ACTUALLY PULLED THE
8 TRIGGER, AND I'M NOT GOING TO REITERATE IT. I HAD, FOR ME, A
9 LENGTHY ARGUMENT THE OTHER DAY WHEN WE FINISHED THE FIRST
10 PHASE OF THIS TRIAL, AND IT HAS NOT BEEN THAT LONG AGO. EACH
11 OF YOU HAS PAID VERY CLOSE ATTENTION TO THE EVIDENCE. YOU
12 HEARD EVERYTHING THAT WENT ON.

13 I'M NOT GOING TO SIT HERE AND REHASH IT, BUT THERE
14 ARE A FEW POINTS THAT I WOULD BEG YOU TO CONSIDER, AND THE
15 FIRST IS THE ABSENCE OF MANY ITEMS OF EVIDENCE THAT COULD
16 HAVE AND, I SUBMIT, SHOULD HAVE BEEN PRESENTED TO YOU. AND
17 THOSE THINGS I STILL THINK OR I SUBMIT SHOULD HAVE BEEN
18 SUBMITTED TO YOU SO YOU WOULD HAVE THE FULL PICTURE, SO YOU
19 COULD MAKE THIS MOST IMPORTANT DECISION, THIS MOST IMPORTANT
20 DETERMINATION.

21 SECONDLY, THE OPEN QUESTION OF HOW KEVIN'S -- THE
22 LOCATION OF KEVIN MERCER'S BUICK ENTERED INTO THIS WHOLE
23 PICTURE OF WHAT HAPPENED ON MAY 16TH, 2002. IF YOU RECALL,
24 THE STATE DIDN'T EVEN BRING OUT THAT HIS CAR WAS AT THE
25 ECONOMY INN. WHAT WAS HIS CAR DOING THERE? WAS KEVIN THERE?

1 WAS MARCUS THOMPSON DOING THE DIRTY DEED AT RAINTREE AND THEN
2 WENT AND GOT KEVIN? IT'S AN OPEN QUESTION. IT'S A DOUBT.
3 IT'S STILL NOT UP TO KEVIN MERCER OR US TO PROVE ANYTHING.
4 IT'S UP TO THE STATE TO PROVE TO YOU BEYOND A REASONABLE
5 DOUBT THAT KEVIN MERCER WAS THE MAN THERE AT RAINTREE THAT
6 PULLED THE TRIGGER.

7 THIRD, MARCUS THOMPSON'S GLOVES. I KNOW I KEEP
8 SAYING I'LL GET BACK TO THAT IN A MINUTE, BUT I'M GOING TO
9 GET BACK TO THAT IN A MINUTE.

10 FOURTH, THE LITANY OF PROBLEMS WITH SERGEANT
11 MAGWOOD'S ABILITY TO SEE AND DESCRIBE WHAT HE SAW, THAT
12 COUPLED WITH THE LACK OF ANY KIND OF POSITIVE I.D. OF KEVIN
13 MERCER AS BEING THE PERSON IN THAT PARKING LOT.

14 FIFTH, THERE IS NO WITNESS WHO SAW WHO PULLED THE
15 TRIGGER THAT NIGHT. THE STATE DIDN'T BRING ANYBODY IN HERE
16 TO SAY, YES, I SAW KEVIN MERCER PULL THAT TRIGGER. WHEN THE
17 GUN WENT OFF, NOBODY WAS WATCHING OR, IF THEY WERE, THEY
18 WEREN'T PRESENTED TO YOU.

19 SIXTH AND LAST, THE G.S.R. EVIDENCE, THE SCIENTIFIC
20 EVIDENCE THAT WAS PRESENTED TO YOU. AND I WOULD SUBMIT TO
21 YOU ALL SIX OF THOSE REASONS LEAVE A REASONABLE DOUBT AS TO
22 WHETHER KEVIN MERCER WAS THE PERSON THAT PULLED THE TRIGGER.

23 I'M NOT GOING TO REHASH EVERYTHING. YOU REMEMBER WE
24 TALKED ABOUT THE LACK OF FINGERPRINTS ON THE GUN, AND THE
25 EXPERTS TOLD YOU HOW THAT COULD HAVE BEEN CAUSED BY A GLOVED

1 HAND. YOU HEARD THE TESTIMONY OF THE EXPERTS AND EVERYTHING
2 THAT WAS SUBMITTED TO YOU. AND I ASK YOU TO ONCE AGAIN LOOK
3 AT THE G.S.R. TESTIMONY BECAUSE I SUBMIT AGAIN SCIENTIFIC
4 TESTIMONY DOESN'T LIE. IT'S NOT SUBJECT TO JAILHOUSE GOSSIP
5 OR I THINK WE HEARD THE TERM WOLFING, WHAT THE GUYS DO IN THE
6 JAILHOUSE TO MAKE THEMSELVES SEEM BIGGER OR BADDER.

7 BUT CONSIDER THAT FROM BOTH THE EXPERTS ON G.S.R.,
8 THE LADY FROM S.L.E.D., MR. HOLLIFIELD WHO USED TO BE AT
9 S.L.E.D., THEY TOLD YOU HOW WHEN SOMEBODY FIRES A GUN,
10 ESPECIALLY A BIG 357 LIKE STATE'S EXHIBIT 19, THERE'S A CLOUD
11 OF G.S.R., THREE COMPONENTS: LEAD, BARIUM, ANTIMONY. A
12 CLOUD THAT SURROUNDS THAT GUN AND SURROUNDS THE HAND OF THE
13 PERSON THAT USED THAT GUN.

14 YOU HEARD HOW THE SHERIFF'S DEPARTMENT DID THE
15 G.S.R. SWABS. THEY DID THE TESTS IN A TIMELY MANNER. THEY
16 DID THE TESTS LIKE THEY WERE SUPPOSED TO DO THE TESTS. IT
17 WAS BY THE BOOK. THEY DID KEVIN MERCER'S HANDS. THEY DID
18 MARCUS THOMPSON'S HANDS, ALL FOUR HANDS OF THOSE TWO MEN, AND
19 IT WAS NEGATIVE FOR G.S.R. ON ALL FOUR HANDS WHICH BEGS THE
20 QUESTION, LADIES AND GENTLEMEN: WHERE DID THE GUNSHOT
21 RESIDUE GO?

22 I TOLD YOU I WOULDN'T BE LONG. I WANT TO THANK YOU
23 FOR THE ATTENTION THAT YOU'VE PAID TO ME AND MS. KIMBROUGH
24 DURING OUR PRESENTATION, DURING THE WITNESSES WE'VE PUT UP.
25 I'M GOING TO TURN IT OVER TO HER NOW. SHE IS GOING TO

1 ADDRESS YOU CONCERNING THE OTHER FACTORS, THE OTHER THINGS
2 THAT CAME UP DURING THIS PHASE OF THE TRIAL, AND I KNOW
3 YOU'LL LISTEN TO HER BECAUSE YOU TOLD -- EACH ONE OF YOU TOLD
4 US WHEN WE VOIR DIRED YOU LAST WEEK THAT YOU WANTED TO HEAR
5 EVERYTHING, THAT YOU WANTED TO HEAR ALL THE EVIDENCE IN
6 MITIGATION BEFORE YOU MADE UP YOUR MIND. I'M ASSUMING YOU
7 WANT TO HEAR ALL THE ARGUMENTS BEFORE YOU MAKE UP YOUR MIND
8 AND I'M SURE YOU WILL. AND WHEN YOU GO BACK TO THE JURY
9 ROOM, I JUST ASK YOU TO LOOK AT EVERYTHING AND DETERMINE THE
10 RIGHT THING TO DO AND ESPECIALLY WHAT THE EVIDENCE SHOWS IN
11 THIS CASE OR WHAT IT DOESN'T SHOW ABOUT WHO WAS THE SHOOTER.
12 THANK YOU VERY MUCH.

13 MS. KIMBROUGH: MAY IT PLEASE THE COURT?

14 THE COURT: YES, MA'AM.

15 MS. KIMBROUGH: LADIES AND GENTLEMEN, IF THIS WORLD
16 WERE A BETTER PLACE, THEN THE TRACY DAVIS YOUTH CENTER WOULD
17 HAVE BEEN IN EXISTENCE IN PHILADELPHIA WHEN KEVIN MERCER GREW
18 UP IN THE SLUMS THERE. UNFORTUNATELY, THAT'S NOT THE WORLD
19 WE LIVE IN, AND IT IS EXTRAORDINARILY TRAGIC THAT SOMEONE
20 WITH THE HEART OF SERGEANT DAVIS WAS KILLED. THAT'S BEEN
21 SAID AND IT'S BEEN SAID A LOT AND I'LL SAY IT AGAIN, AND
22 NOTHING THAT WE'VE PRESENTED TO YOU HAVE WE PRESENTED IN AN
23 EFFORT TO DIMINISH THE LOSS OF THAT MAN AND I HOPE THAT YOU
24 DID NOT TAKE IT THAT WAY.

25 WE TRIED TO MAKE IT CLEAR, AND IF I FAILED TO DO

1 THAT, THEN I APOLOGIZE TO YOU, BUT WE TRIED TO MAKE IT CLEAR
2 FROM THE OUTSET THAT THE EVIDENCE WE WERE PRESENTING ABOUT
3 KEVIN MERCER WAS SIMPLY BEING PRESENTED TO SHOW YOU WHO HE IS
4 AND HOW HE GOT WHERE HE IS TODAY. IF IT WERE AN EXCUSE FOR
5 THE CRIME OF MURDER, WE WOULDN'T BE HERE RIGHT NOW. MURDER
6 IS NOT EXCUSED. AS YOU FOUND IN THE FIRST PHASE, IT IS AN
7 UNEXCUSABLE KILLING, NO JUSTIFICATION, NO DEFENSE.

8 SO THE EVIDENCE WE'VE PRESENTED TO YOU WE PRESENTED
9 SIMPLY FOR THE PURPOSES OF ALLOWING YOU TO EVALUATE KEVIN'S
10 MORAL CULPABILITY. NOTHING WE CAN SHOW YOU WILL MAKE IT LESS
11 THAN MURDER, NOTHING, AND WE DIDN'T INTEND TO GIVE YOU THAT
12 IMPRESSION AND, AGAIN, I HOPE WE DID NOT.

13 NOW, WE DID PRESENT A FAIR NUMBER OF EXPERTS, AND
14 I'M CERTAINLY NOT TRAINED IN SCIENCE. WE WENT TO THE PEOPLE
15 THAT WE THOUGHT HAD BEST CREDENTIALS WHO WOULD TAKE THIS CASE
16 SERIOUSLY, WOULD DIG THROUGH ALL THE RECORDS THEY COULD GET,
17 AND WOULD BE CONSCIENTIOUS IN THEIR EFFORTS TO UNDERSTAND WHO
18 KEVIN IS AND WHAT HIS DISABILITIES AND DEFICITS MIGHT BE, IF
19 THERE WERE ANY. AND I THINK IT'S UNDISPUTED THAT DURING THE
20 COURSE OF THIS TRIAL WE'VE PRESENTED EVIDENCE THAT KEVIN
21 MERCER HAS FUNCTIONED HIS WHOLE LIFE WITH CERTAIN DEFICITS.
22 SOME OF THOSE ARE SOCIAL, ECONOMIC; OTHERS ARE EDUCATIONAL.
23 SOME ARE PHYSICAL.

24 AND I WOULD AGREE WITH MR. LITTLEJOHN THAT SOLICITOR
25 MYERS HAS A VERY POWERFUL PRESENTATION, AND UNLESS I

1 MISUNDERSTOOD HIM, I BELIEVE HIS ANALYSIS OF THE EXPERTS IS
2 THAT SOMEHOW NOTHING THAT THEY SAID MATTERED. IT DIDN'T
3 MATTER ABOUT MAY 16TH, SO YOU SHOULDN'T CONSIDER IT NOW.
4 LADIES AND GENTLEMEN, I SUBMIT TO YOU THAT THE WORTH OF A
5 HUMAN LIFE SHOULD BE JUDGED BY MORE THAN THE ACTION, THE
6 WORST ACTION, OF THAT PARTICULAR PERSON. THAT'S WHAT
7 MAY 16TH WAS; IT WAS THE DATE ON WHICH KEVIN MERCER COMMITTED
8 HIS WORST ACT. SO THE PURPOSE OF PRESENTING THIS EVIDENCE TO
9 YOU WAS SIMPLY TO SHOW YOU SOME OF THE FACTORS THAT AFFECTED
10 HOW KEVIN CAME TO BE IN THAT NAVIGATOR ON MAY 16TH.

11 I'M GOING TO BRIEFLY SUMMARIZE THE TESTIMONIES OF
12 THE FOLKS THAT TESTIFIED AS EXPERTS. DR. MORTON. NOW, I
13 THINK DR. MORTON WAS PRETTY CLEAR THAT INITIALLY USING DRUGS,
14 ABUSING DRUGS, IS DONE VOLUNTARILY. I BELIEVE HE TALKED
15 ABOUT SELF-MEDICATION OF PEOPLE THAT ARE ILL. PEOPLE WHO ARE
16 DEPRESSED INITIALLY USE DRUGS TO MAKE THEMSELVES FEEL BETTER;
17 HENCE, THE TERM SELF-MEDICATION. BUT HE ALSO TESTIFIED --
18 AND HE HAS NUMEROUS YEARS OF EXPERIENCE IN THIS FIELD. HE'S
19 WELL QUALIFIED IN HIS FIELD, AND HE'S DONE RESEARCH AND HE
20 TREATS PEOPLE. THAT WHILE INITIALLY THERE'S A VOLITIONAL
21 COMPONENT -- HEY, I WANT TO FEEL BETTER; I'M GOING TO TAKE
22 THIS DRUG. I'VE HAD TRAUMATIC LIFE EXPERIENCES, AND I CAN'T
23 DEAL WITH IT, SO I'M GOING TO TAKE THIS DRUG. BUT I BELIEVE
24 HE TESTIFIED THAT IT BECOMES AN ADDICTION, A DISEASE, A
25 PHYSICAL DISEASE, A BRAIN DISEASE. AND SO AT A CERTAIN POINT

1 THE DISEASE TAKES OVER.

2 NOW, DOES THAT EXCUSE MURDER? NO. IT'S A SMALL
3 PIECE OF INFORMATION THAT WE WOULD LIKE FOR YOU TO CONSIDER
4 WHEN EVALUATING THE MORAL CULPABILITY OF KEVIN MERCER.
5 DOESN'T MAKE HIM LESS GUILTY OF MURDER. HE'LL BE GUILTY OF
6 MURDER, BASED ON YOUR VERDICT, NO MATTER WHAT. HOWEVER, HE
7 DID NOT TURN TO DRUGS IN A VACUUM. HE DIDN'T JUST WAKE UP
8 ONE DAY AND SAY, "HEY, I'M GOING TO START USING DRUGS."
9 THERE WERE OTHER FACTORS IN HIS LIFE, AND I BELIEVE THAT
10 THOSE FACTORS WERE BEST COVERED BY DR. WATTS AND DR. LORING.

11 DR. WATTS WAS THE PSYCHIATRIST. YOU MAY REMEMBER
12 HER. IT WAS A COUPLE OF DAYS AGO. AND SHE TESTIFIED THAT
13 SHE SPENT A GREAT DEAL OF TIME WITH KEVIN MERCER, AND BASED
14 ON HIS HISTORY AND BASED ON HER FINDINGS SHE DIAGNOSED POST-
15 TRAUMATIC STRESS DISORDER. POST-TRAUMATIC STRESS DISORDER IS
16 A REAL ILLNESS. IT'S NOT AN EXCUSE. IT DOESN'T JUSTIFY
17 MURDER. WHAT IT DOES DO IS IT HAS AN EFFECT ON SOMEONE'S
18 FUNCTIONING. THAT'S WHAT SHE SAID; IT AFFECTED HIS
19 FUNCTIONING.

20 SHE ALSO NOTED THAT - THE FACTORS THAT I BELIEVE CAN
21 CLEARLY BE CONTRIBUTED TO LACK OF RESOURCES AND LACK OF
22 MEDICAL CARE - THAT HE'D NEVER BEEN DIAGNOSED BEFORE. HE
23 DIDN'T HAVE ACCESS TO THE PHYSICIANS AND THE TREATMENT AND
24 THE DRUG THERAPY THAT HE NOW HAS ACCESS TO. IT'S VERY SAD IN
25 MY EXPERIENCE DEALING WITH PEOPLE WHO ENTER THE CRIMINAL

1 JUSTICE SYSTEM - AND IT SEEMS ALMOST UNFATHOMABLE UNLESS
2 YOU'RE IN THEIR SHOES - THAT SOME OF THE PEOPLE I REPRESENT
3 HAVE THE BEST QUALITY OF LIFE THAT THEY'VE EVER HAD IN TERMS
4 OF GETTING THEIR BASIC NEEDS MET WHEN THEY BECOME
5 INCARCERATED.

6 THE INFORMATION PROVIDED TO YOU ABOUT KEVIN'S
7 UPBRINGING BY DIANE MERCER, IT SPEAKS TO THAT WHOLE
8 SITUATION, AND IT IS VERY SAD AND IT'S VERY TRAGIC. HOWEVER,
9 AS DR. WATTS POINTED OUT, NOW HE HAS BEEN DIAGNOSED AND I
10 BELIEVE DR. LORING SAID THAT HE'S ACTUALLY BEGUN TO GET SOME
11 MEDICATION. HE DOESN'T HAVE A WHOLE LOT OF THERAPY GOING ON
12 RIGHT NOW, BUT IT'S THERE.

13 NOW, THERE WAS SOME TALK ABOUT ANTISOCIAL
14 PERSONALITY DISORDER. WELL, THERE WERE A COUPLE OF REPORTS
15 THAT WERE DONE, AND ONE OF THE EXAMINATIONS FOUND THE
16 DISORDER. DR. WATTS -- AS SHE SAID, WE SORT OF SPLIT HAIRS.
17 SHE DIDN'T FIND THE DISORDER; SHE FOUND TRAITS. THESE ARE
18 TRAITS THAT CAN BEST BE DESCRIBED AS STREET BEHAVIOR,
19 TRUANCY, MISBEHAVIOR, SOME OF THE STUFF THAT THE SOLICITOR
20 HAS -- HAS GONE THROUGH WITH HIM: GETTING INTO TROUBLE, NOT
21 FOLLOWING THE RULES WELL.

22 YES, HE HAS SOME OF THOSE TRAITS; HE DOES. BUT HE
23 ALSO HAS POST-TRAUMATIC STRESS DISORDER, AND IT'S A REAL
24 ILLNESS. AND UNLIKE THE DRUG ABUSE, KEVIN MERCER DIDN'T
25 CHOOSE TO BE ABUSED. HE DIDN'T CHOOSE TO BE BEATEN OR

1 SEXUALLY MOLESTED. HE DIDN'T CHOOSE TO GROW UP IN THE
2 NEIGHBORHOOD IN WHICH HE GREW UP WITH LACK OF FOOD,
3 INADEQUATE HOUSING. HE CERTAINLY DIDN'T CHOOSE TO HAVE A LOW
4 I.Q. SO UNLIKE THE SUBSTANCE ABUSE, I DON'T HONESTLY THINK
5 THAT POST-TRAUMATIC STRESS DISORDER CAN BE ATTRIBUTED TO ANY
6 SORT OF NEGATIVE CHARACTER ON HIS PART. I HAVEN'T HEARD
7 ANYTHING THAT WOULD SUGGEST THAT KEVIN MERCER WAS RESPONSIBLE
8 FOR BEING TRAUMATIZED AS A CHILD, BUT IT HELPED FORM WHO HE
9 BECAME. IT'S PART OF HIS LIFE EXPERIENCES, AND IT LED HIM TO
10 MAKE SOME POOR JUDGMENTS. BEING WITH MARCUS THOMPSON IS A
11 VERY BAD JUDGMENT CALL.

12 NOW, DR. LORING -- THIS, OF COURSE, ALSO RELATES TO
13 THE POST-TRAUMATIC STRESS DISORDER. SHE DISCUSSED IT, AND I
14 WON'T GO THROUGH THE CHARTS AGAIN. YOU'VE SEEN SO MANY
15 CHARTS, BUT VERY BRIEFLY, SHE TALKED ABOUT OPPORTUNITIES AND
16 SHE TALKED ABOUT RISK AND RISK FACTORS. NOW, AGAIN, I'M NOT
17 GOING TO READ THROUGH ALL OF THESE FOR YOU, BUT IT SEEMS
18 CLEAR TO ME - AND I'M NO SCIENTIST - BUT THE RISK FACTORS FAR
19 OUTWEIGH THE OPPORTUNITIES.

20 SOMETIMES WE LIKE TO PAT OURSELVES ON THE BACK AND
21 SAY, "SEE HOW FAR I CAME? ISN'T THIS GREAT? I'VE REALLY
22 ACCOMPLISHED SOMETHING." BUT I DON'T THINK ANY OF US GETS TO
23 WHERE WE ARE IN LIFE WITHOUT HELP FROM OTHER PEOPLE, WITHOUT
24 OPPORTUNITIES. IN KEVIN'S CASE THE RISKS FAR OUTWEIGH THE
25 OPPORTUNITIES.

1 NEXT, I'D LIKE TO MOVE TO DR. AIKEN, EXCUSE ME, MR.
2 AIKEN, JAMES AIKEN. BEEN IN CORRECTIONS HIS WHOLE CAREER.
3 HE'S OBVIOUSLY NOT SOMEONE WHO IS SUBJECT TO THE SAME ATTACK
4 AS BEING A PERSON WHO MAKES EXCUSES OR TRIES TO MAKE YOU FEEL
5 SORRY FOR ANYONE. HE IS A MAN WHO SPENT HIS WHOLE CAREER
6 TRYING TO TEACH PEOPLE TO FOLLOW THE RULES. WHAT DID HE SAY
7 TO YOU? IN HIS EXPERIENCE THERE ARE CERTAIN TYPES OF
8 OFFENDERS WHO ARE EXTREMELY DANGEROUS EVEN IN A CORRECTIONAL
9 SETTING. I THINK HE CALLED THEM PREDATORS. THEY GO OUT AND
10 THEY LOOK FOR PEOPLE, AND WHEN THEY ATTACK, IT'S SEEMINGLY
11 OUT OF THE BLUE AND WITHOUT WARNING, AND THEY DO IT TO KILL
12 AND THEY'RE EXTREMELY DANGEROUS. THEY CANNOT BE CONTROLLED.

13 WHAT DID HE SAY ABOUT KEVIN MERCER? KEVIN MERCER IS
14 A PROBLEM. HE GETS INTO TROUBLE. HE DOESN'T TUCK IN HIS
15 SHIRT. HE'S DISOBEDIENT. HE KNOCKED OVER A TEA CART. I
16 MEAN, IT'S -- PERHAPS I'M SEEING THIS THE WRONG WAY, BUT THE
17 LOVE LETTER TO THE CORRECTIONAL OFFICER, TO ME IT WAS
18 PITIFUL. IT DOESN'T MAKE HIM A DANGER. I MEAN, IT IS AN
19 INDICATION OF JUST HOW MINIMALLY FUNCTIONAL HE IS AND HOW
20 IMPAIRED HIS SOCIAL SKILLS ARE. I MEAN, IT WAS
21 INAPPROPRIATE, YES, BUT IT'S THE KIND OF THING YOU WOULD
22 EXPECT FROM SOMEONE WHO'S AN EIGHT-YEAR-OLD. I HAPPEN TO
23 HAVE AN EIGHT-YEAR-OLD. I DON'T KNOW IF HE'S WRITTEN ANY
24 INAPPROPRIATE LOVE LETTERS, BUT IT REMINDS ME OF THAT TYPE OF
25 BEHAVIOR. INAPPROPRIATE.

1 AND THERE WERE A LOT OF OTHER INFRACTIONS THAT THE
2 STATE WENT OVER IN ADDITION TO THE FAILURE TO TUCK IN THE
3 SHIRT. I THINK, IF I REMEMBER CORRECTLY, AT LEE CORRECTIONAL
4 WHICH IS CLOSER TO THE CONDITIONS IN WHICH HE WOULD BE
5 CONFINED IF GIVEN A LIFE SENTENCE, HE GOT IN TROUBLE FOR
6 WRITING ONE EXTRA LETTER TO HIS MOTHER. FIVE LETTERS. FIVE
7 LETTERS. AND HE GOT IN TROUBLE FOR IT. AND I GUESS MY POINT
8 IN ALL THIS, LADIES AND GENTLEMEN, IS TO SIMPLY STATE THAT IN
9 A MAXIMUM SECURITY PRISON THINGS ARE DIFFERENT. THAT'S WHAT
10 JAMES AIKEN SAID. 24/7. YOU MISBEHAVE; WE'LL LOCK YOU UP.

11 HE ALSO SAID THAT IN HIS EXPERIENCE, 20 SOME-ODD
12 YEARS, THAT FOLKS WHO COME IN WHO ARE MANAGEMENT PROBLEMS,
13 THEY BURN OUT BECAUSE THEY FIND OUT THAT THE STRUCTURE IS
14 RIGID; IT DOESN'T MOVE. IT'S NOT PROBATION. IT'S NOT A FINE
15 WHERE YOU WALK OUT OF THE COURTROOM AND YOU'RE SUPPOSED TO
16 SEND IN YOUR CHECK. IT'S NONE OF THAT. THEY WILL LOCK YOU
17 DOWN. THEY WILL STICK YOU IN A HOLE, WHATEVER IT TAKES,
18 UNTIL YOU LEARN THAT THE SYSTEM ISN'T GOING TO CHANGE FOR
19 YOU. THAT'S WHY WE HAVE MAXIMUM SECURITY FACILITIES BECAUSE
20 SADLY IN THIS WORLD THERE ARE PEOPLE WHO SIMPLY DO NOT
21 FUNCTION WITHOUT THAT LEVEL OF RIGIDITY AND STRUCTURE IN
22 THEIR LIVES.

23 FINALLY, I'D LIKE TO TALK TO YOU A LITTLE BIT ABOUT
24 KEVIN'S FAMILY. YOU HEARD FROM THEM. AND I WASN'T REALLY
25 SURE HOW TO RESPOND TO MR. MYERS' COMMENT THAT NONE OF THEM

1 BEGGED FOR MERCY. I SUBMIT TO YOU THAT THEIR TESTIMONY
2 APPROPRIATELY INDICATED TO YOU A BASIS FOR GIVING MERCY, AND
3 I WOULD SUBMIT TO YOU THAT ONE OF THE BEST REASONS FOR
4 SHOWING TO KEVIN MERCER IS RIGHT HERE: THE THREE LITTLE
5 CHILDREN. IT WAS VERY UNCOMFORTABLE TO HAVE TO BRING THOSE
6 CHILDREN IN THIS COURTROOM, BUT SOMETIMES WITHOUT SEEING THE
7 REAL-LIFE CONSEQUENCES OF A DEATH SENTENCE IT IS HARD TO
8 FATHOM ALL PEOPLE WHO WILL BE HURT BY IT. KEVIN, JR., KIARA,
9 AND KAVON. THESE ARE REAL PEOPLE. KEVIN MERCER, HOW EVER
10 FLAWED, IS THEIR REAL FATHER. AND DESPITE HIS FLAWS AS A
11 PERSON, AS A CITIZEN, AS A HUSBAND, I DON'T THINK THERE WAS
12 ANY TESTIMONY THAT HE WAS ANYTHING OTHER THAN A GOOD DAD.

13 IN MY ESTIMATION, IT MAY BE BECAUSE KEVIN FUNCTIONS
14 A LOT LIKE A SMALL CHILD. HE COULD RELATE TO THEM. HE COULD
15 PLAY WITH THEM. HE'LL NEVER BE HOME TO CELEBRATE THEIR
16 BIRTHDAYS, TO SEE THEIR GRADUATION, TO CELEBRATE CHRISTMAS.
17 I SUBMIT TO YOU THAT HAVING YOUR FATHER BE ALIVE WOULD MAKE
18 AN IMPACT ON THOSE CHILDREN'S LIVES.

19 IRONICALLY, OR NOT SO IRONICALLY, ACTUALLY KEVIN
20 (SIC) MAGWOOD, A MEMBER OF THE MOD SQUAD -- I ENJOYED
21 LISTENING TO HIM TALK. HE SEEMED TO BE A VERY WISE AND JUST
22 PERSON, AND HE SAID IT BEST: ANY LIFE LOST IS TRAGIC. I
23 THINK THAT PRINCIPLE APPLIES TO KEVIN MERCER.

24 LADIES AND GENTLEMEN, I'VE NOT KNOWN KEVIN MERCER
25 VERY LONG - I'D SAY SINCE THE BEGINNING OF THIS YEAR - AND

1 I'M GETTING READY TO PLACE HIS FATE IN YOUR HANDS. I'VE
2 NEVER DONE A CAPITAL CASE AT TRIAL, AND SO I HOPE THAT I'VE
3 ABLY REPRESENTED MY CLIENT. AND IN CONCLUDING I JUST WANT TO
4 SHARE WITH YOU SOMETHING THAT I READ AND SOMETHING THAT I
5 THINK IS SIGNIFICANT AND MEANINGFUL FOR THIS PARTICULAR
6 PROCEEDING. IT'S A STATEMENT MADE BY JUSTICE ANTHONY
7 KENNEDY, NOT A LIBERAL DEFENSE LAWYER, BUT A REAGAN APPOINTEE
8 TO THE UNITED STATES SUPREME COURT, AND HE SAID, "A COUNTRY
9 WHICH IS SECURE IN ITS INSTITUTIONS AND CONFIDENT IN ITS LAWS
10 SHOULD NOT BE ASHAMED OF THE CONCEPT OF MERCY."

11 I WOULD SUBMIT TO YOU, FINALLY, THAT KEVIN MERCER IS
12 NOT THE WORST TYPE OF OFFENDER. MURDER IS THE WORST CRIME.
13 THAT'S HALF OF THE EQUATION; THAT WAS THE FIRST PHASE. THE
14 SECOND PHASE IS: WHO IS THE WORST TYPE OF OFFENDER? I WOULD
15 SUBMIT TO YOU THAT SOMEONE WITH AN I.Q. OF EITHER 74 OR 81,
16 DEPENDING ON WHO YOU LISTEN TO, SOMEONE WHOSE HOME LIFE DID
17 NOT EXACTLY GROOM THEM TO BE A PRODUCTIVE CITIZEN, SOMEONE
18 WHO HAS ATTEMPTED BUT FAILED TO BE GAINFULLY EMPLOYED, THAT
19 THAT IS NOT THE WORST TYPE OF OFFENDER.

20 I WOULD SUBMIT TO YOU THAT THE WORST TYPE OF
21 OFFENDER IS SOMEONE WHO'S GOT IT ALL GOING ON AND THEY GO
22 WRONG ANYWAY. THEY HAVE THE ADVANTAGES. WE ASK YOU FOR
23 MERCY, AND I BELIEVE THAT MY CLIENT IS GOING TO DO THE SAME.
24 AND WE ASK YOU TO SIMPLY GIVE HIM THAT OPPORTUNITY IN HIS OWN
25 WAY TO EXPRESS WHAT HE HAS TO SAY TO YOU ALL AS HIS JURORS,

1 THAT YOU GIVE HIM A FAIR DELIBERATION AND RETURN A SENTENCE
2 OF LIFE. AS THE JUDGE WILL INSTRUCT YOU, IT WILL BE LIFE
3 WITHOUT PAROLE, SOMETIMES REFERRED TO AS PINE-BOX LIFE.
4 HE'LL NEVER GET OUT. HE'LL BE AROUND AND HIS CHILDREN WOULD
5 HAVE THEIR FATHER. THANK YOU.

6 MR. MERCER: LADIES AND GENTLEMEN, THERE'S REALLY
7 NOT TOO MUCH TO SAY IN A SITUATION LIKE THIS. I CAN GIVE MY
8 OPINIONS ABOUT WHO DID WHAT AND WHO, YOU KNOW -- YOU KNOW, AS
9 FAR AS WHO WAS THE RIGHT MAN TO ACCUSE. HOWEVER, YOU KNOW,
10 I'M DEEPLY GRIEVED BY WHAT HAPPENED IN THIS SITUATION AND,
11 YOU KNOW, I FEEL LIKE I'VE BEEN THROUGH THIS SAME THING WITH
12 A FAMILY MEMBER AS FAR AS LOSING A GREAT MAN THAT WAS A GOOD
13 PERSON.

14 BUT AS FAR AS THINGS THAT DAY, I WAS -- I FEEL AS
15 THOUGH -- I WAS ACCUSED THOUGH. I FEEL LIKE, YOU KNOW, I'M
16 NOT SATISFIED WITH, YOU KNOW, THE VERDICT, BUT LIKE I SAID,
17 YOU KNOW, RIGHT NOW I'M HERE JUST TO ASK FOR, YOU KNOW, MAYBE
18 SOME MERCY FROM THE JURORS. I'M BEGGING MERCY FROM THE DAVIS
19 FAMILY AND FROM MY FRIENDS. I HOPE THAT Y'ALL WILL PUT THAT
20 INTO CONSIDERATION. THANK YOU.

21 THE COURT: LADIES AND GENTLEMEN, NOW THAT YOU HAVE
22 HEARD ALL THE EVIDENCE IN THIS PHASE OF THE CASE AND THE
23 ARGUMENTS OF THE LAWYERS, IT BECOMES MY RESPONSIBILITY AGAIN
24 TO TELL YOU THE LAW THAT IS APPLICABLE TO THIS CASE. NOW, AS
25 I EXPLAINED TO YOU EARLIER IN THE FIRST PHASE OF THE TRIAL,

1 ONLY THE JURY CAN MAKE THE FINDINGS OF FACT IN THIS CASE AND
2 I AM NOT PERMITTED TO INDICATE TO YOU HOW I MIGHT FEEL ABOUT
3 THE FACTS. SO IF I HAVE SAID ANYTHING OR DONE ANYTHING
4 DURING THE COURSE OF THIS PHASE OF THE TRIAL THAT MIGHT LEAD
5 YOU TO BELIEVE THAT I HAVE AN OPINION ABOUT THE FACTS OR
6 ABOUT WHAT THE SENTENCE SHOULD BE, THEN YOU SHOULD DISREGARD
7 THAT.

8 LADIES AND GENTLEMEN, AS JUDGES OF THE FACTS YOU
9 MUST, OF COURSE, EVALUATE THE CREDIBILITY OF THE WITNESSES
10 JUST AS YOU DID IN THE FIRST PHASE OF THE TRIAL, USING THE
11 SAME FACTORS THAT I INSTRUCTED YOU ON IN THAT FIRST PHASE AND
12 ANY OTHER FACTORS THAT YOU FIND MIGHT BE HELPFUL IN EVALU --
13 IN HELPING YOU TO EVALUATE THE CREDIBILITY OF THE WITNESSES.
14 FURTHER, YOU MAY CONSIDER BOTH DIRECT AND CIRCUMSTANTIAL
15 EVIDENCE. THE DEFINITIONS FOR THOSE TERMS THAT I GAVE YOU IN
16 THE FIRST PHASE APPLY EQUALLY IN THIS PHASE OF THE TRIAL.

17 NOW, I HAVE ADMITTED INTO EVIDENCE IN THIS PHASE A
18 STATEMENT THAT IS ALLEGED TO HAVE BEEN MADE BY THE DEFENDANT.
19 BEFORE YOU MAY CONSIDER THIS STATEMENT AS EVIDENCE FOR ANY
20 PURPOSE, YOU MUST ANSWER TWO QUESTIONS. THE STATE MUST HAVE
21 PROVEN BEYOND A REASONABLE DOUBT THAT THE ANSWER IS YES TO
22 BOTH OF THESE QUESTIONS BEFORE YOU MAY CONSIDER THIS
23 STATEMENT FOR ANY REASON OR FOR ANY PURPOSE. IF THE STATE
24 HAS FAILED TO PROVE THAT BOTH OF THE ANSWERS IS YES, THEN YOU
25 MAY NOT CONSIDER THIS STATEMENT FOR ANY PURPOSE WHATSOEVER.

1 THE SAME RULE STILL APPLIES TO THE STATEMENT OF THE
2 DEFENDANT THAT I ADMITTED IN THE FIRST PHASE OF THE TRIAL,
3 ALTHOUGH THE STATE NEED NOT HAVE PROVEN THE ANSWERS AGAIN AS
4 TO THAT STATEMENT. THE QUESTIONS ARE: DID THE DEFENDANT
5 MAKE THE STATEMENT? THAT'S THE FIRST ONE. AND, SECONDLY,
6 DID THE -- WAS THE STATEMENT MADE VOLUNTARILY?

7 NOW, I'M GOING TO GO OVER THOSE QUESTIONS IN A
8 LITTLE MORE DETAIL JUST AS I DID BEFORE. THE FIRST QUESTION
9 IS WHETHER THE DEFENDANT MADE THE STATEMENT, AND YOU MAY
10 CONSIDER THE STATEMENT ONLY IF YOU FIND THAT THE STATE HAS
11 PROVEN BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID MAKE
12 THE STATEMENT. THE SECOND QUESTION IS: DID THE DEFENDANT
13 MAKE THE STATEMENT VOLUNTARILY? THE WORD VOLUNTARILY, OF
14 COURSE, MEANS THAT HE FREELY CHOSE TO MAKE THE STATEMENT,
15 THAT IT WAS NOT INDUCED BY PRESSURE OR FORCE OR INTIMIDATION.
16 IF THE STATEMENT WAS VOLUNTARILY GIVEN, IT MAY BE USED
17 AGAINST HIM. IF THE STATEMENT WAS NOT VOLUNTARY, IT CANNOT
18 BE USED AGAINST HIM. IN DETERMINING WHETHER OR NOT THE
19 STATEMENT OF THE DEFENDANT WAS VOLUNTARY, YOU MAY CONSIDER
20 ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE STATEMENT.

21 NOW, YOU HAVE HEARD THE TESTIMONY OF SEVERAL EXPERT
22 WITNESSES IN THIS PHASE OF THE TRIAL. EXPERT WITNESSES ARE
23 THOSE WITNESSES WHO HAVE SPECIAL KNOWLEDGE, SKILL,
24 EXPERIENCE, TRAINING, OR EDUCATION IN A PARTICULAR FIELD OR
25 OCCUPATION AND BECAUSE OF THOSE SPECIAL QUALIFICATIONS,

1 EXPERTS ARE ALLOWED TO GIVE OPINIONS AS TO MATTERS WITHIN
2 THEIR AREA OF EXPERTISE. IN DETERMINING THE WEIGHT TO BE
3 GIVEN THE OPINIONS GIVEN BY EXPERTS, YOU SHOULD CONSIDER THE
4 QUALIFICATIONS AND THE CREDIBILITY OF THE EXPERT AND THE
5 REASONS GIVEN FOR HIS OR HER OPINION. YOU ARE NOT BOUND BY
6 THE OPINIONS OF EXPERTS. GIVE THEM THE WEIGHT, IF ANY, THAT
7 YOU BELIEVE THEY SHOULD RECEIVE.

8 NOW, ALSO AS I EXPLAINED TO YOU IN THE FIRST PHASE
9 OF THE TRIAL, I AM THE EXCLUSIVE JUDGE OF THE LAW. SO IF YOU
10 HAVE SOME IDEA AS TO WHAT THE LAW IS OR WHAT THE LAW SHOULD
11 BE AND IF THAT DIFFERS FROM WHAT I NOW TELL YOU THE LAW IS,
12 THEN YOU ARE OBLIGATED UNDER THE OATH THAT YOU HAVE TAKEN AS
13 JURORS TO SET YOUR NOTION OF THE LAW ASIDE AND TO ACCEPT AND
14 APPLY THE LAW PRECISELY AS I NOW EXPLAIN IT TO YOU.

15 NOW, AGAIN, AS I DID IN THE FIRST PHASE, I INSTRUCT
16 YOU AND I EMPHASIZE TO YOU THAT THE FACT THAT THE DEFENDANT
17 DID NOT TESTIFY IN THIS PHASE OF THE TRIAL CANNOT BE
18 CONSIDERED BY YOU IN ANY WAY DURING YOUR DELIBERATIONS. THE
19 DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND
20 THE EXERCISE OF THAT CONSTITUTIONAL RIGHT CANNOT AND MUST NOT
21 BE HELD AGAINST THE DEFENDANT. UNDER THE OATH THAT YOU HAVE
22 TAKEN AS JURORS, YOU ARE TO DRAW NO INFERENCE AND NO
23 CONCLUSION WHATSOEVER FROM THE FACT THAT THE DEFENDANT DID
24 NOT TESTIFY. DO NOT EVEN DISCUSS THIS IN THE JURY ROOM.

25 NOW, LET ME REMIND YOU THAT A REASONABLE DOUBT IS A

1 DOUBT WHICH MAKES AN HONEST, SINCERE, CONSCIENTIOUS JUROR IN
2 SEARCH OF THE TRUTH IN THE CASE TO HESITATE TO ACT. PROOF
3 BEYOND A REASONABLE DOUBT MUST, THEREFORE, BE PROOF OF SUCH A
4 CONVINCING CHARACTER THAT A REASONABLE PERSON WOULD NOT
5 HESITATE TO RELY ON IT AND ACT ON IT IN THE MOST IMPORTANT OF
6 HIS OR HER OWN AFFAIRS. PROOF BEYOND A REASONABLE DOUBT CAN
7 ALSO BE DESCRIBED AS PROOF THAT LEAVES YOU FIRMLY CONVINCED
8 OF THE FACTS THAT THE STATE IS ATTEMPTING TO PROVE. THERE
9 ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE
10 CERTAINTY, AND ALSO IN THIS PHASE, AS IT WAS TRUE IN THE
11 FIRST PHASE, THE LAW DOES NOT REQUIRE FACTS TO BE PROVEN
12 BEYOND ALL POSSIBLE DOUBT.

13 NOW, LADIES AND GENTLEMEN, YOUR FIRST TASK IN THIS
14 PHASE OF THE TRIAL IS TO DETERMINE WHETHER THE STATE HAS
15 PROVEN BEYOND A REASONABLE DOUBT THE EXISTENCE OF A STATUTORY
16 AGGRAVATING CIRCUMSTANCE. SOUTH CAROLINA CODE SECTION
17 16-3-20 SETS FORTH THE FOLLOWING AS A STATUTORY AGGRAVATING
18 CIRCUMSTANCE AND I'M GOING TO QUOTE IT: THE MURDER WAS
19 COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH
20 A DEADLY WEAPON.

21 NOW, I INSTRUCTED YOU IN THE FIRST PHASE OF THE
22 TRIAL ON THE ELEMENTS OF ARMED ROBBERY, AND I'M NOT GOING TO
23 GO THROUGH THOSE AGAIN. THIS IS THE ONLY STATUTORY
24 AGGRAVATING CIRCUMSTANCE THAT THE STATE SEEKS TO PROVE AND
25 THE ONLY ONE THAT YOU MAY CONSIDER. IF YOU UNANIMOUSLY FIND

1 THAT THE STATE HAS FAILED TO PROVE THE EXISTENCE OF THIS
2 AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT, THEN THAT
3 WOULD BE THE END OF YOUR WORK IN THIS CASE. YOU WOULD
4 DELIBERATE NO FURTHER.

5 NOW, I'M GOING TO SPEND A GOOD BIT OF TIME A LITTLE
6 BIT LATER GOING OVER THE VERDICT FORMS THAT I HAVE PREPARED
7 FOR YOU. ONE OF THE VERDICT FORMS I'LL SHOW YOU NOW. AND I
8 KNOW YOU CAN'T SEE IT, BUT IN THE CAPTION UP HERE IT SAYS,
9 "AGGRAVATING CIRCUMSTANCES VERDICT FORM." BELOW IT SAYS,
10 "WE, THE JURY, UNANIMOUSLY FIND THE STATE HAS FAILED TO PROVE
11 BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE STATUTORY
12 AGGRAVATING CIRCUMSTANCE," AND THEN IT HAS A SIGNATURE LINE
13 FOR THE FOREMAN. IF THAT IS YOUR VERDICT, THE FOREPERSON --
14 AND IF THAT IS A UNANIMOUS VERDICT, THE FOREPERSON, MR.
15 LEITNER, WOULD SIGN THAT VERDICT FORM, NOTIFY THE BAILIFF
16 THAT YOU HAVE REACHED A VERDICT, AND WE'LL GET YOU BACK OUT
17 HERE INTO THE COURTROOM TO RECEIVE YOUR VERDICT.

18 NOW, IF YOU FIND THAT THE STATE HAS PROVEN THE
19 STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT,
20 THEN YOU WOULD FILL OUT THIS VERDICT FORM. AGAIN, THE
21 CAPTION IS THE SAME: "AGGRAVATING CIRCUMSTANCES VERDICT
22 FORM." IT READS, "WE, THE JURY, UNANIMOUSLY FIND THE STATE
23 HAS PROVEN BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY
24 AGGRAVATING CIRCUMSTANCE," AND THAT CIRCUMSTANCE IS QUOTED
25 EXACTLY AS I READ IT TO YOU A MOMENT BEFORE. AND YOU CAN

1 PROBABLY SEE FROM THERE THAT IT HAS SIGNATURE LINES FOR EACH
2 OF THE 12 OF YOU ON THIS VERDICT FORM. IF YOU BELIEVE THE
3 STATE HAS PROVEN THE STATUTORY AGGRAVATING CIRCUMSTANCE
4 BEYOND A REASONABLE DOUBT, THEN YOU WOULD FILL OUT THAT
5 VERDICT FORM AND THEN YOU WOULD CONTINUE DELIBERATING.

6 YOU'D MOVE ON TO CONSIDER THE SENTENCE THAT WOULD BE
7 IMPOSED ON THE DEFENDANT, AND AS YOU KNOW, THE JURY HAS TWO
8 OPTIONS FOR IMPOSING SENTENCE: A LIFE SENTENCE AND THE DEATH
9 PENALTY. A LIFE SENTENCE MEANS THAT THE DEFENDANT WOULD BE
10 IMPRISONED UNTIL THE DEATH OF THE DEFENDANT WITHOUT THE
11 POSSIBILITY OF PAROLE. THE DEATH PENALTY MEANS THAT THE
12 DEFENDANT WILL BE PUT TO DEATH OR EXECUTED.

13 NOW, YOU WILL RECALL THAT IN THE GUILT PHASE OF THE
14 TRIAL I CHARGED YOU ON THE CONCEPT OF THE HAND OF ONE IS THE
15 HAND OF ALL. THAT CONCEPT DOES NOT APPLY IN THIS PENALTY
16 PHASE OF THE TRIAL. BEFORE YOU MAY -- BEFORE YOU MAY
17 CONSIDER IMPOSING THE DEATH PENALTY, YOU MUST FIRST FIND THAT
18 THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT THAT THE
19 DEFENDANT, KEVIN J. MERCER, FIRED THE SHOT THAT KILLED THE
20 VICTIM. IF YOU FIND THAT THE STATE HAS FAILED TO PROVE THAT
21 KEVIN J. MERCER FIRED THAT SHOT, THEN YOU MAY NOT IMPOSE THE
22 DEATH PENALTY BUT YOU MUST IMPOSE A LIFE SENTENCE.

23 IN DECIDING WHAT PENALTY TO IMPOSE, YOU SHOULD
24 CONSIDER ALL OF THE EVIDENCE IN THE CASE INCLUDING EVIDENCE
25 OF THE AGGRAVATING CIRCUMSTANCE AND ANY EVIDENCE OF

1 MITIGATING CIRCUMSTANCES. NOW, YOU WILL EACH RECALL FROM
2 YOUR INDIVIDUAL VOIR DIRE THAT WE HAD HERE IN THIS COURTROOM
3 LAST WEEK THAT AGGRAVATING CIRCUMSTANCES ARE FACTS,
4 INCIDENTS, OR DETAILS THAT SOUTH CAROLINA HAS DECLARED WILL
5 AGGRAVATE THE CRIME OF MURDER OR MAKE IT WORSE. AN
6 AGGRAVATING CIRCUMSTANCE INCREASES THE SEVERITY OF THE CRIME
7 OF MURDER AND ADDS TO THE INJURY RESULTING FROM THE CRIME.

8 MITIGATING CIRCUMSTANCES, ON THE OTHER HAND, ARE
9 FACTS, INCIDENTS, OR DETAILS THAT SOUTH CAROLINA HAS DECLARED
10 WILL REDUCE THE SEVERITY OF THE CRIME OF MURDER. MITIGATING
11 CIRCUMSTANCES SERVE TO EXTENUATE OR TO REDUCE THE DEGREE OF
12 MORAL CULPABILITY OR RESPONSIBILITY FOR THE MURDER.

13 NOW, YOU'LL HAVE WITH YOU IN THE JURY ROOM, AS I
14 THINK THE SOLICITOR REFERRED, THIS DOCUMENT HERE THAT I HAVE
15 SIGNED AND IT IS A -- IT'S ENTITLED, "JURY INSTRUCTIONS ON
16 AGGRAVATING AND MITIGATING CIRCUMSTANCES," AND IT ALSO LISTS
17 THE ONE STATUTORY AGGRAVATING CIRCUMSTANCE THAT YOU MAY
18 CONSIDER.

19 IT ALSO LISTS THREE STATUTORY MITIGATING
20 CIRCUMSTANCES. THE FIRST IS THE MURDER WAS COMMITTED WHILE
21 THE DEFENDANT WAS UNDER THE INFLUENCE OF MENTAL OR EMOTIONAL
22 DISTURBANCE. THE SECOND IS THE -- IS THE CAPACITY OF THE
23 DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO
24 CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS
25 SUBSTANTIALLY IMPAIRED. AND THE THIRD IS THE AGE OR

1 MENTALITY OF THE DEFENDANT AT THE TIME OF THE CRIME.

2 NOW, LADIES AND GENTLEMEN, BY GIVING YOU THIS FORM
3 AND BY TELLING YOU THE AGGRAVATING AND MITIGATING
4 CIRCUMSTANCES THAT YOU MAY CONSIDER, I AM NOT TELLING YOU
5 THAT THOSE AGGRAVATING OR MITIGATING CIRCUMSTANCES EXIST.
6 THAT IS FOR YOU TO DETERMINE. YOU MUST ALSO CONSIDER WHETHER
7 THE EVIDENCE SUPPORTS THE EXISTENCE OF ANY NONSTATUTORY
8 MITIGATING CIRCUMSTANCE. NONSTATUTORY MITIGATING
9 CIRCUMSTANCES ARE NOT WRITTEN OUT IN THE STATUTE BUT ARE
10 CIRCUMSTANCES WHICH YOU FIND SERVE THE SAME PURPOSE AND THAT
11 IS TO REDUCE THE SEVERITY OF THE CRIME OF MURDER.

12 NOW, I HAVE INSTRUCTED YOU THAT YOU MUST FIND THE
13 EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE
14 DOUBT. HOWEVER, YOU NEED NOT FIND ANY MITIGATING
15 CIRCUMSTANCE BEYOND A REASONABLE DOUBT. YOU NEED NOT EVEN BE
16 UNANIMOUS IN FINDING A MITIGATING CIRCUMSTANCE. IT IS NOT
17 NECESSARY THAT YOU FIND A MITIGATING CIRCUMSTANCE BEFORE YOU
18 IMPOSE A LIFE SENTENCE. YOU MAY IMPOSE A LIFE SENTENCE FOR
19 ANY REASON OR FOR NO REASON.

20 THE DEATH PENALTY IS NEVER MANDATORY FOR YOU.
21 HOWEVER, YOU MUST UNDERSTAND THAT IF YOU RECOMMEND THE DEATH
22 PENALTY, IT IS MANDATORY FOR ME, AND THE DEFENDANT WILL BE
23 SENTENCED TO DEATH. THE SAME IS ALSO TRUE FOR THE -- FOR A
24 RECOMMENDATION OF A LIFE SENTENCE. WHATEVER YOUR
25 RECOMMENDATION IS, THE LAW REQUIRES ME TO FOLLOW IT AND I

1 WILL.

2 NOW, LADIES AND GENTLEMEN, YOUR VERDICT MUST BE
3 UNANIMOUS. ALL 12 OF YOU MUST AGREE BEFORE YOU CAN DECIDE
4 WHETHER OR NOT THE STATE HAS PROVEN THE AGGRAVATING
5 CIRCUMSTANCE BEYOND A REASONABLE DOUBT, AND IF YOU FIND THAT
6 THE STATE HAS, YOUR VERDICT MUST BE UNANIMOUS BEFORE YOU CAN
7 RECOMMEND EITHER A LIFE SENTENCE OR THE DEATH PENALTY.

8 NOW, I'VE ALREADY GONE OVER WITH YOU THE TWO VERDICT
9 FORMS THAT YOU WOULD USE IN LETTING THE COURT KNOW WHETHER OR
10 NOT YOU FIND THAT THE STATE HAS PROVEN THE AGGRAVATING
11 CIRCUMSTANCE. I HAVE ALSO PREPARED TWO VERDICT FORMS THAT
12 YOU MAY USE IN DECIDING UPON THE PENALTY THAT SHOULD BE
13 IMPOSED UPON THE DEFENDANT.

14 THE FIRST IS CAPTIONED "RECOMMENDATION OF LIFE
15 SENTENCE" AND IT READS, "WE, THE JURY, UNANIMOUSLY RECOMMEND
16 TO THE COURT THAT THE DEFENDANT, KEVIN J. MERCER, BE
17 SENTENCED TO LIFE IMPRISONMENT," AND IT HAS ONE SIGNATURE
18 LINE FOR THE FOREMAN. IF THAT IS YOUR VERDICT AND IF YOU --
19 IF YOU UNANIMOUSLY AGREE UPON IT, THEN, MR. FOREMAN, YOU
20 WOULD FILL OUT THAT VERDICT FORM AND NOTIFY THE BAILIFF THAT
21 YOU HAVE REACHED A VERDICT, AND WE'LL GET YOU BACK OUT HERE
22 INTO THE COURTROOM TO RECEIVE THAT VERDICT.

23 I HAVE ALSO PREPARED A VERDICT FORM THAT YOU MAY USE
24 IF THE JURY UNANIMOUSLY DECIDES THAT YOU WILL RECOMMEND THE
25 DEATH PENALTY, AND IT IS CAPTIONED "RECOMMENDATION OF DEATH

1 PENALTY." AND IT READS: "WE, THE JURY, HAVING FOUND BEYOND
2 A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY
3 AGGRAVATING CIRCUMSTANCE" AND THEN I QUOTE THAT CIRCUMSTANCE,
4 "NOW RECOMMEND TO THE COURT THAT THE DEFENDANT, KEVIN J.
5 MERCER, BE SENTENCED TO DEATH," AND IT HAS A SIGNATURE LINE
6 ON THAT VERDICT FORM FOR EACH OF THE 12 MEMBERS OF THE JURY.

7 NOW, LADIES AND GENTLEMEN, WHEN YOU RETURN TO THE
8 JURY ROOM TO DELIBERATE AND WEIGH THE EVIDENCE, USE YOUR GOOD
9 JUDGMENT AND YOUR COMMON SENSE. YOU MUST DELIBERATE FAIRLY
10 AND IMPARTIALLY. YOU MUST MAKE YOUR DECISION WITHOUT BIAS OR
11 PREJUDICE TOWARDS OR AGAINST THE STATE OR THE DEFENDANT. YOU
12 MUST HONOR THE OATH THAT YOU TOOK ON MONDAY MORNING. YOU
13 MUST CAREFULLY AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE,
14 AND YOU MUST FOLLOW THE LAW AS I HAVE GIVEN IT TO YOU.

15 I WANT TO REMIND YOU AGAIN AS TO HOW YOU MAY AND HOW
16 YOU MAY NOT USE NOTES. IF ANY MEMBER OF THE JURY TOOK NOTES,
17 THEN THAT INDIVIDUAL MEMBER OF THE JURY MAY USE THOSE NOTES
18 IN ASSISTING THAT JUROR TO RECALL THE EVIDENCE AND THE
19 TESTIMONY. THOSE NOTES MAY NOT BE SHARED WITH OTHER MEMBERS
20 OF THE JURY, AND YOU MAY NOT REVEAL IN YOUR DISCUSSIONS OF
21 THE EVIDENCE THAT YOU ARE RELYING ON YOUR NOTES FOR YOUR
22 RECOLLECTION.

23 I WILL ALSO REMIND YOU THAT YOU WILL HAVE WITH YOU
24 IN THE JURY ROOM A FIREARM, AND THAT FIREARM WILL BE ENCLOSED
25 IN THE SEALED PLASTIC BAG JUST AS IT WAS DURING THE GUILT

1 PHASE. I'M GOING TO KEEP THE LIVE AMMUNITION HERE IN THIS
2 COURTROOM JUST AS I DID DURING THE GUILT PHASE. IF ANY OF
3 YOU FEEL THAT YOU NEED TO HAVE THAT AMMUNITION IN THE JURY
4 ROOM, WE'LL SEND IT BACK THERE IN EXCHANGE FOR THE WEAPON,
5 AND IF ANY OF YOU FEEL THAT YOU NEED TO HAVE BOTH OF THEM AT
6 THE SAME TIME, WE'LL MAKE ARRANGEMENTS FOR THAT TO -- FOR
7 THAT TO OCCUR. BOTH THE AMMUNITION AND THE FIREARM SHOULD
8 REMAIN IN THEIR SEALED BAGS. IF ANY OF YOU FEEL THAT YOU
9 NEED TO TAKE THEM OUT OF THOSE BAGS, YOU LET ME KNOW THAT AND
10 WE'LL DO THAT OUT HERE IN THIS COURTROOM UNDER MY
11 SUPERVISION.

12 NOW, LADIES AND GENTLEMEN, I'M GOING TO SEND YOU
13 BACK INTO THE JURY ROOM. THE THREE ALTERNATES PLEASE REMAIN
14 IN YOUR CHAIRS. PLEASE DO NOT BEGIN YOUR DELIBERATIONS
15 BECAUSE I WILL HAVE SOME MATTERS OF LAW THAT I NEED TO TAKE
16 UP WITH THE LAWYERS. IN JUST A FEW MINUTES I HOPE I'LL BE
17 SENDING YOU THE EXHIBITS AND I WILL ALSO BE SENDING YOU THESE
18 VERDICT FORMS, AND AT THAT TIME THE BAILIFF WILL INSTRUCT YOU
19 THAT YOU MAY BEGIN YOUR DELIBERATIONS. MR. FOREMAN, MEMBERS
20 OF THE JURY, Y'ALL CAN GO BACK TO THE JURY ROOM NOW.

21 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
22 3:40 P.M.)

23 THE COURT: MS. DAY AND MR. BURRIS AND MS. JOYE, I'M
24 GOING TO SEND YOU BACK INTO THE SAME ROOM THAT YOU WERE IN
25 BEFORE. I WOULD LIKE FOR YOU ALL TO CONTINUE TO OBSERVE THE

1 RULE THAT YOU MAY NOT DISCUSS THIS CASE. IT STILL IS
2 POSSIBLE THAT WE MAY NEED YOUR SERVICES HERE, SO I WANT YOU
3 TO KEEP THAT IN MIND AND BEAR WITH US. I KNOW THAT SITTING
4 BACK THERE AND -- IS NOT THE MOST EXCITING THING YOU CAN DO,
5 AND I APPRECIATE YOUR COOPERATION. WE'LL BE WITH YOU IN A
6 LITTLE WHILE.

7 (WHEREUPON, THE ALTERNATES WERE EXCUSED FROM OPEN
8 COURT AT 3:41 P.M.)

9 THE COURT: ANY EXCEPTIONS TO THE CHARGE?

10 MR. MYERS: NO EXCEPTIONS, YOUR HONOR, AND YOU MAY
11 HAVE COVERED THIS. I DON'T KNOW WHETHER I HEARD IT OR NOT.
12 BUT SOMETIMES THE COURT REFERS TO A STEWART CHARGE, AND THAT
13 IS THAT ANY OTHER CRIMES OR RULES INFRACTIONS OR BAD ACTS
14 CAN'T BE USED TO PROVE THE AGGRAVATING CIRCUMSTANCE, BUT THEY
15 CAN BE USED AS TO THE DEFENDANT'S CHARACTER. YOU MAY HAVE
16 CHARGED THAT---

17 THE COURT: I DIDN'T CHARGE THAT.

18 MR. MYERS: AND IF THEY WANT IT, FINE. IF THEY
19 DON'T WANT IT, FINE. I'M JUST BRINGING THAT TO YOUR
20 ATTENTION AND THE DEFENDANT'S ATTENTION.

21 MR. LITTLEJOHN: IF YOU WOULD GIVE ME JUST A SECOND,
22 YOUR HONOR.

23 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN
24 MR. LITTLEJOHN AND MS. KIMBROUGH.)

25 MR. LITTLEJOHN: YOUR HONOR, WE HAVE NO PROBLEMS

1 WITH THE COURT'S CHARGE AS GIVEN.

2 THE COURT: ARE YOU AWARE OF ANY REQUIREMENT THAT I
3 CHARGE THAT?

4 MR. MYERS: NOT IF THEY'RE TO ASK YOU NOT TO CHARGE
5 IT. THAT'S WHY I PUT IT ON THE RECORD. BUT I THINK THE
6 COURT HAS SAID THAT NEEDS TO BE CHARGED, BUT THEY CAN WAIVE
7 IT, AND IF THEY WAIVE IT, I DON'T HAVE ANY PROBLEM---

8 THE COURT: THEY WEREN'T ALLOWED TO WAIVE THE LIFE
9 IN PRISON WITHOUT THE POSSIBILITY OF PAROLE IN THE RECENT
10 LANEY DECISION. SO IF THE COURT HAS SAID IT NEEDS TO BE
11 CHARGED, THEN I BETTER CHARGE IT.

12 MR. LITTLEJOHN: YOUR HONOR, I'M NOT FAMILIAR WITH
13 THE CASE THAT SOLICITOR MYERS IS REFERRING TO. IF HE'S GOT
14 THE CASE, I WOULDN'T MIND LOOKING AT IT.

15 THE COURT: STATE VERSUS STEWART IS 320 SOUTHEAST
16 SECOND 447.

17 MR. MYERS: YES, SIR.

18 THE COURT: YEP. ALL RIGHT. BRING THEM BACK.

19 MR. LITTLEJOHN: YOUR HONOR, COULD I -- FOR THE
20 RECORD, AS A MATTER OF STRATEGY, WE WOULD WAIVE OUR RIGHT TO
21 HAVE THAT INSTRUCTION GIVEN TO THE JURY. YOUR HONOR, LET ME
22 MAKE SURE I UNDERSTAND WHAT THE COURT IS GOING TO -- I DON'T
23 KNOW THAT I'M READING THIS CASE RIGHT NOW THAT IS THE SAME AS
24 WHAT THE SOLICITOR PARAPHRASED.

25 THE COURT: ALL RIGHT. I WOULD JUST SAY THAT, "IN

1 DETERMINING WHETHER OR NOT THE STATE HAS PROVEN AN
2 AGGRAVATING CIRCUMSTANCE, YOU MAY NOT CONSIDER THE
3 DEFENDANT'S PRIOR OR SUBSEQUENT CRIMINAL RECORD."

4 MR. LITTLEJOHN: WITH NO INSTRUCTION AS TO HOW THAT
5 MIGHT BEAR ON CHARACTER. IS THAT WHAT I UNDERSTAND? THE
6 COURT WOULD NOT MAKE ANY FURTHER INSTRUCTION?

7 MR. MYERS: I THINK THE INSTRUCTION GOES LIKE THIS:
8 THAT THE STATE HAS PRESENTED EVIDENCE OF OTHER CRIMES OR BAD
9 ACTS OR RULES INFRACTIONS AND THAT THESE CRIMES, BAD ACTS,
10 AND RULES INFRACTIONS MAY NOT BE USED TO PROVE A STATUTORY
11 AGGRAVATING CIRCUMSTANCE, THAT THE EVIDENCE OF PRIOR CRIMES,
12 BAD ACTS, AND RULES INFRACTIONS CAN BE OFFERED AS EVIDENCE OF
13 THE DEFENDANT'S CHARACTER AND HIS CHARACTERISTICS AS THEY MAY
14 BE LOGICALLY RELEVANT TO THE CRIME. THESE MAY BE CONSIDERED
15 ALONG WITH ALL OTHER EVIDENCE, AND THE JURY MAY GIVE THEM
16 WHATEVER WEIGHT THEY DEEM PROPER UNDER THE CIRCUMSTANCES.

17 IT CLEARLY SAYS THAT IT CAN'T BE USED TO PROVE THE
18 AGGRAVATING CIRCUMSTANCE, BUT THEY ARE ADMITTED AS TO THE
19 DEFENDANT'S CHARACTER, AND THAT'S WHAT WE WOULD PROPOSE, IF
20 THEY WANT IT. NOW, IF THEY WAIVE IT, THAT'S UP TO THEM.

21 THE COURT: I TELL YOU WHAT. I'M GOING TO TAKE A
22 SHORT BREAK, AND I WANT YOU TO TAKE -- YOU AND MS. KIMBROUGH
23 TO SPEAK TO MR. MERCER ABOUT IT AND SEE WHAT HE HAS TO SAY,
24 AND THEN YOU ALL DECIDE WHETHER OR NOT YOU WISH TO WAIVE THE
25 GIVING OF THE INSTRUCTION ROUGHLY IN THE FORM THAT WAS

1 OUTLINED BY THE SOLICITOR.

2 MR. LITTLEJOHN: ALL RIGHT, SIR.

3 MS. KIMBROUGH: THANK YOU.

4 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

5 THE COURT: YES, SIR.

6 MR. LITTLEJOHN: YOUR HONOR, I'VE CONSULTED WITH MS.
7 KIMBROUGH AND WE'VE CONSULTED WITH MR. MERCER, AND WE WOULD
8 WAIVE THAT PORTION OF THE -- THE PORTION OF THE PROPOSED
9 CHARGE THAT WE'VE DISCUSSED. YOUR HONOR, WE THINK IT WOULD
10 GIVE UNDUE EMPHASIS TO IT IF IT'S AFTER THE -- AFTER THE
11 CHARGE HAS BEEN GIVEN IN WHOLE, AND WE'D ASK THE COURT NOT TO
12 CHARGE IT.

13 THE COURT: I THINK THAT I'M GOING TO -- I'M GOING
14 TO TAKE A -- I'M GOING TO -- I GOT ANOTHER CASE I'M GOING TO
15 GO BACK THERE AND READ, BUT I THINK THERE'S ONE MORE THING
16 YOU NEED TO THINK ABOUT. ORDINARILY IN THE PENALTY PHASE THE
17 ONLY -- THE ONLY FACT THAT THE STATE BEARS THE BURDEN OF
18 PROVING WOULD BE AN AGGRAVATING CIRCUMSTANCE.

19 MR. MYERS: YES, SIR.

20 THE COURT: THAT'S NOT TRUE HERE.

21 MR. MYERS: THAT'S RIGHT.

22 THE COURT: IN THIS CASE THE STATE HAS TO PROVE NOT
23 ONLY THE AGGRAVATING CIRCUMSTANCE, BUT AS I HAVE CHARGED THE
24 JURY, THEY ALSO HAVE TO PROVE THAT THE DEFENDANT WAS, IN
25 FACT, THE SHOOTER. SO I BELIEVE THAT IF I WERE TO GIVE THE

1 CHARGE, I WOULD NOT ONLY CHARGE THAT THEY MAY NOT CONSIDER
2 HIS PAST OR SUBSEQUENT CRIMINAL RECORD IN DECIDING WHETHER OR
3 NOT THE STATE HAS PROVEN THE AGGRAVATING CIRCUMSTANCE, BUT I
4 WOULD ALSO CHARGE THAT THEY MAY NOT CONSIDER THAT CRIMINAL
5 RECORD IN DECIDING WHETHER OR NOT THE STATE HAS PROVEN THAT
6 HE WAS THE SHOOTER. AT LEAST I'M PROPOSING THAT I -- THAT
7 THAT'S SOMETHING I COULD CHARGE THEM ON.

8 AND I THINK THAT -- I DON'T -- AS I READ IN STEWART,
9 IT DOES NOT REQUIRE THAT CHARGE. IT SIMPLY SAYS THAT ON THE
10 FACTS OF THAT CASE, THE CRIMES THAT HE HAD BEEN COMMITTED
11 (SIC) OF PREVIOUSLY WERE VERY SIMILAR TO THE CRIME THAT HE
12 WAS ON CHARGE FOR NOW, AND THE FACT THAT THE JUDGE GAVE THAT
13 CHARGE ELIMINATED ANY PREJUDICE THAT MIGHT HAVE RESULTED FROM
14 THE INTRODUCTION OF THE PRIOR CRIMINAL RECORD. SO I BELIEVE
15 THAT -- I'M TOLD THAT STATE VERSUS SKIPPER ADDRESSES THIS,
16 AND THAT'S WHAT I'M FIXING TO GO READ.

17 MR. MYERS: STATE VERSUS MIDDLETON IS CITED IN HERE
18 ALSO, YOUR HONOR.

19 THE COURT: I SAW MIDDLETON. MIDDLETON SAYS THAT I
20 BELIEVE -- IF I'VE GOT IT RIGHT, IT SAYS THAT IT SHOULD BE --
21 IT SHOULD BE CHARGED. WELL, OKAY. SEE, YOU HAVE LOOKED AT
22 HIS CRIMINAL RECORD AND HIS RECORD OF INFRACTIONS.

23 MR. LITTLEJOHN: YES, YOUR HONOR.

24 THE COURT: AND YOU BELIEVE THAT BY MY POINTING OUT
25 WHAT THAT EVIDENCE CAN BE USED FOR, IN ADDITION TO WHAT IT

1 CAN'T BE USED FOR, MIGHT FOCUS THE JURY IN ON AN AREA OF --
2 THAT YOU DON'T WANT THEM TO BE FOCUSED IN ON. AND YOU'VE
3 DISCUSSED THIS WITH MR. MERCER.

4 MR. LITTLEJOHN: YES, YOUR HONOR. WE ALSO THINK --
5 I APPRECIATE THE COURT BRINGING TO OUR ATTENTION ABOUT THE
6 SECOND LEGAL FACTOR THAT THE COURT -- I MEAN THAT THE JURY
7 WOULD HAVE TO DETERMINE WHICH IS WHETHER HE WAS THE
8 TRIGGERMAN OR NOT. BUT WE DON'T -- WE THINK BECAUSE THAT'S
9 SUCH A FINITE ISSUE THAT THEY HAVE TO DETERMINE, THAT NONE OF
10 HIS SIMILAR -- NONE OF HIS PRIOR OFFENSES OR INFRACTIONS
11 COULD EVEN BEAR ON THAT PARTICULAR ISSUE. SO, YES, YOUR
12 HONOR, I THINK IT WOULD BRING UNDUE EMPHASIS TO THESE PRIOR
13 MATTERS, AND WE WOULD -- WE WOULD ASK THE COURT NOT TO -- NOT
14 TO GIVE THAT INSTRUCTION.

15 THE COURT: GOT ANYTHING TO SAY?

16 MR. MYERS: IF THE DEFENDANT AGREES WITH IT AND
17 THEY'VE DISCUSSED IT WITH HIM AND THEY DON'T WANT YOU TO GIVE
18 THAT CHARGE, THEN I THINK IT'S WAIVED AND YOU DON'T HAVE TO
19 GIVE IT.

20 THE COURT: WELL, I THINK IT SEEMS -- IT SEEMS TO ME
21 THAT HAVING -- OF COURSE, I HAVEN'T HEARD EVERYTHING THAT YOU
22 WENT THROUGH IN YOUR THOUGHT PROCESS, BUT FROM WHAT I HAVE
23 HEARD AND FROM MY FAMILIARITY WITH THE CASE, IT SEEMS TO ME
24 TO BE A REASONABLE DECISION.

25 MR. LITTLEJOHN: YEAH. I FINALLY MADE ONE, YOUR

1 HONOR.

2 THE COURT: NO. YOU'VE MADE PLENTY, BUT IT'S NOT
3 ANY DIFFERENT -- I MEAN, YOU'RE NOT MAKING THAT DECISION
4 BECAUSE OF THE TIMING OF THIS BEING BROUGHT UP. I MEAN
5 YOU---

6 MR. LITTLEJOHN: NO, YOUR HONOR.

7 THE COURT: WOULD YOU HAVE MADE THE SAME REQUEST IF
8 THIS HAD BEEN -- IF I HAD PROPOSED IN MY INITIAL DRAFT CHARGE
9 TO CHARGE THIS? WOULD YOU HAVE MADE THE SAME REQUEST?

10 MR. LITTLEJOHN: YES, YOUR HONOR. THAT'S JUST
11 ANOTHER -- ANOTHER THING TO CONSIDER, AND I'VE DISCUSSED IT
12 WITH THE DEFENDANT AND HE'S WAIVING HIS RIGHT TO THAT CHARGE,
13 IF HE HAS A RIGHT.

14 THE COURT: ALL RIGHT. WELL, IN -- IN SKIPPER THE
15 COURT SAYS THAT THEY NEVER INTENDED IN STEWART ANYTHING MORE
16 THAN TO SAY THAT ON THE FACTS OF THAT CASE THE CHARGE WAS
17 PROPER, AND THEN THEY GO ON TO SAY, "OUR HOLDING WAS NOT
18 INTENDED TO REQUIRE THE INSTRUCTION WHEREAS HERE THE
19 STATUTORY AGGRAVATING CIRCUMSTANCE RELIED ON BY THE STATE IN
20 THE SENTENCING PHASE HAS BEEN PROVEN BEYOND A REASONABLE
21 DOUBT IN THE GUILT PHASE." SO THAT'S THIS -- THAT'S HERE.

22 THE ONLY THEN QUESTION REMAINING IS HOW IT MIGHT
23 IMPACT THE REQUIREMENT THAT I HAVE PLACED UPON THE STATE TO
24 PROVE WHO THE SHOOTER WAS BEYOND A REASONABLE DOUBT. THAT
25 WAS NOT A REQUIREMENT PLACED UPON THEM IN THE GUILT PHASE.

1 THEY NOW HAVE ADDITIONAL EVIDENCE BEFORE THEM IN THE PENALTY
2 PHASE. WE KNOW THAT LAY PEOPLE, WHEN THEY THINK ABOUT PRIOR
3 CRIMINAL CONDUCT, ONE OF THE REACTIONS THAT THEY HAVE IS,
4 "WELL, HE DID IT BEFORE. HE MUST HAVE DONE IT AGAIN." AND
5 THAT'S WHY WE HAVE THE RULE AGAINST CHARACTER EVIDENCE. SO,
6 YOU KNOW, THAT'S SOMETHING -- THOSE ARE -- THOSE ARE TWO
7 THINGS THAT YOU HAVE TO WEIGH, AND YOU HAVE, YOU'RE TELLING
8 ME.

9 MR. LITTLEJOHN: THAT'S CORRECT, YOUR HONOR.

10 THE COURT: SOLICITOR, ANY RESPONSE?

11 MR. MYERS: NO, SIR.

12 THE COURT: ALL RIGHT.

13 MR. MYERS: THE ONLY THING...

14 THE COURT: YES, SIR?

15 MR. MYERS: THE ONLY THING I'D REQUEST IS YOU GET
16 THE DEFENDANT TO PUT ON THE RECORD IF HE AGREES WITH THAT.

17 THE COURT: ONE OF THE THINGS THAT SKIPPER SAYS IS
18 THAT IN REGARDS TO THE GIVING OR NOT GIVING OF THE CHARGE
19 THAT'S SET FORTH IN STEWART IS THAT IT NEED NOT BE GIVEN OR
20 THE TEST IS -- THE TEST TO BE APPLIED IS WHETHER THE FAILURE
21 TO GIVE THE CHARGE IS PREJUDICIAL TO THE DEFENDANT. AND YOU
22 HAVE CONSULTED AMONG YOURSELVES AND YOU HAVE CONSULTED WITH
23 MR. MERCER, AND GIVEN THE UNIQUE FACTS AND CIRCUMSTANCES OF
24 THIS CASE AND THE UNIQUE LENGTH AND CHARACTER OF HIS RECORD
25 OF CRIMES AND INFRACTIONS, YOU HAVE DETERMINED AS A STRATEGIC

1 MATTER THAT YOU BELIEVE YOUR CLIENT WOULD BE MORE PREJUDICED
2 TO GIVE THE CHARGE THAN HE WOULD BE TO NOT GIVE THE CHARGE.

3 MR. LITTLEJOHN: YES, YOUR HONOR.

4 MS. KIMBROUGH: YES, YOUR HONOR.

5 THE COURT: NOW, MR. MERCER -- DO YOU MIND IF I ASK
6 YOUR CLIENT ABOUT THIS?

7 MS. KIMBROUGH: NO. BUT, YOUR HONOR, HE'S INDICATED
8 TO US THAT HE REALLY NEEDS TO GO TO THE BATHROOM.

9 THE COURT: WELL...

10 MS. KIMBROUGH: BUT I WILL TELL YOU AS AN OFFICER OF
11 THE COURT WE'VE SPOKEN WITH HIM AND HE HAS TOLD US THAT'S
12 FINE.

13 THE COURT: IS THAT TRUE, MR. MERCER?

14 MR. MERCER: YES, SIR.

15 THE COURT: ALL RIGHT. SO NO EXCEPTIONS OTHER THAN
16 -- NO EXCEPTIONS.

17 MR. LITTLEJOHN: THAT'S CORRECT, YOUR HONOR.

18 MS. KIMBROUGH: NONE.

19 MR. MYERS: NOTHING FURTHER.

20 THE COURT: Y'ALL GET THE JURY -- I MEAN GET THE
21 EXHIBITS TOGETHER AND MAKE SURE YOU HOLD OUT STATE'S EXHIBIT
22 24?

23 COURT REPORTER: 22.

24 THE COURT: 22? AND SEND EVERYTHING BACK. HERE ARE
25 THE -- HERE ARE THE VERDICT FORMS AND THE STATUTORY

COLLOQUY

1 INSTRUCTION, AND THAT'S IT.

2 (PAUSE IN PROCEEDINGS.)

3 THE COURT: BE SEATED. JUST GET ONE PERSON FROM THE
4 SOLICITOR'S OFFICE REAL QUICK. (PAUSE.) ALL RIGHT. IT'S MY
5 UNDERSTANDING THAT YOU ALL HAVE AGREED ON THE PROPER SET OF
6 EXHIBITS TO GO BACK TO THE JURY?

7 MR. LITTLEJOHN: YES, YOUR HONOR.

8 THE COURT: AND SO THE BAILIFFS HAVE THAT. I'M
9 GOING TO INSTRUCT THEM TO TAKE THAT BACK TO THE JURY AND
10 INSTRUCT THE JURY TO BEGIN THEIR DELIBERATIONS. AND YOU ALSO
11 HAVE THE VERDICT FORMS?

12 BAILIFF: YES, SIR.

13 THE COURT: ALL RIGHT. WE'LL BE IN RECESS UNTIL WE
14 HEAR FROM THE JURY.

15 MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

16 (WHEREUPON, THE JURY BEGAN DELIBERATING AT 4:12 P.M.
17 COURT'S EXHIBIT 6 WAS MARKED FOR IDENTIFICATION.)

18 THE COURT: BE SEATED, PLEASE. ALL RIGHT. IT'S MY
19 UNDERSTANDING THAT THE JURY HAS REACHED A VERDICT. I'M GOING
20 TO BRING THEM IN HERE IN JUST A MINUTE. JUST AS I SAID TO
21 EVERYONE WHEN WE ANNOUNCED THE VERDICT IN THE GUILT PHASE OF
22 THE TRIAL, IF THERE'S ANYONE WHO FEELS THAT THEY CANNOT
23 CONTAIN THEIR EMOTIONS WHEN THIS VERDICT IS ANNOUNCED, THEN I
24 WOULD LIKE FOR YOU TO REMOVE YOURSELF FROM THE COURTROOM NOW
25 BECAUSE I WILL NOT TOLERATE ANY OUTBURSTS WHATSOEVER WHEN

1 THIS VERDICT IS PUBLISHED. BRING IN THE JURY.

2 (WHEREUPON, THE JURY RETURNED TO OPEN COURT WITH A
3 VERDICT AT 6:50 P.M.)

4 THE COURT: MR. FOREMAN, HAS THE JURY REACHED A
5 VERDICT?

6 FOREMAN: WE HAVE, YOUR HONOR.

7 THE COURT: PASS IT TO THE BAILIFF, PLEASE.

8 THE CLERK: INDICTMENT 2003-GS-32-409, IN THE MATTER
9 OF THE STATE VERSUS KEVIN J. MERCER: WE, THE JURY,
10 UNANIMOUSLY FIND THE STATE HAS PROVEN BEYOND A REASONABLE
11 DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE: THE
12 MURDER WAS COMMITTED WHILE IN THE COMMISSION OF A ROBBERY
13 WHILE ARMED WITH A DEADLY WEAPON.

14 IN THE MATTER OF THE STATE VERSUS KEVIN J. MERCER:
15 WE, THE JURY, HAVING FOUND BEYOND A REASONABLE DOUBT THE
16 EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE
17 - THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ARMED
18 ROBBERY WITH A DEADLY WEAPON - NOW RECOMMEND TO THE COURT
19 THAT THE DEFENDANT, KEVIN J. MERCER, BE SENTENCED TO DEATH.
20 AND IT IS SO SIGNED.

21 MR. FOREMAN, LADIES AND GENTLEMEN, AS I CALL YOUR
22 NAME, PLEASE RESPOND TO THE FOLLOWING QUESTION. TIMOTHY
23 LEITNER, AS TO THE SENTENCE, IS IT YOUR SENTENCE AND IS IT
24 STILL YOUR SENTENCE?

25 JUROR LEITNER: IT IS.

1 THE CLERK: LAUREN GIBSON---

2 JUROR GIBSON: IT IS.

3 THE CLERK: WAIT UNTIL I ASK THE QUESTION, PLEASE,
4 MA'AM. AS TO THE SENTENCE, IS THIS YOUR SENTENCE AND IS IT
5 STILL YOUR SENTENCE?

6 JUROR GIBSON: YES.

7 THE CLERK: DIANE RIVERS, AS TO THE SENTENCE, WAS
8 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

9 JUROR RIVERS: YES, IT IS.

10 THE CLERK: WILLIAM LIVINGSTON, AS TO THE SENTENCE,
11 WAS THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

12 JUROR LIVINGSTON: YES.

13 THE CLERK: DIANE BOUYE, AS TO THE SENTENCE, WAS
14 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

15 JUROR BOUYE: YES.

16 THE CLERK: JANET HARMON, AS TO THE SENTENCE, WAS
17 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

18 JUROR HARMON: YES, IT IS.

19 THE CLERK: CHARLES MCDANIEL, AS TO THE SENTENCE,
20 WAS THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

21 JUROR MCDANIEL: IT IS.

22 THE CLERK: PAUL STEVENS, AS TO THE SENTENCE, WAS
23 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

24 JUROR STEVENS: YES, MA'AM.

25 THE CLERK: EDWARD OSEGUEDA, AS TO THE SENTENCE, WAS

1 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

2 JUROR OSEGUEDA: YES, IT IS.

3 THE CLERK: RONALD SCHROEDER, AS TO THE SENTENCE,
4 WAS THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

5 JUROR SCHROEDER: YES, IT IS.

6 THE CLERK: THOMAS MARINELLI, AS TO THE SENTENCE,
7 WAS THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

8 JUROR MARINELLI: IT IS.

9 THE CLERK: VICKY MILLS, AS TO THE SENTENCE, WAS
10 THIS YOUR SENTENCE AND IS IT STILL YOUR SENTENCE?

11 JUROR MILLS: YES.

12 THE CLERK: ALL JURORS ARE POLLED, YOUR HONOR.

13 THE COURT: ANYTHING ELSE BEFORE WE MOVE INTO
14 SENTENCING?

15 MR. MYERS: NOTHING FROM THE STATE.

16 MR. LITTLEJOHN: YOUR HONOR, WE'D JUST FOR THE
17 RECORD MOVE TO RENEW ALL OUR MOTIONS PREVIOUSLY MADE.

18 THE COURT: I RESPECTFULLY DENY THOSE MOTIONS. ALL
19 RIGHT. BRING MR. MERCER AROUND. WOULD YOU GO AND GET THE
20 ALTERNATES AND BRING THEM IN, PLEASE? ANYTHING ELSE FROM THE
21 STATE?

22 MR. MYERS: NO, SIR.

23 THE COURT: MR. LITTLEJOHN?

24 MR. LITTLEJOHN: NOTHING FURTHER FROM THE DEFENSE,
25 YOUR HONOR.

1 THE COURT: DOES ANYBODY HAVE HANDY THE INDICTMENT
2 NUMBER FOR THE ASSAULT AND BATTERY WITH INTENT TO KILL
3 CHARGE?

4 THE CLERK: JUST A MINUTE, YOUR HONOR.

5 (WHEREUPON, THE ALTERNATES WERE BROUGHT INTO OPEN
6 COURT AT 6:55 P.M.)

7 THE CLERK: YOUR HONOR, THE INDICTMENT NUMBER WAS
8 2006-GS-32-0553.

9 THE COURT: AND THE ARMED ROBBERY COUNT IS COUNT 2
10 OF THIS INDICTMENT?

11 THE CLERK: YES, SIR.

12 MR. MYERS: YES, SIR.

13 THE COURT: MR. MERCER, IS THERE ANYTHING YOU'D LIKE
14 TO SAY?

15 MR. MERCER: I JUST, YOU KNOW, ASK FOR -- I WOULD
16 ASK FOR MERCY. THEY HAVE REACHED THE DECISION, SO I'M AT A
17 LOSS FOR WORDS. I DON'T KNOW WHAT ELSE TO SAY.

18 THE COURT: ANYTHING ELSE, MR. LITTLEJOHN?

19 MR. LITTLEJOHN: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. ON THE ARMED ROBBERY, THE
21 SENTENCE IS THIRTY YEARS IMPOSED AS A CONSECUTIVE SENTENCE TO
22 THE TWELVE YEARS HE'S NOW SERVING ON THE ASSAULT AND BATTERY
23 WITH INTENT TO KILL. ON THE COUNT 3, POSSESSION OF A
24 FIREARM, THE SENTENCE IS FIVE YEARS IMPOSED AS A CONSECUTIVE
25 SENTENCE TO THE ARMED ROBBERY.

1 ON COUNT 1, I FIND THAT THE EVIDENCE OF THIS CASE
2 WARRANTS THE IMPOSITION OF THE DEATH PENALTY, AND ITS
3 IMPOSITION IS NOT A RESULT OF PREJUDICE, PASSION, OR ANY
4 OTHER ARBITRARY FACTOR. THE DEFENDANT HAS BEEN FOUND BY THE
5 JURY TO BE GUILTY OF THE OFFENSE OF MURDER. THE JURY HAS
6 RECOMMENDED THAT THE DEFENDANT SHOULD BE SENTENCED TO DEATH.

7 IT IS, THEREFORE, THE JUDGMENT AND SENTENCE OF THE
8 COURT THAT THE DEFENDANT, KEVIN J. MERCER, BE TAKEN TO THE
9 LEXINGTON COUNTY DETENTION CENTER AND THENCE TO THE STATE
10 DEPARTMENT OF CORRECTIONS, HENCEFORTH TO BE KEPT IN CLOSE AND
11 SAFE CONFINEMENT UNTIL THE FIRST DAY OF JULY 2006 UPON WHICH
12 DAY BETWEEN THE HOURS OF 6:00 P.M. AND 6:00 A.M., OR UPON
13 ORDER OF EXECUTION ISSUED BY THE SOUTH CAROLINA SUPREME
14 COURT, THE DEFENDANT, KEVIN J. MERCER, SHALL SUFFER DEATH IN
15 THE MANNER PROVIDED BY LAW. MAY GOD HAVE MERCY ON YOU, SIR.

16 LADIES AND GENTLEMEN, I WOULD LIKE TO PUBLICLY THANK
17 YOU FOR THE ATTENTION THAT YOU HAVE GIVEN THE CASE. I KNOW
18 THAT IT HAS BEEN DIFFICULT, AND ON BEHALF OF LEXINGTON COUNTY
19 AND THE STATE WE THANK YOU FOR YOUR HARD WORK AND YOUR
20 ATTENTION THAT YOU'VE PAID. I WOULD LIKE FOR YOU TO STEP
21 BACK INTO THE JURY ROOM, AND I WILL DISMISS YOU FROM THERE.

22 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT AT
23 7:00 P.M.)

24 THE COURT: ALL RIGHT. WE'RE ADJOURNED.

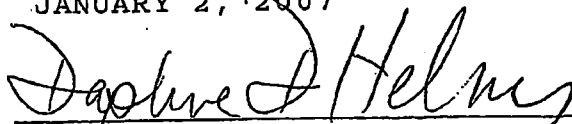
25 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

2436

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 10TH THROUGH 22ND DAYS OF APRIL, 2006.

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

JANUARY 2, 2007


DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

2003-GS-32-409

THE STATE OF SOUTH CAROLINA

-VS-

KEVIN J. MERCER

: TRANSCRIPT OF RECORD

JANUARY 13, 2006

LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
S. RICK HUBBARD, III, ESQUIRE
D. SHAWN GRAHAM, ESQUIRE
ATTORNEYS FOR THE STATE

CAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: BE SEATED. OKAY. WE ARE BACK IN STATE
2 VERSUS KEVIN MERCER TO DEAL WITH A FEW ISSUES INCLUDING AN
3 ISSUE REGARDING THE SUBSTITUTION OF COUNSEL. WE'LL TAKE THAT
4 UP FIRST. FOR PERSONAL REASONS THAT RELATE TO THE TIMING OF
5 THE SCHEDULING OF THE TRIAL, MS. MCPHERSON ASKED TO BE
6 RELIEVED OR TO HAVE THE TRIAL DELAYED, AND IT'S MY
7 UNDERSTANDING THAT THAT HAS BEEN WORKED OUT AND THAT MELISSA
8 KIMBROUGH WHO IS HERE IS NOW GOING TO STEP IN AS SECOND CHAIR
9 TO MR. LITTLEJOHN IN REPRESENTING MR. MERCER. IS THAT
10 CORRECT?

11 MR. LITTLEJOHN: THAT'S OUR UNDERSTANDING, YOUR
12 HONOR.

13 THE COURT: AND YOU HAVE -- YOU BOTH, I UNDERSTAND,
14 HAVE DISCUSSED THIS WITH MR. MERCER?

15 MR. LITTLEJOHN: YES, YOUR HONOR.

16 THE COURT: AND -- AND---

17 MR. LITTLEJOHN: MR. MERCER HAS MET MS. KIMBROUGH
18 THIS MORNING.

19 THE COURT: OKAY.

20 MR. LITTLEJOHN: AND HAD TIME TO TALK WITH HER
21 CONCERNING HIS DEFENSE.

22 THE COURT: ALL RIGHT. ANYTHING YOU WANT TO ADD,
23 MS. KIMBROUGH?

24 MS. KIMBROUGH: NONE, YOUR HONOR.

25 THE COURT: MR. MERCER, ARE YOU SATISFIED WITH THIS?

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1 MR. MERCER: YES, SIR.

2 THE COURT: ALL RIGHT. AND, MR. LITTLEJOHN, YOU'VE
3 HAD DISCUSSIONS WITH HIM ABOUT WHETHER OR NOT HE'S SATISFIED
4 WITH THIS CHANGE AND...

5 MR. LITTLEJOHN: YES, SIR. WE TALKED ABOUT IT
6 BRIEFLY THIS MORNING BEFORE WE CAME INTO THE HEARING, AND
7 IT'S MY UNDERSTANDING THAT HE IS SATISFIED WITH THE
8 SUBSTITUTION OF COUNSEL.

9 THE COURT: OKAY. AND YOU -- YOU EASILY MEET THE
10 THREE-YEAR ADMISSION. IS THAT CORRECT?

11 MS. KIMBROUGH: YES, YOUR HONOR.

12 THE COURT: ISN'T THAT THE ONLY REQUIREMENT FOR
13 SECOND CHAIR?

14 MS. KIMBROUGH: IT IS, YOUR HONOR.

15 MR. LITTLEJOHN: I BELIEVE SO, YOUR HONOR.

16 MS. KIMBROUGH: I WAS ADMITTED IN '96.

17 THE COURT: OKAY. ALL RIGHT. NOW, THE ONE -- THE
18 ONE QUESTION THAT I HAD - AND WE PROBABLY OUGHT TO PULL THE
19 STATUTE OUT TO LOOK AT IT - IS WHETHER OR NOT IT IS NECESSARY
20 TO HAVE A MEMBER OF THE PUBLIC DEFENDER'S OFFICE ASSIGNED IN
21 THE DEFENSE OF EACH DEATH PENALTY CASE. THE STATUTE IS
22 THOUGHT BY SOME, I BELIEVE, TO REQUIRE THAT, BUT IT'S HARD
23 FOR ME TO IMAGINE THAT IT ACTUALLY DOES REQUIRE THAT. HAVE
24 Y'ALL LOOKED AT THAT?

25 MR. LITTLEJOHN: YOUR HONOR, I CANNOT SAY THAT I

1 HAVE.

2 THE COURT: WHAT'S THE STATUTE NUMBER? WHO KNOWS?

3 MR. LITTLEJOHN: YOUR HONOR, IT'S GOING TO BE IN
4 16-3, SOMEWHERE IN THERE, 16 DASH 3.

5 MS. KIMBROUGH: I BELIEVE IT'S 26.

6 THE COURT: ALL RIGHT. YOU'RE RIGHT.

7 MS. KIMBROUGH: 16-26.

8 THE COURT: YEAH. I THINK THAT CLEARLY -- IT SAYS
9 ONLY ONE OF THE ATTORNEYS SHALL BE THE PUBLIC DEFENDER OR A
10 MEMBER OF THE STAFF. THE OBVIOUS PURPOSE OF THAT IS TO -- IS
11 TO MAKE SURE THAT YOU DO -- THAT THE DEFENDANT DOES, IN FACT,
12 GET TWO SEPARATE LAWYERS RATHER THAN JUST TWO PEOPLE WORKING
13 OUT OF THE SAME OFFICE, SO -- ALL RIGHT. SO I DON'T SEE ANY
14 PROBLEM WITH THAT. YOU HAVE PREPARED ME AN ORDER REGARDING
15 THE SUBSTITUTION OF COUNSEL?

16 MS. KIMBROUGH: YES, YOUR HONOR. I HAD SENT IT TO
17 YOU---

18 THE COURT: OKAY.

19 MS. KIMBROUGH: ---BY E-MAIL.

20 THE COURT: I'VE GOT IT. LET ME... WELL, I THOUGHT
21 I DID. I'VE GOT IT ON HERE. I'LL PRINT IT OUT IN A FEW
22 MINUTES. OKAY. NOW, THE OTHER ISSUES THAT I KNOW WE NEED TO
23 ADDRESS ARE -- WE DID GET THE ORDER FROM COURT ADMINISTRATION
24 ASSIGNING ME TO LEXINGTON FOR THE TWO WEEKS BEGINNING
25 APRIL 10TH. THE ONE THING THAT WE DIDN'T THINK ABOUT WHEN WE

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1 STARTED TALKING ABOUT THAT DATE IS THAT EASTER IS APRIL THE
2 16TH, AND SO WE OBVIOUSLY DON'T WANT TO SEQUESTER A JURY OVER
3 THE EASTER WEEKEND. SO WHAT I THOUGHT - AND I'VE DISCUSSED
4 THIS, I BELIEVE, WITH BOTH SIDES TOGETHER - IS THAT IF WE GO
5 THROUGH THE QUALIFICATION PROCESS THE WEEK OF APRIL 10TH AND
6 GET ENOUGH JURORS QUALIFIED TO WHERE WE FEEL WE'RE READY TO
7 STRIKE A JURY WHICH IS PROBABLY GOING TO TAKE US AT LEAST
8 'TIL LATE THURSDAY AFTERNOON ANYWAY, PROBABLY ON INTO FRIDAY
9 -- AND WE'LL JUST STOP RIGHT THERE, AND THEN WE'LL BREAK FOR
10 THE WEEKEND. THEN WE'LL COME BACK ON MONDAY MORNING, STRIKE
11 THE JURY, AND IF WE'RE GOING TO SEQUESTER THE JURY, SEQUESTER
12 THE JURY AT THAT TIME. DOES THAT SUIT EVERYBODY?

13 MR. HUBBARD: YES, SIR.

14 MS. KIMBROUGH: YES, YOUR HONOR.

15 THE COURT: DOES ANYBODY SEE ANY PROBLEMS WITH THAT?

16 MR. LITTLEJOHN: NO, YOUR HONOR, NOT FROM THE
17 DEFENSE.

18 MR. HUBBARD: JUDGE, DO YOU THINK WE'D GO INTO A
19 THIRD WEEK IF WE STARTED---

20 THE COURT: WELL, WHAT DO YOU THINK? I MEAN, YOU
21 TELL ME.

22 MR. HUBBARD: GENERALLY -- GENERALLY, JUDGE, WE'VE
23 BEEN ABLE TO DO EVEN BOTH HALVES OF A TRIAL, ASSUMING WE GET
24 INTO THAT SECOND STAGE -- WE'VE BEEN ABLE TO DO IT IN FIVE
25 DAYS BEFORE, BUT I DIDN'T KNOW IF IN A PRECAUTION IF YOU WANT

1 TO AT LEAST LET COURT ADMINISTRATION KNOW WE MIGHT NEED -- IF
2 WE SPILL INTO THAT WEEKEND, THAT FOLLOWING WEEKEND, AND MAYBE
3 INTO THAT MONDAY OR TUESDAY---

4 THE COURT: OKAY. WELL---

5 MR. HUBBARD: ---I DIDN'T KNOW IF THAT WOULD LEAVE
6 YOU IN A BIND OR ANYTHING.

7 THE COURT: I MEAN, IF WE WILL -- ONCE WE START, I
8 MEAN, WE'LL FINISH.

9 MR. HUBBARD: OKAY.

10 THE COURT: AND IF I CAN'T GO TO MY NEXT ASSIGNMENT,
11 I JUST CAN'T GO.

12 MR. HUBBARD: I THINK IT WOULD BE UNDERSTANDABLE.

13 THE COURT: ALL RIGHT. SO IN TERMS OF SCHEDULING,
14 WE ALL AGREE THAT THAT IS THE WAY WE'RE GOING TO HANDLE THE
15 SCHEDULING.

16 MR. LITTLEJOHN: YES, YOUR HONOR.

17 MS. KIMBROUGH: YES, YOUR HONOR.

18 THE COURT: OKAY. WE'RE GOING TO SOMETIME IN --
19 WHAT DID WE SAY? MID FEBRUARY? HOPE?

20 THE CLERK: YES, SIR. FEBRUARY THE 13TH WOULD GIVE
21 US SEVEN WEEKS.

22 THE COURT: FEBRUARY 13TH SHE'S GOING TO SEND OUT
23 THE SUMMONS TO THE JURORS, AND THAT'S ONLY FOUR WEEKS AWAY,
24 SO WE'VE GOT TO GET CRACKING. WE'VE GOT TO HAVE AN AGREED
25 UPON, HOPEFULLY, OR IF NOT AGREED UPON, A RULED UPON, JUROR

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JAN 13 2006

1 QUESTIONNAIRE. HAVE Y'ALL NORMALLY AGREED ON YOUR
2 QUESTIONNAIRE WITH DEFENSE COUNSEL?

3 MR. MYERS: WE -- IF THEY HAVE ONE DIFFERENT THAN
4 THE NORMAL ONE, THEY EITHER SUBMIT ONE AND THEN WE TRY TO
5 WORK IT OUT ON WHAT'S SENT OUT...

6 THE COURT: OKAY. WELL, CAN Y'ALL TRY SOMETIME
7 MAYBE EVEN TODAY OR EARLY NEXT WEEK TO---

8 MR. MYERS: DO Y'ALL HAVE ONE?

9 MR. LITTLEJOHN: JUDGE, WE DO NOT HAVE ONE AT THIS
10 POINT.

11 THE COURT: WHY DON'T YOU GET THE ONE THAT THEY
12 PROPOSE, SINCE THEY HAVE ONE PREPARED, AND THEN YOU LOOK --
13 Y'ALL LOOK AT IT AND TAKE YOUR TIME AND DECIDE WHAT ELSE YOU
14 MIGHT WANT IN IT OR WHAT IN IT YOU MIGHT OBJECT TO. IF Y'ALL
15 CAN'T WORK THAT OUT, LET ME KNOW VERY SOON ABOUT THE
16 DISAGREEMENT.

17 MR. MYERS: MAY I ASK A QUESTION?

18 THE COURT: YES, SIR.

19 MR. MYERS: DO YOU HAVE A COPY OF THE LAST ONE WE
20 USED?

21 THE CLERK: YES, SIR. IT'S THE STANDARD...

22 MR. MYERS: I WOULD PROPOSE THAT THE CLERK SHOW THE
23 DEFENSE THE ONE WE USED IN THE LAST CASE, AND I HAVE NO
24 OBJECTION TO THAT ONE, AND THEN I CAN GET WITH THEM AND WE
25 CAN USE THAT AS A FOUNDATION.

1 THE COURT: OKAY.

2 THE CLERK: IT'S USUALLY THE STANDARD THAT WAS
3 PASSED DOWN BY THE SUPREME COURT, YOUR HONOR.

4 THE COURT: OKAY. WHY DON'T YOU -- WHY DON'T Y'ALL
5 TRY TO GET BACK IN TOUCH WITH ME BY, SAY, A WEEK FROM
6 TODAY---

7 MR. LITTLEJOHN: YES, SIR.

8 THE COURT: ---TO REPORT EITHER THAT YOU HAVE AN
9 AGREEMENT OR WHAT THE DISAGREEMENT IS AND I'LL GET IT RULED
10 ON. WE'RE GOING TO DRAW -- SHE SAYS Y'ALL NORMALLY DRAW 300
11 TO 350. I FIGURED BECAUSE OF EASTER AND THE FACT THAT -- DO
12 WE KNOW WHEN SPRING BREAK IS IN LEXINGTON PUBLIC SCHOOLS?

13 THE CLERK: I DO NOT KNOW IF IT'S THE WEEK OF THE
14 10TH OR THE WEEK OF THE 17TH AFTER EASTER. I'M NOT SURE.

15 MR. HUBBARD: APRIL 10TH IS WHAT...

16 THE COURT: APRIL 10TH?

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

18 THE COURT: OKAY. WELL, WE'RE GOING TO HAVE TO
19 CONTEND WITH THAT, AND THAT'S NOT GOING TO HURT US TOO BAD.
20 I MEAN, WE CAN -- IF SOMEBODY'S GOING TO BE HERE FOR PART OF
21 THE WEEK AND NOT SOME OTHER PART OF THE WEEK, WE CAN -- SINCE
22 IT'S JURY QUALIFICATION, WE CAN WORK WITH THEM. BUT I
23 FIGURED WE'D DRAW 350. AND THE OTHER ISSUE THAT I KNOW NEEDS
24 TO BE ADDRESSED, I SUPPOSE BY DEFENSE COUNSEL, IS TO MAKE
25 SURE THAT THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS

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1 HAS GOTTEN DELIVERED TO THEM ALL OF THE INFORMATION THAT THEY
2 NEED IN ORDER TO BEGIN THEIR EVALUATION. AND CAN YOU CHECK
3 ON THAT AND REPORT BACK TO ME AGAIN BY, LET'S SAY, THE MIDDLE
4 OF NEXT WEEK---

5 MS. KIMBROUGH: YES, YOUR HONOR.

6 THE COURT: ---THAT THAT'S BEEN DONE? I UNDERSTAND
7 YOU THINK THERE'S AN APPOINTMENT SCHEDULED, SO MAYBE IT
8 ALREADY HAS BEEN DONE.

9 MS. KIMBROUGH: YES, YOUR HONOR. I WILL LOOK INTO
10 IT. IN FACT, I'VE PREPARED A TRANSPORT ORDER ON JANUARY 18TH
11 BECAUSE THAT'S THE DATE AND TIME THAT IT'S BEEN SCHEDULED.
12 IT'S BEEN SCHEDULED FOR 8:30 AT CRAFTS-FARROW.

13 THE COURT: OKAY. HAVE YOU GOT -- DO YOU HAVE THAT
14 ORDER WITH YOU NOW?

15 MS. KIMBROUGH: I DO. YOUR HONOR, MAY I APPROACH?

16 THE COURT: SURE.

17 MS. KIMBROUGH: THIS IS A LETTER FROM THE DEPARTMENT
18 OF MENTAL HEALTH. IT'S NOT D.D.S.N. IT'S THE FORENSIC
19 EVALUATION OF CRIMINAL RESPONSIBILITY AND COMPETENCY.

20 THE COURT: OKAY.

21 MS. KIMBROUGH: AND I SUSPECT D.D.S.N. WILL NEED A
22 SEPARATE TIME TO DO THEIR EVALUATION.

23 THE COURT: ALL RIGHT.

24 MS. KIMBROUGH: THANK YOU, SIR.

25 THE COURT: OKAY. THE ONLY OTHER THING THAT I CAN

1 THINK OF RIGHT NOW IS THAT THERE -- THAT MR. MERCER
2 APPARENTLY FILED SOME SORT OF A MOTION EARLIER THIS MONTH
3 ASKING AGAIN THAT NEW COUNSEL BE APPOINTED. WHERE DO WE
4 STAND WITH THAT?

5 MR. LITTLEJOHN: YOUR HONOR, I ASKED MR. MERCER
6 ABOUT THAT. APPARENTLY HE HAD PREPARED THAT BEFORE THE LAST
7 HEARING, AND SO HE SENT IT IN THE MAIL AND SOMEHOW IT GOT
8 HERE AFTER WE HAD THE LAST HEARING. I'VE DISCUSSED THAT WITH
9 HIM. HE IS, I THINK, SATISFIED TO GO FORWARD WITHOUT THAT
10 ARGUE -- WITHOUT THAT MOTION BEING HEARD. AM I RIGHT?

11 MR. MERCER: YES, SIR.

12 MR. LITTLEJOHN: OKAY.

13 THE COURT: THAT'S TRUE, MR. MERCER?

14 MR. MERCER: YES.

15 THE COURT: SIR?

16 MR. MERCER: YES.

17 THE COURT: OKAY. MS. KIMBROUGH, WITH REGARD TO THE
18 ORDER SUBSTITUTING COUNSEL, I HAVE -- MY LAW CLERK SAYS WE
19 CAN'T OPEN IT. SO DID YOU BRING -- YOU BROUGHT -- OH, YOU
20 BROUGHT IT; RIGHT?

21 MS. KIMBROUGH: I BROUGHT SOME TRANSPORT ORDERS.
22 WHAT I CAN DO IS GET A HARD COPY AND DELIVER IT TO YOU THIS
23 AFTERNOON.

24 THE COURT: OKAY. ALL RIGHT. NOW, IN THE FUTURE --
25 AND, MR. MERCER, I WANT YOU TO LISTEN TO THIS. BECAUSE YOU

1 ARE REPRESENTED BY COUNSEL, ANYTHING THAT YOU WANT TO FILE
2 WITH THE COURT NEEDS TO BE FILED BY YOUR LAWYERS. SO IF YOU
3 WANT SOMETHING FILED, YOU TALK TO YOUR LAWYERS ABOUT GETTING
4 THAT DONE. DON'T FILE ANYTHING ELSE DIRECTLY WITH THE COURT.
5 DO YOU UNDERSTAND WHAT I MEAN? THE REASON FOR THAT IS
6 BECAUSE, FIRST OF ALL, THAT'S THE WAY IT'S SUPPOSED TO BE
7 DONE AND, SECOND OF ALL, I WANT TO MAKE SURE THAT NOTHING
8 GETS LOST.

9 A COUPLE OF THINGS THAT YOU HAVE FILED WE WEREN'T
10 SURE -- YOU KNOW, YOU SENT IT TO THE SOLICITOR ONE TIME; YOU
11 SENT IT TO SOMEBODY OTHER THAN THE CLERK OF COURT. IF YOU'RE
12 GOING TO FILE SOMETHING, WE WANT TO MAKE SURE IT GETS FILED
13 PROPERLY. SO WORK THROUGH YOUR LAWYERS INSTEAD OF FILING
14 THINGS DIRECTLY. ALL RIGHT. NOW, ANYTHING FURTHER WE NEED
15 TO DISCUSS RIGHT NOW?

16 MR. HUBBARD: YES, SIR, YOUR HONOR. YOUR HONOR, MR.
17 MERCER ALSO HAS A PENDING LYNCHING CHARGE, A CHARGE THAT HE
18 GOT WHILE HE WAS OVER IN THE LEXINGTON COUNTY DETENTION
19 CENTER AWAITING TRIAL ON THE UNDERLYING MURDER CHARGE.
20 OBVIOUSLY THAT CAN HAVE AN IMPACT ON THE CAPITAL CASE. WE
21 WOULD LIKE TO PROCEED ON THAT LYNCHING CHARGE AS EARLY AS
22 NEXT MONTH, GO AHEAD AND TRY THIS LYNCHING CASE AND SEE WHERE
23 WE STAND ON THAT, AND WE CAN BE PREPARED ON THAT
24 FEBRUARY 13TH.

25 THE COURT: WHO REPRESENTS HIM?

1 MR. HUBBARD: THESE ARE THE ONLY TWO LAWYERS OF
2 RECORD THAT I KNOW OF, YOUR HONOR.

3 THE COURT: DO Y'ALL KNOW IF YOU HAVE BEEN APPOINTED
4 ON THE LYNCHING CHARGE?

5 MS. KIMBROUGH: YOUR HONOR, I THINK UNDER RULE 608
6 ANY NEW CHARGES THAT ARISE DURING THE COURSE OF AN ORIGINAL
7 REPRESENTATION YOU'RE RESPONSIBLE FOR HANDLING. HOWEVER, WE
8 WOULD OBVIOUSLY OBJECT TO TRYING THIS CASE THAT SOON. WE'RE
9 GOING TO BE TRYING TO PREPARE FOR A CAPITAL CASE, AND WEDGING
10 IN A LYNCHING TRIAL IN THE MIDST OF A LESS-THAN-HUNDRED-DAY
11 TIME SPAN I THINK IS A LITTLE UNREALISTIC.

12 MR. HUBBARD: WHAT THE IRONY IS, YOUR HONOR:
13 THEY'RE GOING TO HAVE TO BE PREPARED ON THE LYNCHING CASE TO
14 PREPARE FOR THE CAPITAL CASE BECAUSE IT'S GOING TO BE PART
15 AND PARCEL OF WHEN WE GET TO THAT PENALTY PHASE, OTHER
16 ACTIVITIES, DANGEROUSNESS IN JAIL... ANY OF THOSE ISSUES
17 THAT MIGHT BE THERE IN A TYPICAL CAPITAL CASE, THIS LYNCHING,
18 THE ISSUES FROM THAT LYNCHING CASE, ARE GOING TO BE PART AND
19 PARCEL OF THAT CAPITAL CASE. SO WE'RE NOT ASKING THEM TO DO
20 ANYTHING MORE, AND THE INFORMATION, I THINK, HAS ALREADY BEEN
21 GIVEN TO THEM. WE JUST WANT TO PROCEED TO TRIAL TO RESOLVE
22 THAT ISSUE ONE WAY OR THE OTHER, AND IT COULD BE TO THE
23 DEFENDANT'S BENEFIT IF THAT ISSUE IS RESOLVED. IF THAT TRIAL
24 IS RESOLVED TO HIS FAVOR, THEN OBVIOUSLY IT HELPS HIM IN HIS
25 CAPITAL CASE.

1 MS. KIMBROUGH: YOUR HONOR, JUST BRIEFLY. IT
2 CERTAINLY DOES NOT INURE TO THE BENEFIT OF MR. MERCER TO HAVE
3 HIS LAWYERS PREPARING FOR A LESSER TRIAL. I MEAN, LYNCHING
4 IS VERY -- IS A VERY SERIOUS CHARGE. THERE ARE NUMEROUS
5 WITNESSES. I JUST GOT ON THIS CASE OFFICIALLY, YOU KNOW,
6 FIVE MINUTES AGO, UNOFFICIALLY ABOUT FOUR OR FIVE DAYS AGO.
7 THERE ARE NUMEROUS WITNESSES. WE ARE IN THE PROCESS OF
8 SEEKING FUNDING FOR A PRIVATE INVESTIGATOR, AS WE BROUGHT TO
9 YOUR ATTENTION. THERE'S NO WAY WE CAN BE PREPARED TO TRY
10 THIS CASE IN FEBRUARY, AND AS I BELIEVE I BROUGHT TO THE
11 COURT'S ATTENTION, I AM GOING TO BE -- I AM LEAD COUNSEL IN A
12 CAPITAL P.C.R. THAT A HEARING HAS BEEN SCHEDULED SEVERAL
13 MONTHS AGO. IT'S SCHEDULED FOR FEBRUARY 20TH IN ORANGEBURG,
14 AND THERE'S JUST SIMPLY NO WAY THAT WE ARE GOING TO BE
15 PREPARED TO TRY A CASE WITH THAT LEVEL OF COMPLEXITY IN A
16 MONTH. AND WE THINK IT'S UNREASONABLE, AND IT CERTAINLY
17 WOULD HURT MR. MERCER BECAUSE WE HAVE TO GET OUR
18 INVESTIGATION DONE AND TO PREPARE THE WHOLE CASE, NOT JUST
19 SOME LITTLE PIECE OF IT, IN THE MIDDLE OF PREPARING FOR, YOU
20 KNOW, A TRIAL THAT HAS HIS LIFE AT STAKE.

21 FURTHERMORE, WE DON'T KNOW IF WE'RE GOING TO GET TO
22 THE PENALTY PHASE YET, AND I THINK THAT'S SORT OF PUTTING THE
23 CART BEFORE THE HORSE, ASSUMING THAT WE'RE GOING TO GET
24 THERE, AND THAT SOMEHOW THAT'S BENEFICIAL TO US.

25 MR. LITTLEJOHN: YOUR HONOR, I'D LIKE TO ECHO WHAT

1 MS. KIMBROUGH SAID. I DON'T HAVE THE FILE IN FRONT OF ME,
2 AND I APOLOGIZE. I HAD A DOUBLE FLAT TIRE THIS MORNING WHEN
3 I WAS GETTING READY TO LEAVE. MY SPARE WAS FLAT ALSO, SO I
4 HAD TO GET HERE BEFORE I COULD GET TO THE OFFICE. BUT IT'S
5 MY UNDERSTANDING I WAS APPOINTED TO REPRESENT MR. MERCER ON
6 THIS PARTICULAR CHARGE, ON THE MURDER CHARGE THAT OCCURRED ON
7 MAY 14TH, 2002.

8 YOUR HONOR, THE PUBLIC DEFENDER WAS ALSO
9 REPRESENTING MR. MERCER WHEN I WAS APPOINTED. IT'S BEEN MY
10 UNDERSTANDING ALL ALONG THAT THEY HAVE BEEN REPRESENTING HIM
11 ON THE LYNCHING CHARGE AND ANOTHER CHARGE THAT HE HAS
12 PENDING. I'VE DONE VERY LITTLE TO PREPARE FOR THAT BECAUSE I
13 HAVEN'T BEEN APPOINTED.

14 YOUR HONOR, I'D ALSO ADD THAT I'M SCHEDULED TO TRY A
15 MURDER/DRUG CASE IN FEDERAL COURT BEGINNING IN MARCH THAT'S
16 GOING TO BE QUITE EXTENSIVE AND QUITE INVOLVED, AND TO
17 SUDDENLY BE BROUGHT IN AND HAVE TO TRY A COMPLICATED LYNCHING
18 CASE, I JUST THINK THAT'S COMPLETELY UNFAIR AND WOULD
19 CERTAINLY WORK TO THE DETRIMENT OF MY CLIENT.

20 MR. HUBBARD: YOUR HONOR, OBVIOUSLY THIS IS AN ISSUE
21 THAT SHOULD BE RESOLVED BEFORE THE CAPITAL CASE. EVEN IF WE
22 DON'T GET INTO THE PENALTY PHASE OF THIS CAPITAL CASE, IT'S
23 SOMETHING THEY'RE GOING TO HAVE TO BE PREPARED FOR, AND IF
24 THEY HAVE A BETTER DATE BETWEEN NOW AND THE TIME WE TRY THIS
25 CAPITAL CASE, WE'RE OPEN TO THAT. BUT, YOUR HONOR, IT'S AN

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1 ISSUE THEY'RE GOING TO HAVE TO DEAL WITH FROM NOW UNTIL THAT
2 CAPITAL CASE ANYWAY. IT IS SOMETHING---

3 MR. LITTLEJOHN: YOUR HONOR---

4 MR. HUBBARD: IT IS SOMETHING WHERE THERE ARE
5 WITNESSES THEY'RE GOING TO HAVE TO TALK TO ANYWAY. WE'RE
6 GOING TO BE TALKING TO THEM. IT'S JUST SOMETHING THAT
7 EVERYBODY IN THIS ROOM IS GOING TO HAVE TO DEAL WITH BEFORE
8 APRIL 10TH ANYWAY. AND, YOUR HONOR, IT CAN INURE TO HIS
9 BENEFIT. IF HE IS FOUND NOT GUILTY---

10 THE COURT: YOU DON'T NEED TO REPEAT YOURSELF.

11 MR. HUBBARD: I'M SORRY. BUT JUST -- YOUR HONOR
12 KNOWS WHAT I'M SAYING AND THAT'S -- AND OBVIOUSLY THE STATE
13 FEELS LIKE WE NEED THAT ISSUE RESOLVED.

14 THE COURT: WELL, THINKING THROUGH THE THING
15 HOPEFULLY IN LOGICAL ORDER, THE FIRST QUESTION IS: ON THE
16 LYNCHING TRIAL, LYNCHING CASE, WHO IS GOING TO REPRESENT MR.
17 MERCER? NOW, IT DOESN'T NECESSARILY HAVE TO BE Y'ALL. I'M
18 NOT -- I MEAN, ORDINARILY IT WOULD BE SOMEBODY IN THE PUBLIC
19 DEFENDER'S OFFICE UNLESS THERE WAS A CONFLICT. ARE THERE
20 MULTIPLE DEFENDANTS?

21 MR. HUBBARD: THERE WAS A CO-DEFENDANT WHO HAS PLED
22 TO THAT CHARGE.

23 THE COURT: WAS THAT CO-DEFENDANT REPRESENTED BY THE
24 PUBLIC DEFENDER?

25 MR. HUBBARD: YOUR HONOR, RIGHT OFFHAND I CAN'T SAY.

1 WE WILL FIND OUT AND LET YOUR HONOR KNOW. DO YOU KNOW IF WE
2 HAVE THAT FILE? IS THAT... WE'RE CHECKING RIGHT NOW, YOUR
3 HONOR.

4 THE COURT: ALL RIGHT. WELL, LET'S -- LET'S ASSUME
5 THEN, JUST SO I CAN THINK THROUGH THE WHOLE SCENARIO BEFORE I
6 MAKE UP MY MIND, FIRST OF ALL, EVEN AS TO WHETHER OR NOT THIS
7 IS MY DECISION, BUT -- BUT ASSUME THERE WAS SOMEBODY ELSE
8 AVAILABLE TO REPRESENT MR. MERCER ON THE LYNCHING CHARGE AND
9 YOU ALL DID NOT HAVE TO BE DIRECTLY INVOLVED IN THE TRIAL OF
10 THAT CASE. NOW, HOW DOES THAT AFFECT THE POSITION OF THE
11 DEFENDANT IN TERMS OF WHETHER OR NOT IT SHOULD BE TRIED?

12 MR. LITTLEJOHN: YOUR HONOR, THE FIRST THING THAT
13 COMES TO MY MIND IS THAT THEY'RE GOING TO SPEND PROBABLY A
14 BETTER PORTION OF A WEEK TRYING ISSUES THAT THEY'RE GOING TO
15 WANT TO PRESENT, ASSUMING WE GET TO THE SECOND PHASE OF A
16 MURDER TRIAL, THAT'S GOING TO TAKE THE SAME AMOUNT OF TIME,
17 THAT'S NOT GOING TO ADD ANYTHING TO THE STATE'S CASE OTHER
18 THAN THEY'RE GOING TO HAVE A CONVICTION OR THEY'RE NOT.
19 THEY'RE GOING TO PUT UP THE SAME EVIDENCE IN THE SECOND PHASE
20 OF THE TRIAL, AND IT SEEMS TO ME ONLY THE -- OBVIOUSLY THEY
21 JUST WANT A CONVICTION BUT---

22 THE COURT: WELL---

23 MR. LITTLEJOHN: ---IT'S GOING TO BE A WASTE OF THE
24 COURT'S TIME BECAUSE THEY'RE GOING TO HAVE TO TRY IT TWICE
25 ANYWAY.

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1 THE COURT: OKAY. WELL, ALL-RIGHT. SO WE GOT
2 JUDICIAL ECONOMY AS ONE CONSIDERATION THAT GOES INTO THE
3 DECISION ABOUT WHETHER OR NOT TO TRY THE CASE. BUT WOULDN'T
4 IT BE -- I MEAN, HE'S GOING TO GET UP AND TELL ME THAT IF YOU
5 DON'T TRY THE CASE THEN BEFORE THE DEATH PENALTY TRIAL, THEN
6 HE'S GOING TO BE PUT TO THE TASK OF TRYING TO PROVE THE CASE
7 DURING THE DEATH PENALTY TRIAL WHICH IS GOING TO LENGTHEN THE
8 TRIAL. AND IF YOU DO TRY IT AND YOU GET A NOT GUILTY
9 VERDICT, IT'S DONE. IF YOU TRY IT AND GET A GUILTY VERDICT,
10 THEN ALL THAT HAS TO BE PRESENTED IN THE DEATH PENALTY CASE
11 IS THE FACT OF THE CONVICTION AND THE -- AND THE BASIC FACTS
12 SURROUNDING IT WHICH WILL BE A VERY SHORT PRESENTATION. I'M
13 ASSUMING THAT'S WHAT HE'S GOING TO SAY IN TERMS OF JUDICIAL
14 ECONOMY.

15 MS. KIMBROUGH: YOUR HONOR, I WOULD POINT OUT: THE
16 STATE CAN INTRODUCE THIS EVIDENCE AS A PRIOR BAD ACT. THEY
17 CAN BRING PEOPLE IN TO TESTIFY DURING THE PENALTY PHASE. IT
18 DOESN'T HAVE TO BE TRIED PRIOR TO THIS CAPITAL CASE, IF WE
19 GET TO THE PENALTY PHASE. THAT EVIDENCE CAN BE PRESENTED.
20 IT'S PRESENTED ALL THE TIME IN DEATH PENALTY CASES WHERE
21 SOMEONE HAS NOT ACTUALLY BEEN TRIED AND CONVICTED OF A
22 PARTICULAR OFFENSE. THEY ARE PRIOR BAD ACTS. THEY CAN BRING
23 THEIR WITNESSES IN THERE TO TALK ABOUT HOW HE'S A FUTURE
24 DANGER OR HE DID THIS OR, YOU KNOW, HE'S UNCONTROLLABLE.
25 THEY CAN DO ALL THAT.

1 THE COURT: WELL, I GUESS WHAT I WAS TRYING TO DO IS
2 TO -- IF Y'ALL ARE NOT INVOLVED IN IT DIRECTLY, THEN---

3 MS. KIMBROUGH: I THINK I UNDERSTAND YOUR QUESTION.
4 HOW DOES IT HURT US---

5 THE COURT: OBVIOUSLY -- OBVIOUSLY THIS -- THIS IS
6 OBVIOUS, AND LET'S -- WE CAN SET THIS ASIDE. IT'S OBVIOUS
7 THAT Y'ALL DON'T WANT IT TRIED FIRST AND THEY DO. THOSE ARE
8 FOR STRATEGIC REASONS. NOW, SETTING THE STRATEGIC REASONS
9 ASIDE AND THINKING ABOUT THE LEGAL REASONS THAT I MUST
10 CONSIDER, WHAT -- IF Y'ALL ARE -- IF NEITHER OF Y'ALL ARE
11 INVOLVED IN THE TRIAL OF THE LYNCHING CASE, WHAT DIFFERENCE
12 DOES IT MAKE TO YOU EITHER IN TERMS OF TRIAL PREPARATION OR
13 OTHER NON-STRATEGIC CONSIDERATIONS WHETHER IT'S TRIED BEFORE
14 OR AFTER THE DEATH PENALTY CASE?

15 MR. LITTLEJOHN: WELL, YOUR HONOR, AT THE LEAST I
16 WOULD THINK BASED ON THE MAGNITUDE OF WHAT WE'RE REPRESENTING
17 THIS MAN ON, ONE OR BOTH OF US WOULD HAVE TO MONITOR OR KEEP
18 UP WITH THE LYNCHING TRIAL JUST TO SEE WHAT WAS GOING ON, TO
19 SEE WHAT EFFECT IT MIGHT HAVE ON THE -- ON THE FUTURE MURDER
20 TRIAL. AND I PERSONALLY HATE TO HAND, GIVEN WHERE WE ARE IN
21 THIS SITUATION, TO HAND MR. MERCER OVER TO OTHER ATTORNEYS TO
22 HANDLE SUCH A THING THAT COULD BE SO DRAMATIC AND COULD HAVE
23 SUCH AN EFFECT ON THE MURDER CASE.

24 THE COURT: OKAY. I WANT US TO BE VERY CAREFUL TO
25 NOT FOCUS ON YOU ALL'S STRATEGIC REASONS WHY YOU MIGHT WANT

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1 IT TRIED BEFORE OR AFTER AND --- BECAUSE REALLY IF -- IF -- IN
2 ONE SENSE THIS IS NOT MY DECISION. THE SOLICITOR CONTROLS
3 THE DOCKET. THEY CAN CALL THE CASE FOR TRIAL ANY TIME THEY
4 WANT TO, AND THE ONLY PERSON WHO CAN STOP IT IS EITHER THE
5 CHIEF ADMINISTRATIVE JUDGE OR THE TRIAL JUDGE BY CONTINUING
6 THE CASE. NOW, AS A PRACTICAL MATTER, I CAN HAVE SOME -- I
7 CAN CONTROL IT IF I CHOOSE TO.

8 MR. LITTLEJOHN: YES, SIR.

9 THE COURT: BUT THE QUESTION IS WHETHER OR NOT --
10 THE FIRST QUESTION IS WHETHER OR NOT I SHOULD AND IF -- THE
11 SECOND QUESTION IS: IF I AM GOING TO GET INVOLVED IN IT,
12 WHAT SHOULD I DO?

13 MR. LITTLEJOHN: YOUR HONOR---

14 THE COURT: AND I'M NOT GOING TO DECIDE IT BASED ON
15 THE SOLICITOR'S STRATEGIC REASONS FOR WANTING IT TRIED NOR ON
16 YOUR STRATEGIC REASONS FOR NOT WANTING IT TRIED.

17 MR. LITTLEJOHN: YOUR HONOR, STRATEGIC REASONS
18 ASIDE, IT WOULD BE OUR POSITION THAT NOT ONLY WILL THEY BE
19 WASTING THE COURT OR ANOTHER COURT'S TIME DOING THIS, THEY'RE
20 GOING TO BE WASTING OUR TIME THAT COULD BE DEVOTED TO
21 PREPARING THIS MURDER CASE. AS THE COURT HAS INDICATED, THIS
22 THING IS COMING UP VERY FAST, AND IF WE HAVE TO TAKE A WEEK
23 OUT TO MONITOR AND SEE WHAT'S GOING ON IN THE LYNCHING CASE,
24 IT'S CERTAINLY GOING TO CUT INTO OUR---

25 THE COURT: LET ME ASK YOU---

1 MR. LITTLEJOHN: ---PREPARATION TIME.

2 THE COURT: LET ME ASK YOU A QUESTION. IF YOU WERE
3 TO TRY THAT CASE AND IF YOU GOT A CONVICTION---

4 MR. HUBBARD: YES, SIR.

5 THE COURT: ---WOULD IT NOT BE TRUE THAT YOUR
6 PRESENTATION OF EVIDENCE CONCERNING THAT CRIME WOULD BE AS I
7 SUGGESTED?

8 MR. HUBBARD: YES, SIR.

9 THE COURT: LIMITED TO THE FACT OF THE CONVICTION
10 AND THE BASIC FACTS SURROUNDING IT?

11 MR. HUBBARD: THAT'S CORRECT, YOUR HONOR.

12 THE COURT: AND IT WOULD TAKE A RELATIVELY SHORT
13 PERIOD OF TIME?

14 MR. HUBBARD: YES, SIR, YOUR HONOR. YES, SIR. AND
15 TO ANSWER YOUR OTHER QUESTION, YOUR HONOR, AS TO WHO
16 REPRESENTED THAT CO-DEFENDANT, IT WAS MURRY KINARD, A PRIVATE
17 LAWYER. I BELIEVE HE WAS APPOINTED ON THAT CASE. I THINK
18 THAT THE PUBLIC DEFENDER INITIALLY HAD MR. MERCER, AND SO MR.
19 KINARD REPRESENTED THE CO-DEFENDANT ON THIS CASE, SO -- JUST
20 FOR THAT INFORMATION, YOUR HONOR.

21 THE COURT: WELL, IT SEEMS TO ME THAT IF WE TRY THE
22 CASE OR IF THEY TRY THE CASE, THEN THAT REMOVES FROM YOUR
23 PLATE THE NECESSITY OF CONCERNING YOURSELVES WITH THE
24 LYNCHING CASE BECAUSE SOMEBODY ELSE WILL BE DEFENDING HIM,
25 AND WHEN IT COMES TIME FOR THE TRIAL OF THIS CASE, EITHER

1 THERE WILL BE A NOT GUILTY VERDICT IN WHICH CASE THERE WILL
2 BE NO MENTION OF THE LYNCHING CHARGE OR THERE WILL BE A
3 GUILTY VERDICT, IN WHICH CASE THE MENTION OF IT WILL BE VERY
4 -- RELATIVELY BRIEF. BUT, ON THE OTHER HAND, IF THE CASE IS
5 NOT TRIED, THEN YOUR LOAD WILL BE INCREASED BECAUSE YOU ARE
6 GOING TO HAVE TO BE PREPARED FOR THAT LITTLE MINI TRIAL
7 DURING THE COURSE OF THE PENALTY PHASE OF THE TRIAL IF, IN
8 FACT, THE CASE GETS THAT FAR.

9 MR. LITTLEJOHN: YOUR HONOR, I UNDERSTAND THAT, AND
10 IF I MAY BRING UP A SEPARATE ISSUE THAT I JUST THOUGHT OF --
11 BECAUSE I WAS TOTALLY SURPRISED BY THE SOLICITOR'S GRATUITOUS
12 OFFER TO TRY THIS LYNCHING CASE. BUT, YOUR HONOR, AS YOU --
13 AS YOU WELL KNOW, BASED ON JOINT MOTION OF BOTH THE STATE AND
14 THE DEFENSE, MR. MERCER IS GOING TO UNDERGO MENTAL EVALUATION
15 HERE VERY SHORTLY. COUPLED WITH THAT MENTAL EVALUATION,
16 WHICH I DON'T KNOW WHAT THE RESULTS OF THAT WILL BE, I DON'T
17 KNOW WHAT RESULT -- WHAT THE RESULTS OF THAT WILL BE, WHAT
18 THE EFFECT MIGHT BE ON THE LYNCHING TRIAL. BUT NOT ONLY
19 THAT, WE'RE GOING TO HAVE TO ALSO MAKE PROVISION FOR MR.
20 MERCER TO BE EVALUATED. THAT'S GOING TO TAKE SOME TIME;
21 THAT'S GOING TO TAKE SCHEDULING. HIS PREPARATION FOR A
22 LYNCHING TRIAL, HIS INVOLVEMENT IN A LYNCHING TRIAL, IS
23 CERTAINLY GOING TO CUT INTO THAT, AND LIKE THE COURT SAID, WE
24 HAVE A LIMITED AMOUNT OF TIME BETWEEN NOW AND WHEN THIS CASE
25 STARTS.

1 THE COURT: ALL RIGHT.

2 MR. HUBBARD: YOUR HONOR, NOT TO JUMP IN BEFORE YOUR
3 HONOR HAS A CHANCE TO ADDRESS THAT...

4 THE COURT: BUT JUMP IN ANYWAY.

5 MR. HUBBARD: OKAY. IF YOU WANT, I'LL SIT DOWN. I
6 THINK WHAT WE COULD DO, YOUR HONOR, IS TAKE THE DATES OF THIS
7 LYNCHING -- HE'S NOT BEEN EVALUATED YET. THEY'RE STILL
8 SCHEDULING THAT. GO AHEAD AND ADD THESE. AMEND THE ORDER TO
9 INCLUDE THESE DATES OF THE LYNCHING SO THAT THERE'S NO
10 QUESTION THAT HE'S BEEN EVALUATED, AND THEN I BELIEVE YOUR
11 HONOR HAD INDICATED THAT YOU WERE TRYING TO SEE THAT THIS
12 EVALUATION IS EXPEDITED.

13 OBVIOUSLY IF HE HASN'T BEEN EVALUATED WE MIGHT HAVE
14 TO SECOND -- STOP AND THINK ABOUT WHEN WE'RE TRYING THIS
15 LYNCHING. BUT IF WE INCLUDE THOSE DATES ALONG WITH THE DATES
16 OF THE -- THAT THEY'RE HAVING TO BE EVALUATED -- HE'S HAVING
17 TO BE EVALUATED ON AS TO THE DEATH PENALTY CASE, GO AHEAD AND
18 HANDLE ALL OF THAT AT ONE TIME, SINCE HE HASN'T BEEN
19 EVALUATED YET. WE'RE NOT ASKING ANYBODY TO REDO ANYTHING AT
20 THIS POINT. WE'VE CAUGHT IT EARLY ENOUGH. THAT WILL ANSWER
21 THE QUESTION AS TO ANY EVALUATION, AND WE'LL PROCEED WHEN
22 THAT'S DONE.

23 THE COURT: ALL RIGHT. I'M GOING TO -- HERE'S --
24 HERE'S WHAT I THINK MY ROLE IS HERE. THE SOLICITOR CAN CALL
25 THE CASE WHENEVER THEY WANT TO. NOBODY HAS CONTROL OVER THAT

1 BUT THEM, AND THEN THE QUESTION BECOMES WHAT HAPPENS. MY
2 CONCERN IS TO MAKE SURE THAT THE LYNCHING TRIAL AND ITS
3 PREPARATION DOES NOT INTERFERE WITH DEFENSE COUNSEL IN THIS
4 CASE'S ABILITY TO PREPARE FOR TRIAL NOR DOES IT INTERFERE
5 WITH THE AVAILABILITY OF THE DEFENDANT TO Y'ALL -- TO COUNSEL
6 TO PREPARE FOR THIS TRIAL NOR DOES IT INTERFERE IN ANY WAY
7 THAT MIGHT BE RELATED TO THE EVALUATION OR ANYTHING LIKE
8 THAT.

9 FAILING SOMETHING LIKE THAT, I THINK I'M GOING TO
10 KEEP MY HANDS OFF OF IT. AND SO I'M GOING TO SAY THAT I AM
11 NOT GOING TO REQUIRE YOU TWO TO REPRESENT HIM, AND I'M GOING
12 TO ASK JUDGE KEESLEY TO APPOINT THE PUBLIC DEFENDER TO
13 REPRESENT MR. MERCER IN THE LYNCHING CASE SO THAT YOU ALL ARE
14 NOT SADDLED WITH THAT ADDITIONAL TIME CONSTRAINT. NOW, THAT
15 DOESN'T -- IF EITHER OF YOU WANTS TO BE INVOLVED IN IT, YOU
16 CERTAINLY ARE FREE TO. THEN IF THEY -- IF THERE IS A TIME IN
17 WHICH THEY WANT TO CALL THE CASE FOR TRIAL, WE'LL TAKE IT UP
18 AT THAT TIME.

19 AT THAT TIME I'LL ADDRESS WITH WHOEVER THE
20 ADMINISTRATIVE -- WITH JUDGE KEESLEY WHO IS THE
21 ADMINISTRATIVE JUDGE AND WITH WHOEVER IS THE TRIAL JUDGE THE
22 CONCERNS THAT I JUST MENTIONED TO MAKE SURE THAT THE CALLING
23 OF THAT CASE FOR TRIAL DOES NOT INTERFERE WITH WHAT YOU ALL
24 ARE DOING TO PREPARE TO DEFEND MR. MERCER IN THIS CASE. AND
25 THAT, I THINK, IS -- I THINK IF I DO MORE THAN THAT, I'M

1 GOING BEYOND MY BOUNDS WITH -- FOR MY APPOINTMENT TO THIS
2 TRIAL.

3 MR. HUBBARD: YOUR HONOR, I HAVE ONE QUESTION. AS
4 FAR AS AMENDING THE ORDER TO ADDRESS THE DATES IN THIS
5 LYNCHING AS WELL FOR HIS EVALUATION, SHOULD WE ADDRESS THAT
6 WITH JUDGE KEESLEY OR WITH YOU? I KNOW IF WE ADDRESS IT WITH
7 JUDGE KEESLEY I KNOW HE'S GOING TO WANT TO TALK TO YOU, AND
8 IT MAY SLOW EVERYTHING DOWN---

9 THE COURT: DO Y'ALL HAVE ANY OBJECTION TO EXPANDING
10 THE TIME FRAME IN WHICH HIS EVALUATION WOULD COVER IN ORDER
11 TO COVER THE DATES OF THE ALLEGED LYNCHING INCIDENT?

12 MS. KIMBROUGH: YOUR HONOR, OFF THE TOP OF MY HEAD
13 I'M NOT SURE. I WOULD LIKE TO TALK TO OUR PSYCHIATRIST---

14 THE COURT: OKAY.

15 MS. KIMBROUGH: ---BEFORE WE TAKE ANY POSITION ON
16 THAT.

17 THE COURT: ALL RIGHT.

18 MS. KIMBROUGH: I DON'T KNOW WHAT---

19 THE COURT: WELL, WHY DON'T YOU GO AHEAD AND PREPARE
20 A PROPOSED ORDER FOR ME TO SIGN?

21 MR. HUBBARD: YES, SIR.

22 THE COURT: RUN IT BY DEFENSE COUNSEL IN THIS
23 CASE---

24 MR. HUBBARD: YES, SIR.

25 THE COURT: ---AND IN THE OTHER CASE, AND WE'LL GO

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1 FROM THERE.

2 MR. LITTLEJOHN: YOUR HONOR, I GUESS WE'D HAVE TO
3 ALSO INCLUDE THE PUBLIC DEFENDER'S OFFICE. IF THEY'RE
4 REPRESENTING HIM ON THE LYNCHING CHARGE, THEY SHOULD HAVE
5 SOME INPUT AS TO---

6 THE COURT: RIGHT.

7 MR. LITTLEJOHN: ---WHETHER HE'S INCLUDED IN THAT
8 EVALUATION ORDER.

9 THE COURT: RIGHT. SO I JUST TOLD MR. HUBBARD THAT
10 HE'S TO RUN IT BY THE DEFENSE COUNSEL IN THE LYNCHING CASE.
11 THAT'S WHAT I MEANT TO SAY.

12 MR. LITTLEJOHN: ALL RIGHT.

13 THE COURT: ALL RIGHT. ANYTHING ELSE?

14 MS. KIMBROUGH: JUST BRIEFLY, YOUR HONOR. I'D JUST
15 LIKE TO MAKE SURE THAT MR. LITTLEJOHN AND I RECEIVE NOTICE OF
16 ANY HEARINGS OR MOTIONS RELATED TO THE LYNCHING. IF THE
17 PUBLIC DEFENDER'S OFFICE IS GOING TO TAKE OVER THAT, I STILL
18 THINK THAT WE NEED TO BE APPRISED AS TO WHAT KIND OF
19 EVALUATIONS ARE BEING DONE, WHAT KIND OF HEARINGS ARE GOING
20 ON, AND WHETHER OR NOT THE TRIAL IS ACTUALLY GOING TO
21 PROCEED, ESPECIALLY IF WE HAVE AN INVESTIGATOR, WHICH MAKES
22 SENSE, AND CERTAINLY FROM AN ECONOMIC STANDPOINT IT WOULD
23 MAKE SENSE FOR OUR INVESTIGATOR TO SHARE INFORMATION WITH
24 THEM AND VICE VERSA. OBVIOUSLY ANY DISCOVERY IN THAT CASE IS
25 GOING TO BE, WE BELIEVE, DISCOVERABLE IN OUR CASE. IF

1 THEY'RE GOING TO PRODUCE THE LYNCHING CONVICTION IN---

2 THE COURT: I'M SURE THEY DON'T -- YOU DON'T HAVE
3 ANY OBJECTION TO THAT, DO YOU?

4 MR. HUBBARD: NO OBJECTION AT ALL. YOUR HONOR, I
5 BELIEVE WE ALREADY HAVE GIVEN THEM THE INFORMATION ON THE
6 LYNCHING. IF NOT, WE'LL GO BACK AND MAKE SURE THAT WE HAVE,
7 BUT WE HAVE NO OBJECTION TO THAT AT ALL, YOUR HONOR. WE'LL
8 NOTICE THEM OF EVERY HEARING IN EVERY MATTER.

9 MS. KIMBROUGH: THANK YOU.

10 THE COURT: ALL RIGHT. ANYTHING FURTHER?

11 MR. HUBBARD: I DON'T BELIEVE SO, YOUR HONOR.

12 THE COURT: FROM THE DEFENSE?

13 MR. LITTLEJOHN: NO, YOUR HONOR, NOT AT THIS TIME.

14 MS. KIMBROUGH: NO. WE DO HAVE SOME FUNDING
15 MATTERS.

16 MR. MYERS: MAY I TALK TO YOU ABOUT ANOTHER CASE?

17 THE COURT: SIR?

18 MR. MYERS: MAY I TALK TO YOU ABOUT ANOTHER CASE?

19 THE COURT: YES, SIR.

20 (WHEREUPON, A BENCH CONFERENCE WAS HELD BETWEEN MR.
21 MYERS AND THE COURT WITH REGARD TO A SEPARATE CASE.)

22 THE CLERK: YOUR HONOR, EARLIER THIS WEEK SOMEONE
23 CAME TO THE CLERK OF COURT'S OFFICE AND EITHER TOOK THE FILE
24 WITH THEM OR THE FILE HAS BEEN LOST, AND MS. KIMBROUGH SAID
25 SOMETHING IN THE HALL EARLIER THAT SOMEBODY CAME TO MY OFFICE

1 EARLIER THIS WEEK AND DID HAVE THE FILE. I WANT THE NAME OF
2 THAT PERSON BECAUSE I WANT TO TRACK DOWN WHAT THEY DID WITH
3 THE FILE BECAUSE ALL OF MY ORIGINAL PAPERWORK IS MISSING.
4 WE'VE BEEN LOOKING FOR IT ALL WEEK LONG.

5 THE COURT: OKAY.

6 THE CLERK: WHO WAS THAT PERSON, MS. KIMBROUGH?

7 MS. KIMBROUGH: THE LADY THAT'S WORKING ON MR.
8 MERCER'S BEHALF IS PAIGE TARR. SHE CAN BE REACHED...

9 THE CLERK: YES, MA'AM?

10 MS. KIMBROUGH: I'M SORRY. LET ME PULL THAT NUMBER.
11 SHE'S IN MY OFFICE.

12 THE CLERK: UH-HUH.

13 MS. KIMBROUGH: I CAN TRY TO TRACK HER DOWN AND GET
14 HER TO CALL YOU. IF YOU'LL GIVE ME YOUR DIRECT NUMBER, I'LL
15 GO AHEAD AND SEE IF I CAN FIND HER.

16 THE CLERK: YES, MA'AM. IT'S 785---

17 MS. KIMBROUGH: ALL RIGHT.

18 THE CLERK: ---8553. I NEED TO KNOW WHO SHE GAVE
19 THAT FILE BACK TO AFTER SHE COPIED IT---

20 MS. KIMBROUGH: OKAY.

21 THE CLERK: ---BECAUSE THE ENTIRE FILE IS MISSING.
22 ALL ORIGINAL DOCUMENTS ARE MISSING AT THIS TIME. THANK YOU,
23 YOUR HONOR.

24 MS. KIMBROUGH: THANK YOU, YOUR HONOR.

25 THE CLERK: THANK YOU, MA'AM.

1 MS. KIMBROUGH: SURE.

2 THE COURT: ALL RIGHT. SO WE'RE DONE WITH THIS --
3 WITH THIS HEARING - AND WE'RE GOING TO BREAK FOR LUNCH - FOR
4 ALL PURPOSES OTHER THAN MY HAVING AN EX PARTE HEARING WITH
5 DEFENSE COUNSEL REGARDING FUNDING IN THE MERCER CASE. SO IF
6 YOU'RE NOT INVOLVED IN THE MERCER CASE, CLEAR THE COURTROOM
7 OR IF YOU'RE NOT INVOLVED WITH SECURITY FOR MR. MERCER OR --
8 OR GETTING A 403. YOU CAN STAY IF YOU'RE A 403.

9 (THE COURTROOM IS CLEARED, AS DIRECTED BY THE
10 COURT.)

11 THE COURT: ALL RIGHT. Y'ALL READY?

12 MS. KIMBROUGH: YES, YOUR HONOR. MAY I APPROACH?

13 THE COURT: FIRST OF ALL, DOES IT SUIT YOU TO HAVE
14 THE FOLKS GETTING 403'S IN HERE OR DO YOU WANT ME TO RUN THEM
15 OUT, TOO?

16 MS. KIMBROUGH: SURE. OH, NO, THEY'RE FINE, TOO.

17 THE COURT: OKAY.

18 MR. LITTLEJOHN: I DON'T KNOW, JUDGE. THEY'RE
19 SITTING ON THE STATE'S SIDE.

20 THE COURT: WOULD Y'ALL MOVE TO THE OTHER SIDE OF
21 THE COURTROOM, PLEASE?

22 MS. KIMBROUGH: THAT IS A PROPOSED MOTION AND ORDER
23 OF FUNDING. IT'S MY UNDERSTANDING IN LOOKING AT THE FILE
24 THAT THERE HAD BEEN SOME PREVIOUS ORDERS THAT WERE PRESENTED
25 TO AND SIGNED BY THE LATE JUDGE WESTBROOK WHEN HE WAS

1 ASSIGNED TO THIS CASE, AND THOSE ORDERS WERE NEVER FILED.
2 CONSEQUENTLY, THE MONIES SOUGHT FOR HIRING EXPERTS WERE NEVER
3 ACTUALLY DISBURSED OR EVEN FOR THAT MATTER PRESENTED FOR
4 PAYMENT TO THE OFFICE OF INDIGENT DEFENSE.

5 BECAUSE OF THAT, AS WE SORT OF DISCUSSED THE LAST
6 COUPLE OF DAYS, WE HAVE GONE AHEAD AND REDRAFTED A PROPOSED
7 FUNDING MOTION, AND IT PROVIDES FOR SEVERAL EXPERTS THAT WE
8 THINK ARE NECESSARY. OBVIOUSLY THE MOST IMPORTANT ARE THE
9 MENTAL HEALTH EXPERTS THAT WE THINK ARE GOING TO PLAY A
10 CRITICAL ROLE IF MR. MERCER IS FOUND GUILTY. THEY MAY ALSO
11 PLAY A ROLE IN THE GUILT PHASE OF THE TRIAL, DEPENDING ON THE
12 RESULTS OF THE TESTING.

13 WE HAVE SOUGHT EXPENSES FOR TRAVEL. MR. MERCER HAS
14 FAMILY MEMBERS IN PHILADELPHIA. HE HAS NUMEROUS RECORDS,
15 BACKGROUND RECORDS, MEDICAL RECORDS, DISABILITY RECORDS. HE
16 GREW UP IN PHILADELPHIA, SO WE DID SEEK WHAT I THINK IS A
17 FAIRLY REASONABLE AMOUNT OF EXPENSES FOR THAT TRAVEL WHICH
18 WOULD BE FOR AN EXPERT AND PROBABLY AN ATTORNEY TO ASSESS
19 WHETHER OR NOT THOSE FOLKS BEING INTERVIEWED WOULD NEED TO BE
20 SUBPOENAED AS WITNESSES. AND WE HAVE SOUGHT FUNDING FOR
21 VARIOUS FORENSIC EXPERTS, PATHOLOGISTS, AND A TRACE EVIDENCE
22 EXPERT FOR THE REASONS THAT WE WERE -- WE HAD SET FORTH.

23 THE COURT: OKAY. NOW, YOU HAVE TAKEN, I BELIEVE, A
24 COMPREHENSIVE LOOK AT NON-ATTORNEYS' FEES FUNDING FOR THE
25 ENTIRETY OF THIS CASE.

1 MS. KIMBROUGH: YES, YOUR HONOR.

2 THE COURT: AND IS IT TRUE THAT WHAT YOU HAVE ASKED
3 ME TO AUTHORIZE NOW YOU HAVE HOPE AND GOOD REASON TO BELIEVE
4 WILL CARRY YOU THROUGH TO THE BEGINNING OF TRIAL?

5 MS. KIMBROUGH: YES, YOUR HONOR.

6 THE COURT: AND THAT SO IF WHAT YOUR PLANNING
7 REVEALS HOLDS TRUE, NO MORE FUNDS WILL HAVE TO BE AUTHORIZED
8 EXCEPT WHEN WE GET AROUND TO ACTUALLY GETTING THESE WITNESSES
9 HERE TO TESTIFY AT TRIAL.

10 MS. KIMBROUGH: THAT IS OUR INTENTION, AND WE
11 BELIEVE IN GOOD FAITH THAT THE AMOUNT SET FORTH WILL DO THAT.

12 THE COURT: ALL RIGHT. BECAUSE THAT'S -- LET'S SEE.
13 THIS IS \$53,000, IF I ADDED IT UP CORRECTLY, WHICH IS TWICE
14 THE NORMAL LIMIT FOR NON-ATTORNEYS' FEES FUNDING. YOU HAVE
15 ARTICULATED A SOUND BASIS FOR IT, I THINK, BUT WHAT I WANT IS
16 WHAT YOU JUST GAVE ME WHICH IS YOUR ASSURANCE THAT YOU
17 BELIEVE THAT THIS WILL DO IT EXCEPT FOR, I GUESS, YOU DON'T
18 KNOW HOW LONG EACH WITNESS IS GOING TO HAVE TO BE HERE TO
19 ACTUALLY TESTIFY, BUT THAT SHOULD BE A RELATIVELY MINOR
20 EXPENSE COMPARED TO THIS.

21 MS. KIMBROUGH: YES.

22 THE COURT: ALL RIGHT. SO IF AT SOME POINT YOU
23 BECOME CONCERNED THAT WHAT I HAVE AUTHORIZED IN THIS ORDER IS
24 NOT GOING TO GET YOU ALL THE WAY TO TRIAL, BRING THAT TO MY
25 ATTENTION AS QUICKLY -- AS EARLY AS YOU CAN BECAUSE I THINK

1 IT'S MY RESPONSIBILITY TO KEEP MY HANDS ON THIS AND GET A
2 GOOD -- KEEP A GOOD HANDLE ON THE EXPENSES AND SO... SO THAT
3 I CAN DO THAT, THAT'S WHAT I'D LIKE FOR YOU TO DO FOR ME.

4 MS. KIMBROUGH: YES, YOUR HONOR.

5 THE COURT: ALL RIGHT. HERE'S THE ORDER.

6 MS. KIMBROUGH: THANK YOU. I ALSO HAVE TWO
7 TRANSPORT ORDERS.

8 THE COURT: OKAY.

9 MS. KIMBROUGH: ONE OF WHICH MR. LITTLEJOHN AND I
10 JUST FOUND OUT TODAY IS INCORRECT. I CAN STRIKE THROUGH IT.
11 THE EVALUATION THAT'S BEING CONDUCTED AT CRAFTS-FARROW, THERE
12 WAS A NOTICE THAT APPARENTLY MR. LITTLEJOHN SHOULD RECEIVE IN
13 HIS MAIL TODAY SAYING THAT THEY HAD CHANGED THE DATE FROM THE
14 18TH OF JANUARY TO THE 25TH.

15 THE COURT: WAIT A MINUTE. WE'RE AT -- WE GOT A --
16 OH, THAT'S RIGHT.

17 MS. KIMBROUGH: THIS ISN'T EX PARTE, THE TRANSPORT
18 ORDER.

19 THE COURT: DO WHAT?

20 MS. KIMBROUGH: I SAID THE TRANSPORT ORDER
21 CONVERSATION...

22 THE COURT: OH, YEAH, YEAH, YEAH. WE'RE DONE WITH
23 THAT. OKAY. YOU CAN -- YOU CAN -- Y'ALL CAN COME IN. WE'RE
24 DONE WITH THE EX PARTE STUFF.

25 MS. KIMBROUGH: AND THEN THERE IS ANOTHER TRANSPORT

1 ORDER THAT WE PREPARED FOR PURPOSES OF HAVING MR. MERCER
2 EVALUATED BY OUR EXPERTS. THAT WILL BE DONNA WATTS AND TORA
3 BRAWLEY, IF I CAN LAY MY HANDS ON THEM. MAY I APPROACH, YOUR
4 HONOR?

5 THE COURT: YES, YOU MAY.

6 MS. KIMBROUGH: THANK YOU. THESE ARE TRANSPORTATION
7 ORDERS.

8 THE COURT: OKAY. ANYTHING ELSE?

9 MS. KIMBROUGH: THERE'S ONE CONCERN THAT MR. MERCER
10 HAS, AND I THINK THIS MIGHT BE A GOOD TIME TO BRING IT UP.
11 IT'S A CONCERN RELATED TO HIS HOUSING. HE'S CURRENTLY AT
12 SAFE KEEPER.

13 THE COURT: WELL, NOW IS THIS SOMETHING THAT...

14 MS. KIMBROUGH: I'M NOT SURE IF YOUR HONOR CAN
15 ADDRESS IT OR NOT.

16 THE COURT: I PROBABLY CAN'T, BUT IS IT -- IN THE
17 FIRST PLACE, IS IT SOMETHING THAT NEEDS TO BE BROUGHT UP WITH
18 THE SOLICITOR HERE? I MEAN, EVEN THOUGH -- EVEN THOUGH IT'S
19 PROBABLY SOMETHING HE DOESN'T CARE ABOUT, SINCE IT'S NOT --
20 SINCE IT DOESN'T FIT INTO THE CATEGORY OF EX PARTE, IT
21 PROBABLY NEEDS TO BE DONE WHEN THEY'RE PRESENT.

22 MS. KIMBROUGH: OKAY.

23 THE COURT: OR AT LEAST WITH AN OPPORTUNITY FOR THEM
24 TO BE PRESENT.

25 MS. KIMBROUGH: THANK YOU.

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1 THE COURT: IF YOU WANT TO RUN DOWN THE HALL AND GET
2 THEM OR SEND SOMEBODY TO GET SOMEBODY FROM THE SOLICITOR'S
3 OFFICE...

4 MS. KIMBROUGH: OKAY. AND PERHAPS WE COULD JUST
5 CONTACT THEM AND SEE IF WE COULD WORK IT OUT WITH THEM
6 BECAUSE IT WILL PROBABLY REQUIRE THEIR INVOLVEMENT SINCE---

7 THE COURT: OKAY.

8 MS. KIMBROUGH: ---IT PERTAINS TO HOUSING.

9 THE COURT: OKAY.

10 MS. KIMBROUGH: THANK YOU.

11 THE COURT: ALL RIGHT. WELL, I WILL -- Y'ALL KNOW
12 HOW TO GET IN TOUCH WITH ME IF YOU NEED ME.

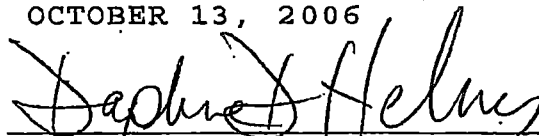
13 MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

14 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE
15 WERE NO EXHIBITS INTRODUCED.)
16
17
18
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20
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24
25

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 13TH DAY OF JANUARY, 2006.

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

OCTOBER 13, 2006



DAPHNE D. HELMS, COURT REPORTER

VOLUME SIX OF SIX

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

2003-GS-32-409

THE STATE OF SOUTH CAROLINA :

-VS- :

TRANSCRIPT OF RECORD :

KEVIN J. MERCER :

FEBRUARY 23, 2006

LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
D. SHAWN GRAHAM, ESQUIRE
ATTORNEYS FOR THE STATECAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANTALSO PRESENT: ELIZABETH C. FULLWOOD, ESQUIRE
LISA MCPHERSON, ESQUIREDAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: BE SEATED, PLEASE. OKAY. LET'S -- LET
2 ME MAKE SURE I UNDERSTAND WHAT ARE ALL THE ISSUES THAT WE
3 NEED TO ADDRESS. I KNOW WE HAVE THE ONE QUESTION OF THE
4 POTENTIAL CONFLICT THAT EXISTS BETWEEN MR. MERCER'S -- OR
5 WITH MR. MERCER'S ATTORNEY IN THE LYNCHING CASE, AND I --
6 I -- I MEANT TO SAY THIS WHEN WE MET THIS MORNING, BUT I
7 THINK IN ORDER TO DEAL WITH THAT, WE'RE GOING TO NEED THOSE
8 TWO ATTORNEYS OVER HERE. AND SO APPARENTLY THEY HAVE --
9 SOMEBODY HAS CALLED THEM AND HAS GONE TO GET THEM?

10 MR. LITTLEJOHN: YOUR HONOR, I JUST LEFT A MESSAGE
11 ON THE VOICE MAIL OVER THERE. APPARENTLY THEY BROKE FOR
12 LUNCH BETWEEN 1 AND 2, AND I THINK IT WAS -- I THINK
13 EVERYBODY THOUGHT SOMEBODY ELSE WAS GOING TO CALL THEM AND---

14 THE COURT: YEAH.

15 MR. LITTLEJOHN: ---AND IT SUDDENLY DAWNED ON US
16 NOBODY HAD CALLED THEM.

17 THE COURT: OKAY. WHERE IS THEIR OFFICE?

18 MR. LITTLEJOHN: IT'S RIGHT ACROSS THE STREET.

19 THE COURT: CAN Y'ALL SEND SOMEBODY OVER THERE TO
20 VERY POLITELY LET THEM KNOW THAT WE NEED THOSE TWO LAWYERS
21 OVER HERE RIGHT AWAY?

22 THE CLERK: I LEFT A VERY POLITE MESSAGE THAT SAID
23 THEY NEEDED TO BE OVER HERE RIGHT AWAY.

24 THE COURT: WHO ARE THE TWO LAWYERS? LISA MCPHERSON
25 AND?

FEBRUARY 23, 2006, HEARING

1 THE CLERK: BETH FULLWOOD.

2 MR. LITTLEJOHN: BETH FULLWOOD---

3 THE COURT: BETH FULLWOOD.

4 MR. LITTLEJOHN: ---IS THE CHIEF PUBLIC DEFENDER.

5 THE COURT: AND ASK THEM, IF THEY DON'T MIND, TO
6 TAKE WHATEVER STEPS THEY CAN REASONABLY TAKE TO GET THEM OVER
7 HERE RIGHT NOW IF THEY -- IF THEY -- IF THEY CAN DO IT.

8 OFFICER: YES, SIR.

9 THE COURT: OKAY. WHAT ELSE BESIDES THAT CONFLICT
10 QUESTION?

11 MR. LITTLEJOHN: YOUR HONOR, THE ONLY OTHER ISSUE I
12 THINK WE HAVE IS WE WERE HANDED A DISCOVERY PACKAGE THIS
13 MORNING THAT CONTAINS NUMEROUS DOCUMENTS AND PHOTOGRAPHS AND
14 SOME VIDEOTAPES AND SOME OTHER THINGS. WE JUST HAVEN'T HAD A
15 CHANCE TO GO THROUGH IT ALL, AND WE'D JUST LIKE TO BE ASSURED
16 BY THE SOLICITOR'S OFFICE THAT THAT IS THE EXTENT OF THE
17 DISCOVERY MATERIAL THAT WE'RE GOING TO BE PROVIDED. AND I
18 GUESS MY CONCERN IS WE JUST DON'T WANT TO RECEIVE DISCOVERY
19 AT THE LAST MINUTE IN THIS CASE THAT WOULD NECESSITATE
20 FURTHER INVESTIGATION OR DELAYS OR ANYTHING OF THAT NATURE.

21 THE COURT: OKAY. ARE YOU AWARE OR, MS. KIMBROUGH,
22 ARE Y'ALL AWARE OF ANY GAPS THAT THERE MAY BE THAT YOU HAVE
23 BEEN ABLE TO SEE IN THE PRODUCTION?

24 MR. LITTLEJOHN: YOUR HONOR, I'M NOT AWARE OF ANY.

25 THE COURT: ALL RIGHT. ALL RIGHT.

1 MR. LITTLEJOHN: BUT I HAVEN'T BEEN THROUGH THIS
2 MATERIAL WE GOT TODAY EITHER.

3 THE COURT: OKAY. ALL RIGHT. LET'S HEAR ABOUT IT.

4 MR. GRAHAM: YOUR HONOR, I CAN TELL YOU IT'S AN
5 ONGOING PROCESS. WHEN WE GET SOMETHING, WE PUT IT TOGETHER
6 AND GIVE IT TO THEM. WE -- I BELIEVE THAT WE'VE GOTTEN MOST
7 EVERYTHING NOW, BUT I CAN'T PROMISE THAT WE'RE NOT GOING TO
8 HAVE A FEW OTHER THINGS COME IN. THERE SHOULDN'T BE ANYTHING
9 BIG LIKE THAT AGAIN.

10 THE COURT: WILL YOU -- YOU HAVE BEEN IN TOUCH WITH
11 YOUR DIFFERENT LAW ENFORCEMENT AGENCIES THOUGH; RIGHT?

12 MR. GRAHAM: CORRECT.

13 THE COURT: AND YOU -- YOU -- YOU SHOULD BE ABLE TO
14 HAVE SOME IDEA AS TO WHETHER OR NOT YOU HAVE EVERYTHING THEY
15 HAVE.

16 MR. GRAHAM: I BELIEVE WE HAVE. I MEAN, AS FAR AS
17 -- YOU KNOW, WE'VE CHECKED HIS RAP SHEET. WE'VE TRIED TO GET
18 ALL THE PAST INCIDENT REPORTS. I THINK WE'VE GOT ALL OF
19 THOSE.

20 THE COURT: RIGHT.

21 MR. GRAHAM: BUT THERE'S -- WHEN YOU WORK TOWARD THE
22 PENALTY PHASE IN LOOKING AT CHARACTER EVIDENCE, THERE'S OTHER
23 THINGS TO TRY TO TRACK DOWN. AND SO I DON'T KNOW -- RIGHT
24 NOW I DON'T KNOW OF ANY PLACE THAT WE HAVEN'T CHECKED.

25 THE COURT: WELL, I'M NOT -- I DON'T THINK -- I

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1 DON'T THINK THEY'RE -- THAT MR. LITTLEJOHN IS NECESSARILY
2 SAYING THAT HE'S EXPECTING YOU TO TURN OVER EVERYTHING THAT
3 YOU MIGHT ULTIMATELY COME INTO POSSESSION OF, BUT IF -- IF
4 LAW ENFORCEMENT HAS SOMETHING THAT RELATES TO THIS CASE, THEN
5 Y'ALL NEED TO BE ABLE TO TELL ME AND TELL THEM THAT YOU HAVE
6 DONE YOUR DEAD-LEVEL BEST TO COME INTO POSSESSION OF THAT
7 YOURSELVES SO THAT YOU CAN TURN IT OVER TO THEM NOW.

8 MR. GRAHAM: WHICH I BELIEVE WE HAVE DONE.

9 THE COURT: IF -- NOW, UNDERSTAND THAT -- I
10 UNDERSTAND THIS IS -- THAT MR. MERCER IS -- HAS -- HAS LIVED
11 OUT OF STATE. THERE ARE THINGS THAT MAY HAVE OCCURRED OUT OF
12 STATE, OTHER THINGS THAT DON'T RELATE TO THIS CASE THAT YOU
13 MAY BE CONTINUING TO INVESTIGATE, AND WHEN YOU COME INTO
14 POSSESSION OF THOSE, YOU KNOW, YOU TURN THEM OVER AS QUICKLY
15 AS YOU CAN. BUT IF IT'S SOMETHING THAT RELATES TO THE FACTS
16 OF THIS INCIDENT, I NEED -- I THINK WE NEED TO ALL BE ASSURED
17 THAT YOU ALL HAVE MADE A VERY COMPLETE INQUIRY WITH LAW
18 ENFORCEMENT AND WITH WHOEVER ELSE TO MAKE SURE THAT YOU HAVE
19 THAT AND YOU'VE TURNED IT OVER.

20 MR. GRAHAM: I BELIEVE THAT WE HAVE -- WE HAVE NOT
21 MET WITH EVERY OFFICER WHO HAS BEEN INVOLVED IN THIS, SO I
22 CAN'T TELL YOU THAT THEY DON'T HAVE SOMETHING -- I CAN TELL
23 YOU THAT WE'VE CHECKED WITH THE SHERIFF'S DEPARTMENT WITH
24 THEIR MAIN CASE FILE. WE'VE LOOKED THROUGH WHAT'S IN
25 EVIDENCE AND MADE SURE THAT EVIDENCE SHEETS HAVE ALL BEEN

1 TURNED OVER. WE TRACKED DOWN S.L.E.D. TO MAKE SURE
2 EVERYTHING THAT WAS SUPPOSED TO BE TESTED AT THIS POINT THAT
3 WE KNOW OF THAT SHOULD BE TESTED HAS BEEN TESTED, THAT WE'VE
4 GOTTEN RESULTS BACK AND WE'VE TURNED THOSE OVER.

5 THE COURT: ALL RIGHT. WELL, I'M SURE THAT IT'S NOT
6 NECESSARY TO MAKE IT CLEAR THAT THAT'S THE NUMBER ONE
7 LIKELIHOOD OF NOT TRYING THE CASE ON APRIL 10TH IS IF
8 SOMETHING COMES UP THAT HASN'T BEEN PRODUCED.

9 MR. GRAHAM: NO QUESTION.

10 THE COURT: SO DO YOU FEEL LIKE THERE'S ANYTHING
11 ELSE I NEED TO DO OTHER THAN SAY WHAT I JUST SAID?

12 MR. GRAHAM: NO, YOUR HONOR.

13 THE COURT: ALL RIGHT. IF -- IS THERE ANYTHING --
14 IS THERE ANYTHING THAT YOU HAVE -- THAT YOU KNOW ABOUT THAT
15 YOU HAVE NOT PRODUCED BECAUSE OF PRIVILEGE OR WHATEVER?

16 MR. GRAHAM: ONE OF THE ISSUES I WAS GOING TO GET TO
17 TODAY WAS DR. FRIERSON, WHEN I SPOKE WITH HIM TODAY, WANTED
18 SOME INFORMATION, AND SO WE'RE TRYING TO TRACK DOWN THAT
19 INFORMATION. IT'S ONE THAT WE DON'T HAVE IN OUR POSSESSION.
20 THAT WAS FOR THE -- THE LAST PART OF MR. MERCER'S MENTAL
21 HEALTH EVALUATION WAS SCHEDULED -- IT HAD BEEN SCHEDULED FOR
22 THE 6TH. IT WAS CONTINUED UNTIL TODAY. AND WHEN MR. MERCER
23 SHOWED OVER THERE TODAY, HE STATED THAT HE WANTED HIS
24 ATTORNEYS, SO IT GOT POSTPONED AGAIN. I SPOKE WITH DR.
25 FRIERSON, AND DR. FRIERSON GAVE ME SOME INFORMATION THAT HE

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1 WANTED ME TO TRY TO GET TO HIM WHICH I'M GOING TO TRY TO GET
2 TO HIM.

3 THE COURT: ALL RIGHT. LET'S TAKE THAT UP. WHEN IS
4 IT GOING TO -- WHEN IS IT GOING TO RESUME?

5 MS. KIMBROUGH: TOMORROW.

6 MR. GRAHAM: IT'S BEEN RESCHEDULED FOR TOMORROW AT
7 1:00.

8 THE COURT: TOMORROW AT 1:00.

9 MS. KIMBROUGH: I HAVE A TRANSPORT ORDER HERE.

10 THE COURT: IS THERE -- IS IT -- ONCE THAT INTERVIEW
11 OR THAT EVALUATION TAKES PLACE, WE'LL BE DONE, RIGHT, AT
12 LEAST AS FAR AS WHAT I'VE ORDERED SO FAR?

13 MS. KIMBROUGH: CORRECT, YOUR HONOR.

14 THE COURT: AND THEN YOU ALL HAVE YOUR OWN WORK THAT
15 YOU'RE DOING, BUT AS FAR AS WHAT I'VE ORDERED, IT'LL BE DONE.

16 MS. KIMBROUGH: YES.

17 THE COURT: OKAY. IS THERE ANY POSSIBILITY THAT
18 WHAT IS SCHEDULED FOR TOMORROW WOULD NOT HAPPEN THAT YOU KNOW
19 OF?

20 MS. KIMBROUGH: NOT -- NO, UNLESS THERE'S SOME
21 BREAKDOWN IN THE TRANSPORTATION FOR MR. MERCER. I WILL BE
22 THERE, AND MY UNDERSTANDING IS THAT'S ALL MR. MERCER WANTED
23 WAS FOR US TO BE THERE. WE'VE ADVISED HIM. WE THOUGHT THAT
24 HE WOULD BE ABLE TO GO THROUGH WITHOUT US THERE BUT...

25 THE COURT: IF YOU RUN INTO ANY DIFFICULTY TOMORROW,

1 CALL ME AND I WILL SEE WHAT I CAN DO TO STRAIGHTEN THAT OUT
2 BECAUSE THAT DOES NEED TO TAKE PLACE RIGHT AWAY. ALL RIGHT?

3 MS. KIMBROUGH: YES, YOUR HONOR.

4 MR. GRAHAM: WHAT DR. FRIERSON ASKED FOR WHEN I
5 SPOKE TO HIM WAS THAT THERE HAD BEEN SOME REFERENCES IN SOME
6 OF THE DOCUMENTS THAT HE'D SEEN REGARDING THE FACT THAT MR.
7 MERCER IS ON DISABILITY. WE'VE GIVEN HIM EVERYTHING WE HAVE
8 ON THE DISABILITY, AND SHORT OF YOU ISSUING AN ORDER, WE
9 CAN'T GET TO IT. I UNDERSTAND FROM SPEAKING WITH MS.
10 KIMBROUGH THAT SHE HAS SOME INFORMATION ON THAT, AND I DON'T
11 KNOW WHETHER SHE'S GOING TO GIVE THAT OVER TO DR. FRIERSON OR
12 NOT, BUT THAT WAS ONE AREA THAT HE ASKED ABOUT.

13 THE COURT: WHO HAS THE DOCUMENTS THEN THAT CAN BE
14 PRODUCED? NOT HER. YOU SAID---

15 MR. GRAHAM: I DON'T KNOW WHETHER IT'S---

16 THE COURT: IT'S NOT A STATE -- A SOUTH CAROLINA
17 AGENCY OR ANYTHING, IS IT?

18 MR. GRAHAM: I DON'T KNOW WHO -- I DON'T KNOW WHERE
19 HIS DISABILITY IS FROM. HE JUST -- IN SOME OF THE DOCUMENTS
20 MR. MERCER HAD MADE REFERENCE THAT HE WAS ON DISABILITY AND
21 HAS BEEN FOR YEARS, DOESN'T KNOW WHAT FOR, AND RECEIVES A
22 CERTAIN AMOUNT OF MONEY.

23 THE COURT: OKAY.

24 MR. GRAHAM: AND DR. FRIERSON ASKED TO HAVE THAT
25 INFORMATION IN THE COMPETENCY OR THE CRIMINAL EVALUATION/

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1 CRIMINAL RESPONSIBILITY PART, AND HE ALSO ASKED FOR SOME
2 OTHER DOCUMENTS WHICH IF YOU WANT TO -- I CAN TELL YOU NOW OR
3 WE CAN GO GROUP BY GROUP AS WE TALK ABOUT IT.

4 THE COURT: DOES ANYBODY KNOW WHO HAS SUCH
5 INFORMATION OR HOW I COULD ASSIST Y'ALL IN GETTING THAT TO
6 DR. FRIERSON?

7 MS. KIMBROUGH: I CAN SPEAK TO THE DISABILITY
8 RECORDS, YOUR HONOR. I REALIZE DR. FRIERSON WANTS THAT
9 INFORMATION. I'M NOT SURE THAT WE SHOULD TURN IT OVER, I
10 MEAN, QUITE FRANKLY. HE'S BEING EVALUATED FOR CRIMINAL
11 RESPONSIBILITY AND COMPETENCY, BUT WE CERTAINLY HAVEN'T
12 RAISED ANY AFFIRMATIVE DEFENSES OF INSANITY OR N.G.R.I. OR,
13 YOU KNOW, LACK OF COMPETENCE TO PROCEED. I'M NOT REALLY SURE
14 THAT HE IS ENTITLED TO ALL THE INFORMATION THAT MIGHT BE
15 CONTAINED IN THE SOCIAL SECURITY FILE.

16 NOW, WE DO HAVE SOME OF THAT INFORMATION, BUT,
17 AGAIN, UNTIL WE DETERMINE WHETHER OR NOT WE'RE GOING TO RELY
18 ON IT, I DON'T THINK WE'RE OBLIGATED TO TURN THAT OVER. AND
19 I'M NOT SURE THAT THE STATE IS ENTITLED TO HAVE PRIVATE
20 MEDICAL INFORMATION UNDER THE NEW HIPAA LAWS. SO I WILL
21 CERTAINLY CALL DR. FRIERSON AND SEE, YOU KNOW, WHAT HIS
22 POSITION IS ON GETTING LESS THAN HE'S ASKING FOR, BUT I --
23 FRANKLY I'M NOT SURE, YOU KNOW, WE'RE OBLIGATED TO TURN THAT
24 OVER OR THAT IT WOULD BE IN OUR CLIENT'S BEST INTEREST TO
25 TURN IT OVER. I'M GOING TO TALK TO OUR EXPERT AND, YOU KNOW,

1 GET HER---

2 THE COURT: OKAY.

3 MS. KIMBROUGH: ---INPUT.

4 THE COURT: WELL, LET ME -- LET ME ASK YOU A
5 QUESTION THEN. THAT'S -- IF THAT'S TRUE, IT'S TRUE ONLY SO
6 LONG AS YOU'RE NOT CLAIMING ANY TYPE OF AFFIRMATIVE DEFENSE.
7 HAVE YOU GOTTEN FAR ENOUGH ALONG IN YOUR WORK AND IN YOUR
8 INQUIRY ON THAT SUBJECT TO BE ABLE TO SAY THAT YOU WON'T MAKE
9 SUCH A CLAIM?

10 MS. KIMBROUGH: WE HAVE CERTAINLY STARTED OUR
11 INDEPENDENT INVESTIGATION. AT THIS POINT I CAN TELL YOU THAT
12 AS WE STAND HERE TODAY WE DON'T ANTICIPATE HAVING ONE OF
13 THOSE TWO ISSUES ARISE. CERTAINLY IT COULD, AS THINGS
14 DEVELOP, BUT AT THIS POINT I CAN SAY THAT WE'RE NOT
15 ANTICIPATING RAISING EITHER OF THOSE ISSUES.

16 THE COURT: OKAY.

17 MS. KIMBROUGH: I MEAN, OBVIOUSLY TO SOME EXTENT
18 IT'S STILL AN OPEN QUESTION BECAUSE WE'VE GOT A FEW MORE
19 THINGS TO DO.

20 THE COURT: BUT NOW AS A FOLLOW-UP TO THAT -- AND
21 YOU DON'T HAVE TO ANSWER IT NECESSARILY IN OPEN COURT. IT
22 COULD BE A QUESTION THAT NEEDS TO BE ANSWERED IN AN EX PARTE
23 HEARING. BUT THOSE EXPERTS THAT YOU WOULD HAVE WORK ON THE
24 CASE RELATED TO THAT SUBJECT, THEY HAVE BEGUN AND ARE IN THE
25 MIDDLE OF THEIR WORK; CORRECT?

1 MS. KIMBROUGH: YES.

2 THE COURT: AND THEY -- OKAY.

3 MS. KIMBROUGH: YES, YOUR HONOR.

4 THE COURT: SO IF THERE IS GOING TO BE SUCH A
5 DEFENSE RAISED, WE SHOULD KNOW ABOUT IT FAIRLY SOON?

6 MS. KIMBROUGH: YES.

7 THE COURT: ANY IDEA ABOUT THE TIME FRAME IN WHICH
8 YOU'LL BE ABLE TO SAY YES OR NO AS TO THAT?

9 MS. KIMBROUGH: I WILL CALL OUR INDEPENDENT
10 PSYCHIATRIC EXPERT AS SOON AS WE LEAVE HERE AND SPEAK TO HER,
11 AND IF THERE'S ANY SERIOUS QUESTION OR -- OR ANY DOUBT IN HER
12 MIND, THEN, YOU KNOW, I CAN CERTAINLY GET A DATE AS TO WHEN
13 THERE WILL BE AN ABSOLUTE DETERMINATION MADE AND I'LL TELL
14 HER THAT WE ARE NEEDING TO EXPEDITE THAT BECAUSE, IF IT'S
15 GOING TO BE RAISED, THEN WE NEED---

16 THE COURT: OKAY.

17 MS. KIMBROUGH: ---TO KNOW IT.

18 THE COURT: ALL RIGHT. AND IF THERE IS, YOU'LL GIVE
19 ME -- YOU'LL CALL ME BACK AND GIVE ME A -- YOU'LL -- YOU'LL
20 GIVE US A DATE.

21 MS. KIMBROUGH: YES. ABSOLUTELY.

22 THE COURT: OKAY.

23 MS. KIMBROUGH: I WILL E-MAIL EVERYONE WHO'S ON THE
24 MERCER LIST IMMEDIATELY.

25 THE COURT: OKAY. ALL RIGHT. NOW, WITH THAT, ANY

1 RESPONSE?

2 MR. GRAHAM: YES, YOUR HONOR. MY UNDERSTANDING WAS
3 THAT THE REASON WE WERE ORDERING THOSE EVALUATIONS WAS TO
4 MAKE SURE THAT THERE WAS NO PROBLEM AND THAT THERE WOULDN'T
5 BE ANY P.C.R. ISSUES LATER. IF THEY'RE GOING TO DECIDE NOW
6 THAT THEY DON'T WANT TO DO SOMETHING, AREN'T WE LEAVING
7 OURSELVES IN A POSITION WHERE WE'RE NOT GOING TO KNOW WHAT A
8 DOCTOR SHOULD HAVE LOOKED AT AND THEN AFTER THE FACT MAYBE
9 SOMETHING WILL COME UP THAT A DOCTOR SHOULD HAVE LOOKED AT
10 AND THEN WE HAVE A P.C.R. PROBLEM WITH THE ATTORNEYS NOT
11 DOING THEIR JOBS? THAT WAS MY UNDERSTANDING OF WHY WE WERE
12 DOING THE MENTAL RETARDATION EVALUATION AND WHY WE WERE
13 SENDING THINGS TO D.D.S.N. AND TO THE DEPARTMENT OF MENTAL
14 HEALTH.

15 THE COURT: WELL, ALL THAT MAY BE TRUE ALTHOUGH IT
16 -- BASED ON WHAT SHE JUST SAID, I DON'T HEAR ANY GAPS IN WHAT
17 THE ATTORNEYS ARE DOING. SHE'S -- SHE'S GOT AN EXPERT.
18 THEY'VE GOT AN EXPERT THEY'VE CONSULTED WITH. THAT'S -- IF
19 THE EXPERT MAKES A MISTAKE, THAT'S NOT AN ATTORNEY ISSUE.
20 BUT I DON'T -- I DON'T -- I DON'T SEE THE -- WELL, I DON'T
21 SEE A PROBLEM BASED ON WHAT SHE JUST SAID.

22 (ATTORNEY BETH FULLWOOD ENTERS THE COURTROOM NOW.)

23 THE COURT: AND THE -- THE INVESTIGA -- THE -- THE
24 EVALUATION THAT HAS TAKEN PLACE REGARDING CRIMINAL
25 RESPONSIBILITY IS -- IS JUST AS YOU SAY. IT IS -- IT WAS A

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1 PRECAUTIONARY EFFORT THAT EVERYBODY AGREED WAS -- WAS FAIR TO
2 TAKE. IT CAN'T TURN INTO A DISCOVERY PROCEDURE FOR THE
3 STATE. AND AS LONG AS I AM SATISFIED THAT THE DEFENSE IS
4 DOING WHAT THEY NEED TO DO IN ORDER TO HANDLE THAT QUESTION
5 FROM THEIR SIDE, I JUST -- I THINK IT'S NOT AN ISSUE AND I
6 DON'T THINK THAT -- I SORT OF -- I TEND TO -- I'M INCLINED TO
7 AGREE WITH MS. KIMBROUGH THAT IT WOULD BE INAPPROPRIATE FOR
8 ME TO ORDER THAT THAT INFORMATION BE PRODUCED TO DR. FRIERSON
9 AT THIS POINT. IF THEY -- IF THEY RAISE IT, I THINK WE'RE --
10 IF THEY'RE -- I THINK WE CAN BE SATISFIED THAT THEY'RE IN A
11 POSITION TO RAISE THOSE ISSUES IN A TIMELY MANNER IF THEY'RE
12 GOING TO BE RAISED, AND IF THEY RAISE IT, THEN THE OUTLOOK
13 CHANGES, SO... ALL RIGHT? WAS THERE ANYTHING ELSE THAT DR.
14 FRIERSON SAID HE WANTED?

15 MR. GRAHAM: EVERYTHING ELSE HE ASKED FOR I THINK I
16 CAN PROVIDE HIM EXCEPT FOR HE ASKED SPECIFICALLY -- HE SAID
17 THAT MR. MERCER WAS ON PROBATION, AND WHILE ON PROBATION, HE
18 WAS ORDERED TO GO TO COUNSELING. THE ONLY THING I'M AWARE OF
19 IS THAT HE, I BELIEVE, TESTED POSITIVE FOR DRUGS WHILE HE WAS
20 ON PROBATION. HE WAS ORDERED INTO INSIGHTS. SO I HAVE
21 PREPARED AN ORDER FOR YOUR SIGNATURE TO ORDER INSIGHTS TO
22 RELEASE THAT INFORMATION TO -- I'VE GOT IT RELEASING IT TO US
23 TO GIVE TO DR. FRIERSON, BUT HOW EVER THAT NEEDS TO BE
24 DONE...

25 THE COURT: WHERE IS INSIGHTS?

1 MR. GRAHAM: IT'S AN ALCOHOL AND DRUG---

2 THE COURT: HERE?

3 MR. GRAHAM: IT'S IN LEXINGTON COUNTY.

4 MS. KIMBROUGH: PERHAPS IT'S BECAUSE I'M NOT A
5 PSYCHIATRIST, BUT I THINK MR. LITTLEJOHN AND I ARE BOTH
6 SOMEWHAT PUZZLED BY WHY -- WHEN THE ONLY QUESTIONS ARE
7 CRIMINAL RESPONSIBILITY AND COMPETENCY WHY WE WOULD -- WHY
8 DR. FRIERSON WOULD NEED PROBATION RECORDS. I MEAN---

9 THE COURT: HE'S -- I MEAN, HE'S THE DOCTOR THAT
10 WAS -- THAT WAS CHOSEN TO MAKE WHAT WE AGREED UPON WAS THE --
11 WOULD BE A WORTHWHILE INQUIRY INTO CRIMINAL RESPONSIBILITY,
12 AND HE'S TOLD US THAT HE WANTS SOMETHING. SO, I MEAN, THE
13 QUESTION IS NOT WHY HE WANTS IT. THE QUESTION IS WHETHER OR
14 NOT I HAVE THE AUTHORITY TO ORDER IT PRODUCED.

15 MS. KIMBROUGH: YES, YOUR HONOR. AGAIN, I FEEL LIKE
16 WE'RE, YOU KNOW, PROVIDING THE STATE WITH DISCOVERY THEY MAY
17 NOT BE ENTITLED TO, BUT, YOU KNOW, OBVIOUSLY IF DR. FRIERSON
18 WANTS IT, WE OBVIOUSLY DON'T -- YOU KNOW, WOULDN'T CONSENT TO
19 HIM HAVING IT. WE CERTAINLY THINK---

20 THE COURT: WELL, WHY DON'T YOU---

21 MS. KIMBROUGH: ---IT'S PRIVILEGED INFORMATION.

22 THE COURT: I MEAN, THE SOLICITOR AT THIS POINT IS
23 JUST TRYING TO GET THE EVALUATION DONE SO THAT IT CAN BE
24 FINALIZED. I DON'T -- I DON'T REALLY THINK THEY'RE
25 INTERESTED IN THE INFORMATION FROM A DISCOVERY STANDPOINT,

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1 ALTHOUGH IT COULD HAVE THAT COLLATERAL EFFECT, BUT WHY DON'T
2 YOU JUST TAKE THOSE TWO INQUIRIES AND PASS THEM ALONG TO YOUR
3 EXPERT AND MAKE SURE THAT -- THAT -- THAT SHE KNOWS ABOUT
4 THAT AND... WELL, I GUESS THE FIRST QUESTION IS IS THERE
5 SOME SORT OF -- IS THERE SOME SORT OF PRIVILEGE THAT IS
6 ATTACHED TO THE RECORDS OF INSIGHTS?

7 MR. GRAHAM: IT'S A -- FROM MY UNDERSTANDING, I CAN
8 TELL YOU THAT THERE'S A -- 44-22-100 DEALS WITH THE RELEASE
9 OF MENTAL HEALTH AND I BELIEVE ADDICTION-TYPE COUNSELING, AND
10 THAT'S PRIVILEGED. THAT'S NOT SOMETHING THAT CAN NORMALLY BE
11 RELEASED, SHORT OF A COURT ORDER.

12 THE COURT: AND THE COURT -- AND DO YOU KNOW OF ANY
13 BASIS FOR ORDERING IT RELEASED OTHER THAN -- OTHER THAN THAT
14 THIS DOCTOR SAID HE WANTS TO LOOK AT IT?

15 MR. GRAHAM: NO, SIR.

16 THE COURT: OKAY. I'M GOING TO LET THAT SIT IN THE
17 SAME CATEGORY AS THE DISABILITY RECORDS. I WOULD -- I WOULD
18 LIKE FOR Y'ALL TO MAKE SURE THAT YOUR EXPERT IS AWARE OF THE
19 INQUIRY THAT HAS BEEN MADE BY DR. FRIERSON, AND IF SHE WANTS
20 THE RECORDS, WE CERTAINLY CAN GET THEM PRODUCED TO HER
21 IMMEDIATELY AND THEN WE'LL WAIT AND SEE HOW THINGS GO IN
22 TERMS OF WHETHER OR NOT Y'ALL RAISE ANY TYPE OF AFFIRMATIVE
23 DEFENSE. IS THAT SATISFACTORY?

24 MR. GRAHAM: YES, YOUR HONOR. THE ONLY THING I WAS
25 GOING TO ADD IS IF YOU DECIDE TO ORDER THEM, WE DON'T HAVE TO

1 SEE THEM, THAT IT COULD GO DIRECTLY TO DR. FRIERSON, AND THEN
2 WHEN HE'S DONE WITH IT, HE COULD SEND IT BACK. HE JUST
3 STATED THAT HE WANTED THAT INFORMATION FOR HIS OPINION.

4 MS. KIMBROUGH: YOUR HONOR, AS LONG AS THE DOCUMENTS
5 ARE SIMPLY BEING USED TO CONDUCT THOSE TWO INQUIRIES,
6 COMPETENCY AND CRIMINAL RESPONSIBILITY, AND THE DOCUMENTS
7 WE'VE PROVIDED TO DR. FRIERSON ARE NOT SORT OF DISTRIBUTED
8 FAR AND WIDE OR, SIMPLY PUT, HE USES THEM FOR HIS PURPOSES
9 AND THEN RETURNS THEM TO US WITHOUT, YOU KNOW, ANY DISCLOSURE
10 BEING MADE TO OTHER PARTIES, I'M NOT SURE WE WOULD HAVE ANY
11 OBJECTION. I WOULD---

12 THE COURT: SO IF HE DRAFTS AN ORDER THAT SAYS THAT
13 THE DISABILITY RECORDS AND THE INSIGHTS RECORDS ARE PRODUCED
14 TO DR. FRIERSON AND THAT DR. FRIERSON IS TO MAKE WHATEVER USE
15 OF THEM HE NEEDS TO MAKE IN ORDER TO DO HIS WORK AND THEN
16 RETURN THEM TO YOU, Y'ALL WOULD HAVE NO PROBLEM WITH THAT?

17 MS. KIMBROUGH: I'D LIKE TO TALK TO OUR EXPERT
18 FIRST, BUT, I MEAN, CERTAINLY WITHOUT, YOU KNOW---

19 THE COURT: ALL RIGHT.

20 MS. KIMBROUGH: ---THEM BEING DISTRIBUTED I DON'T --
21 I DON'T THINK WE WOULD BE OPPOSED TO THAT.

22 MR. GRAHAM: THE ONLY THING FOR CLARIFICATION, YOUR
23 HONOR, IS IT IS MY UNDERSTANDING, ACCORDING TO THE ORDER, IS
24 DR. FRIERSON IS NOT LOOKING AT COMPETENCY. HE'S LOOKING AT
25 CRIMINAL RESPONSIBILITY AND CAPACITY TO CONFORM, JUST FOR THE

1 RECORD.

2 THE COURT: ALL RIGHT. ALL RIGHT. WELL, WHY DON'T
3 YOU -- WHY DON'T YOU TALK TO YOUR EXPERT ABOUT THAT, AND IF
4 Y'ALL CAN AGREE TO IT, LET THEM KNOW? YOU CAN DO AN ORDER
5 AND I'LL -- I MEAN, THIS IS FOR -- COULD WE GET THE STUFF BY
6 TOMORROW AND HAVE IT OVER THERE?

7 MR. GRAHAM: I DON'T KNOW. I KNOW THAT SHE HAD THE
8 DISABILITY STUFF IN HER POSSESSION, SO THAT'S NOT AN ORDER
9 FROM THEM. AS FAR AS INSIGHTS, I MEAN, I DON'T KNOW. I
10 DON'T KNOW HOW LONG IT WOULD TAKE THEM TO GET THERE. WE
11 COULD REQUEST IT.

12 THE COURT: WELL, HE MIGHT NOT NEED IT FOR THE
13 ACTUAL INTERVIEW. HE COULD USE IT LATER. Y'ALL HAVE THAT --
14 Y'ALL HAVE THAT CONVERSATION AND LET HIM KNOW -- IF SHE
15 AGREES TO THE ORDER, PREPARE IT, GET HER TO SIGN IT, GET IT
16 TO ME. I'LL GET IT RIGHT BACK TO YOU.

17 MS. KIMBROUGH: THANK YOU, YOUR HONOR.

18 THE COURT: ALL RIGHT. WHAT ELSE?

19 MR. LITTLEJOHN: YOUR HONOR, ALONG THE SAME LINES OF
20 DISCOVERY REQUESTS, YOUR HONOR, AS FAR AS I KNOW WE HAVE
21 NOTHING THAT'S BEEN PRODUCED BY THE STATE INDICATING ANY SORT
22 OF PLEA AGREEMENT OR OTHER COMPENSATION OR ANYTHING ELSE
23 THAT'S BEEN GIVEN TO THE CO-DEFENDANT IN THIS CASE, MARCUS
24 THOMPSON. IT'S MY UNDERSTANDING THAT MR. THOMPSON WILL BE A
25 WITNESS FOR THE STATE IN THIS CASE, AND WE WOULD CERTAINLY

1 LIKE ANYTHING RELATING TO ANY PLEA AGREEMENT, ANY CONCESSIONS
2 HE'S BEEN GIVEN, WHETHER IT'S FOR BOND OR ANY OTHER PURPOSE,
3 REGARDING MARCUS THOMPSON. YOUR HONOR, I MIGHT JUST FOR --
4 AS AN ADD-ON, I WOULD LIKE TO APPLY THIS MOTION TO ANY OTHER
5 WITNESS THAT THE STATE INTENDS TO CALL IN THIS CASE THAT HAS
6 A PRIOR RECORD OR HAS HAD CHARGES HANDLED BY THE SOLICITOR'S
7 OFFICE OR ANY OTHER SOLICITOR'S OFFICE.

8 THE COURT: OKAY.

9 MR. GRAHAM: YOUR HONOR, IT'S MY UNDERSTANDING AT
10 THIS POINT NO PROMISES HAVE BEEN MADE TO THE CO-DEFENDANT IN
11 THIS CASE OR ANY OTHER WITNESS IN THIS CASE.

12 THE COURT: DO YOU AGREE, THOUGH THAT IF SUCH PROMISE
13 HAS BEEN MADE OR IS MADE IN THE FUTURE THAT THAT -- THE
14 SUBSTANCE OF THOSE PROMISES SHOULD BE DISCLOSED TO THE
15 DEFENSE?

16 MR. GRAHAM: YES, YOUR HONOR.

17 THE COURT: ALL RIGHT. IS THAT SATISFACTORY?

18 MR. LITTLEJOHN: YOUR HONOR, WE WOULD -- BUT WE
19 CERTAINLY WOULD NOT WANT TO GET THAT INFORMATION ON THE EVE
20 OF MR. THOMPSON TESTIFYING. I MEAN, IF THEY'RE GOING TO --
21 IF THEY'VE BEEN IN DISCUSSIONS WITH HIS ATTORNEY ABOUT A
22 POTENTIAL DEAL, THEN WE'D CERTAINLY LIKE TO KNOW THAT AS
23 EARLY AS POSSIBLE SO THAT WE CAN HAVE THE ABILITY TO CROSS-
24 EXAMINE MR. THOMPSON ABOUT ANY BIAS OR PREJUDICE ON HIS PART.

25 YOUR HONOR, ALSO IT'S MY UNDERSTANDING MR. THOMPSON

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1 WAS CHARGED ALONG WITH OUR CLIENT AND WAS RELEASED ON BOND.
2 WE'D LIKE TO KNOW WHAT CONCESSIONS, IF ANY, WERE GIVEN TO MR.
3 THOMPSON OR ANY INPUT THAT THE SOLICITOR OR ANY LAW
4 ENFORCEMENT HAD AS TO HIS BEING RELEASED ON BOND.

5 MR. GRAHAM: I CAN ONLY SPEAK FOR MYSELF, YOUR
6 HONOR. I'M NOT AWARE OF ANY.

7 THE COURT: WELL, YOU CAN SPEAK FOR THE---

8 MR. GRAHAM: I KNOW I HAVE---

9 THE COURT: WELL, YOU CAN SPEAK FOR THE ENTIRE
10 SOLICITOR'S OFFICE.

11 MR. GRAHAM: MR. HUBBARD SAYS HE'S NOT AWARE OF ANY,
12 AND I THINK THE SOLICITOR IS LISTENING TO ME WHEN I SAY HE'S
13 NOT AWARE OF ANY.

14 MR. MYERS: NOT AT ALL.

15 THE COURT: WELL, WAS THE -- WAS THE BOND ORDER DONE
16 BY CONSENT OR WAS IT DONE BY ORDER OF A JUDGE?

17 MR. GRAHAM: I DON'T KNOW, YOUR HONOR.

18 THE COURT: Y'ALL CAN GET THE BOND ORDER. IF IT WAS
19 DONE BY CONSENT, THEN YOU -- YOUR INQUIRY PERHAPS GOES ON,
20 BUT IF IT WAS DONE ON A RULING OF THE JUDGE, THEN HOPEFULLY
21 AT LEAST IT WAS -- EVERYTHING THAT WENT INTO THAT WAS DONE IN
22 OPEN COURT AND THERE WOULD BE A RECORD OF IT, AND YOU CAN GET
23 -- YOU WOULD HAVE NO TROUBLE GETTING THOSE RECORDS.

24 MR. LITTLEJOHN: YOUR HONOR, PERHAPS WE SHOULD ORDER
25 THE TRANSCRIPT AND SEE WHAT TRANSPIRED AT THAT HEARING. IT'S

1 MY UNDERSTANDING HE APPEARED IN GENERAL SESSIONS COURT
2 BECAUSE HE WAS CHARGED WITH ACCESSORY BEFORE THE FACT TO
3 MURDER.

4 THE COURT: AND A CIRCUIT JUDGE SET BOND?

5 MR. LITTLEJOHN: YES, YOUR HONOR. BUT IF THERE WERE
6 ANY SIDE DEALS OR ANYTHING ELSE THAT WAS INVOLVED IN THAT
7 BOND SETTING OTHER THAN WHAT'S ON THE RECORD, WE CERTAINLY
8 THINK WE'RE ENTITLED TO HAVE THAT INFORMATION.

9 THE COURT: I THINK YOU ARE, TOO, BUT IF IT'S -- IF
10 IT WAS DONE BY CONSENT, THEN YOU'VE GOTTEN YOUR ANSWER.
11 THERE WERE NO -- THERE WERE NO SIDE DEALS. IF IT WAS DONE BY
12 -- WITHOUT CONSENT, THEN IT BETTER -- EVERYTHING, I'M SURE,
13 IS ON THE PUBLIC RECORD.

14 MR. LITTLEJOHN: YOUR HONOR, I HOPE THAT'S A SAFE
15 ASSUMPTION ON THE COURT'S PART, BUT IF IT'S NOT, THAT'S
16 CERTAINLY INFORMATION WE THINK WE OUGHT TO HAVE. YOU KNOW,
17 OFTENTIMES THESE THINGS ARE TAKEN UP AT SIDE BAR, BACK IN
18 CHAMBERS OR WHATEVER, AND IF ANYTHING WAS DONE FOR THIS MAN
19 BY THE STATE, WE CERTAINLY THINK WE'RE ENTITLED TO KNOW THAT.

20 MR. GRAHAM: YOUR HONOR, I AGREE THAT THAT'S
21 IMPEACHMENT EVIDENCE; I UNDERSTAND THAT. I'LL GO BACK AND
22 CHECK TO SEE HOW THAT BOND WAS HANDLED, WHO DID IT IN OUR
23 OFFICE, AND IF I FIND OUT ANYTHING THAT NEEDS TO BE
24 DISCLOSED, I'LL DISCLOSE IT.

25 THE COURT: ALL RIGHT. ANYTHING FURTHER OTHER THAN

1 THE CONFLICT QUESTION?

2 MR. LITTLEJOHN: YOUR HONOR, THE ONLY OTHER THING
3 WE'RE -- WE WORKED THROUGH LUNCH TRYING TO PREPARE OUR
4 EXEMPTION CONSENT OR DISSENT, AND I'M STILL GOING THROUGH IT.
5 I DIDN'T REALIZE THERE WERE THAT MANY, BUT WE'LL GET IT TO
6 MS. CARRIGG.

7 THE COURT: THAT'S NOT SOMETHING THAT ABSOLUTELY HAS
8 TO BE DONE TODAY.

9 MR. LITTLEJOHN: ALL RIGHT.

10 THE COURT: I MEAN, YOU CAN -- YOU CAN GET THAT
11 DONE. JUST LET ME KNOW WHEN YOU GET IT DONE, HOPEFULLY OVER
12 THE NEXT DAY OR SO.

13 MR. LITTLEJOHN: THAT WOULD BE FINE. I UNDERSTOOD
14 THE CLERK'S OFFICE WOULD LIKE TO GET IT BACK TODAY. WE'LL
15 GET IT BACK AS SOON AS POSSIBLE.

16 THE COURT: I'M SURE THEY WOULD. AND I WOULD LIKE
17 TO HELP YOU, BUT YOU NEED -- YOU'VE GOT TO HAVE THE
18 APPROPRIATE AMOUNT OF TIME TO GET IT DONE.

19 MR. LITTLEJOHN: ALL RIGHT, SIR.

20 THE COURT: SO WE'RE NOT RUSHING YOU.

21 MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

22 MR. MYERS: ON THAT MATTER, WE GAVE OUR LIST TO THE
23 CLERK, AND THE ONLY ONES THAT WE DIDN'T MARK CONSENT ON WAS
24 SOME OF THEM THAT HAD MAYBE WORK PROBLEMS OR OTHER PROBLEMS
25 WHICH IS A GRAY AREA. HOPE TOLD US THAT IF WE WOULD LOOK AT

1 THEIR EXCUSES MAYBE WE COULD CONSENT TO THOSE, TOO. SO WE'LL
2 REVISIT THOSE. DEFENSE COUNSEL, IF THEY WANT TO LOOK AT OUR
3 LIST - MAYBE THEY ALREADY HAD IT - TO SEE IF ANY WE AGREE
4 ON... IF THERE'S QUESTIONS ABOUT OTHERS, IF THEY'LL TALK
5 WITH US, WE MIGHT CAN AGREE ON THOSE, TOO.

6 THE COURT: ALL RIGHT. WHAT THEY'RE GOING TO --
7 WHAT HOPE IS GOING TO DO IS ANY OF THE -- ANY ONES THAT YOU
8 DON'T BOTH AGREE TO RIGHT NOW WILL ALSO SHOW UP ON THE NEXT
9 LIST WHICH IS GOING TO BE READY FOR YOU ALL TO VIEW STARTING
10 MARCH 6TH. SO AFTER YOU ALL HAVE DONE THE CONSENT EXERCISE
11 ON MARCH 6TH AND 7TH AND I'VE SIGNED THE ORDER ON MARCH 8TH,
12 I WILL LOOK AT THOSE THAT YOU DID NOT CONSENT TO OR CONTINUE
13 LOOKING AT THOSE YOU DID NOT CONSENT TO. WE MAY HAVE A PHONE
14 CONFERENCE OR SOMETHING LIKE THAT OR MAYBE WE'LL TAKE IT UP
15 ON THE 23RD OR WHATEVER. WE'LL TRY TO GET THOSE DONE, BUT
16 WHATEVER ONES YOU CAN CONSENT TO, FINE.

17 THERE'S CERTAINLY NO PRESSURE ON YOU ALL TO CONSENT
18 TO SOMETHING YOU DON'T WANT TO CONSENT TO. IF YOU JUST AGREE
19 THAT THE PERSON IS ENTITLED TO BE EXCUSED, THEN MARK IT DOWN
20 AND WE'LL GO AHEAD AND EXCUSE THEM. OTHERWISE, WE'LL DEAL
21 WITH IT IN THE NORMAL -- AS WE NORMALLY DO.

22 MR. LITTLEJOHN: YOUR HONOR, THAT'S WHAT I'VE TRIED
23 TO DO. THE ONES THAT HAVE ASKED FOR EXEMPTIONS BECAUSE OF
24 AGE OR CHILDREN, OF COURSE, WE'RE CONSENTING TO THAT AND MOST
25 OF THE MEDICAL EXCUSES, BUT SOME OF THE WORK EXCUSES, AS MR.

1 MYERS SAID, WE, QUOTE, PROBABLY WOULD WANT TO TAKE THOSE UP.

2 THE COURT: OKAY. ALL RIGHT.

3 MR. LITTLEJOHN: FOR THE TIME BEING, I'M IN
4 AGREEMENT WITH THE SOLICITOR'S OFFICE ON ONE ISSUE.

5 THE COURT: ALL RIGHT. GOOD. ANYTHING ELSE THEN?

6 MR. GRAHAM: YES, YOUR HONOR. THE STATE HAS TWO
7 ISSUES. FIRST, OCTOBER 12TH, 2005, THE STATE FILED A
8 RECIPROCAL RULE 5. WE HAVE NOT RECEIVED ANYTHING FROM THE
9 DEFENSE. I JUST WANT TO MAKE SURE THAT THEY HAVE NOTHING AT
10 THIS TIME THAT NEEDS TO BE TURNED OVER TO US.

11 MS. KIMBROUGH: YOUR HONOR, WE HAVE NO REPORTS OR
12 ANYTHING ELSE THAT WOULD FALL UNDER THE RECIPROCAL RULE 5
13 OBLIGATION BY DEFENSE COUNSEL TO DISCLOSE. IF WE DO, WE
14 UNDERSTAND THAT WE'RE OBLIGATED TO TURN IT OVER AND WE'LL DO
15 SO.

16 THE COURT: ALL RIGHT.

17 MR. GRAHAM: THE SECOND THING, YOUR HONOR, I WOULD
18 ASK FOR IS I KNOW THAT THEY HAVE AT LEAST HAD AN INDEPENDENT
19 PSYCHIATRIC EXAM; I'M NOT SURE WHAT ELSE. AND I WOULD ASK
20 THAT YOUR HONOR ORDER THEM TO HAVE ALL OF THEIR EXPERTS WRITE
21 AN OPINION, WRITE A REPORT. IT'S A COMMON DEFENSE PRACTICE
22 NOT TO WRITE A REPORT AND THEN COME INTO TRIAL AND NOT HAVE
23 ONE, AND WE WOULD ASK THAT YOU ORDER THEM TO HAVE ANY EXPERT
24 WHO INTENDS TO TESTIFY TO WRITE A REPORT AND ALSO TO PRESERVE
25 THEIR NOTES.

1 MS. KIMBROUGH: YOUR HONOR, THERE'S ABSOLUTELY NO
2 BASIS FOR COMPELLING US TO PRODUCE REPORTS FROM OUR EXPERTS.

3 THE COURT: IF THEY'RE TESTIFYING EXPERTS.

4 MS. KIMBROUGH: WELL, IF -- IF WE DON'T WANT A
5 REPORT FROM A PARTICULAR EXPERT, I DON'T THINK THERE'S ANY
6 AUTHORITY FOR, YOU KNOW, THE POSITION THAT WE SHOULD HAVE TO
7 GET THEM IN DISCOVERY---

8 THE COURT: WELL, I'VE GOT SEVERAL QUESTIONS
9 BOUNCING AROUND IN HERE. ALL RIGHT. THE FIRST IS: IF
10 THEY'RE A NON-TESTIFYING EXPERT, YOU CAN DO WHATEVER YOU WANT
11 TO. YOU DON'T HAVE TO PRODUCE ANYTHING. IF THEY'RE A
12 TESTIFYING EXPERT WHO DOES A REPORT, DO YOU CONCEDE THAT THAT
13 REPORT MUST BE PRODUCED AS RECIPROCAL DISCOVERY?

14 MS. KIMBROUGH: YES. IF A REPORT IS REQUESTED AND
15 IT IS PRODUCED---

16 THE COURT: ALL RIGHT.

17 MS. KIMBROUGH: ---IT WILL BE GIVEN TO YOU.

18 THE COURT: AND IF IT'S A TESTIFYING EXPERT AND THE
19 EXPERT HAS NOTES, DO YOU AGREE THAT THOSE WOULD HAVE TO BE
20 PRODUCED?

21 MS. KIMBROUGH: I BELIEVE IF THE EXPERT RELIES ON
22 THOSE NOTES WHEN THEY TESTIFY, YES, THE STATE WOULD BE
23 ENTITLED TO REVIEW THAT INFORMATION PRIOR TO CROSS-
24 EXAMINATION.

25 THE COURT: WELL, WAIT A MINUTE NOW. LET'S -- IF

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1 THE EXPERT IS GOING TO TESTIFY AND THE EXPERT HAS MADE NOTES
2 ABOUT THE EXPERT'S WORK IN THE CASE, WOULD THOSE NOT ALL HAVE
3 TO BE PRODUCED?

4 MS. KIMBROUGH: I THINK THAT'S WHAT I JUST AGREED
5 TO.

6 THE COURT: YOU SAID IF THEY RELIED ON THEM.

7 MS. KIMBROUGH: RIGHT, IF THEY USED THEM, IF THEY
8 HAVE THEM UP THERE WITH THEM ON THE STAND.

9 THE COURT: WELL, THAT'S AN EVIDENTIARY QUESTION.
10 THAT'S -- THAT'S A REFRESHING RECOLLECTION UNDER WHATEVER
11 RULE NUMBER IT IS. I CAN'T -- 612 OR SOMETHING. BUT HE'S
12 TALKING ABOUT A DISCOVERY QUESTION. YOU HAVE ASKED FOR
13 DISCOVERY FROM THEIR EXPERTS WHICH THEN TURNS -- WHICH THEN
14 GIVES THEM THE RIGHT TO ASK FOR DISCOVERY FROM YOU, AND I'M
15 ASKING... I MEAN, IF YOU HAVE AN EXPERT WHO'S GOING TO
16 TESTIFY, ARE THEY NOT ENTITLED TO HAVE ANY REPORTS THAT THE
17 EXPERT DOES PREPARE OR ANY NOTES THAT THE EXPERT DOES MAKE
18 DURING THE COURSE OF THAT EXPERT'S WORK ON THE CASE?

19 MS. KIMBROUGH: I BELIEVE THEY WOULD HAVE -- THAT
20 THEY WOULD BE CLEARLY ENTITLED TO A COPY OF ANY REPORTS THAT
21 ARE GENERATED. HOWEVER, THE NOTES -- IT'S A LITTLE MORE
22 PROBLEMATIC. YOU KNOW, THERE MAY BE SOME PRIVILEGED
23 INFORMATION IN THERE: THERE MAY BE INFORMATION THAT DOESN'T
24 HAVE ANYTHING TO DO WITH WHAT THEY ULTIMATELY TESTIFY TO.

25 THE COURT: ALL RIGHT. WELL, THEN YOU WOULD -- ALL

1 RIGHT. IF THAT'S TRUE THOUGH, YOU'VE GOT TO DISCLOSE IN A
2 WAY OF SOME -- IN SOME TYPE OF PRIVILEGED LOG TYPE DISCLOSURE
3 WHAT'S THERE AND WHAT'S THE BASIS FOR IT BEING WITHHELD.

4 MS. KIMBROUGH: YES, YOUR HONOR.

5 THE COURT: SO THEY CAN DECIDE WHETHER OR NOT TO
6 CHALLENGE IT IF THEY -- IF THEY WANT TO.

7 MS. KIMBROUGH: YES, YOUR HONOR.

8 THE COURT: AND THE SAME GOES FOR THEM. ALL RIGHT.
9 IS THAT SATISFACTORY?

10 MR. GRAHAM: YOUR HONOR, THE ONLY THING I WOULD SAY
11 IS THE REASON WE ASKED FOR IT IS BECAUSE DURING THE TRIAL
12 THEY'RE GOING TO PUT AN EXPERT UP, IF THEY DO. THEN WE HAVE
13 TO TAKE A BREAK, AND WE NEED TIME TO GO THROUGH ALL THOSE
14 NOTES BECAUSE THEY'RE NOT WRITING THE REPORT NOW, AND THAT
15 JUST SLOWS DOWN THE TRIAL PROCESS. THAT'S WHY WE'RE
16 ASKING... IF THEY WROTE A REPORT, THE PRIVILEGED INFORMATION
17 THAT MS. KIMBROUGH IS REFERRING TO WOULDN'T BE IN THE REPORT.
18 SO WHAT WE WOULD LIKE IS TO HAVE THEM WRITE A REPORT AND THEN
19 PRESERVE THEIR NOTES, AND IF THEIR NOTES BECOME NECESSARY FOR
20 US TO LOOK AT, WE COULD DO IT AT THAT TIME.

21 THE COURT: WELL, WE HAVEN'T GOTTEN TO THE QUESTION
22 YET OF MAKING THE EXPERT WRITE A REPORT THE EXPERT WOULD NOT
23 OTHERWISE WRITE, SO... BUT IN TERMS OF -- OF -- AND SHORT OF
24 THAT QUESTION IS SHE'S AGREED TO PRODUCE THE REPORT THE
25 EXPERT CHOOSES TO MAKE AND TO PRODUCE ALL NOTES THAT ARE NOT

1 PRIVILEGED AND TO MAKE A LOG OF THOSE NOTES THAT ARE WITHHELD
2 BASED ON PRIVILEGE. IS THERE ANYTHING MORE SHE CAN DO?

3 MR. GRAHAM: ONLY WE JUST WOULD LIKE TO HAVE THOSE
4 NOTES AS SOON AS POSSIBLE. WE ALSO WOULDN'T WANT TO WAIT
5 UNTIL THE WITNESS TESTIFIED. WE'D LIKE TO HAVE AN
6 OPPORTUNITY TO REVIEW THOSE NOTES BEFOREHAND SO THAT WE COULD
7 PREPARE.

8 THE COURT: OKAY. I DON'T ANTICIPATE THAT BEING A
9 PROBLEM. I MEAN, I -- I -- I DO NOT WANT DISCOVERY TO BE A
10 PROBLEM EITHER WAY. I WANT TO BE VERY CLEAR ON THAT. WE'LL
11 GET -- I WANT TO GET BACK ACTUALLY IN A MINUTE TO THE -- TO
12 THE QUESTION OF DISCOVERY. I'D KIND OF LIKE FOR BOTH SIDES
13 -- CERTAINLY THE STATE BECAUSE I JUST TALKED TO YOU ABOUT
14 MAKING THAT INQUIRY OF YOUR LAW ENFORCEMENT AGENCIES. I'D
15 LIKE FOR YOU TO BE IN A POSITION OF KNOWING IN ADVANCE OF
16 THIS HEARING WE'RE GOING TO HAVE ON THE 23RD OF MARCH WHETHER
17 OR NOT THERE IS ANYTHING THAT IS GOING TO BE WITHHELD SO THAT
18 WE CAN LITIGATE IT AT THAT TIME AND THAT IF I RULE THAT IT'S
19 TO BE PRODUCED, THERE WILL BE PLENTY OF TIME FOR IT TO BE
20 PRODUCED AND FOR THEM TO DIGEST IT AND USE IT TO GET READY
21 FOR TRIAL.

22 BUT AS FAR AS -- AND AS FAR AS Y'ALL'S STUFF, WE'VE
23 SET UP THE SCHEDULE FOR THE WORK TO BE DONE BY YOUR EXPERTS
24 IN PLENTY OF TIME FOR THEM TO BE READY FOR TRIAL. SO IF
25 THERE IS ANYTHING THAT NEEDS TO BE PRODUCED, IT NEEDS TO BE

1 DONE IN A TIMELY MANNER, AND IF YOU'RE GOING TO WITHHOLD
2 SOMETHING, THE LOG OF WHAT'S BEING WITHHELD NEEDS TO BE
3 PRODUCED IN A TIMELY MANNER SO THAT WE CAN LITIGATE THAT.
4 AND I WOULD ALSO EXPECT THAT THAT WOULD BE SOMETHING THAT WE
5 WOULD BE ABLE TO HANDLE AND RESOLVE ON THE 23RD.

6 SO I'M THINKING IF THERE'S A DISCOVERY ISSUE OUT
7 THERE ANYWHERE ON EITHER SIDE, WE'RE GOING TO RESOLVE IT ON
8 THE 23RD, AND IF IT DOESN'T GET RESOLVED ON THE 23RD, I'M
9 GOING TO HAVE SOME VERY DIFFICULT QUESTIONS AS TO WHY IT
10 WASN'T, AND I DON'T ANTICIPATE THAT'S GOING TO BE A PROBLEM.
11 OKAY.

12 MS. KIMBROUGH: YOUR HONOR, THERE IS ONE THING I'D
13 LIKE TO NOTE IN THAT REGARD. ONE OF THE EXPERTS THAT WE WERE
14 RECENTLY ADVISED WE NEEDED ON THIS CASE THAT WE BROUGHT UP
15 WITH YOUR HONOR IN THE EX PARTE FUNDING MOTION, THIS PERSON
16 IS NOT GOING TO BECOME INVOLVED OR CANNOT, IN FACT, DO THEIR
17 WORK UNTIL VERY CLOSE TO THE TRIAL. IN FACT, I SUSPECT WE
18 WON'T HAVE ANYTHING FROM THEM UNTIL THE BEGINNING OF JURY
19 SELECTION. NOW, OBVIOUSLY THAT'S LIKE SEVEN DAYS BEFORE THE
20 GUILT PHASE STARTS APPROXIMATELY, ASSUMING WE START ON THE
21 17TH, AND I WILL PROMISE THAT AS SOON AS WE HAVE SOMETHING
22 THE STATE WILL HAVE IT.

23 THE COURT: OKAY. WELL, YOU ALSO IF YOU DON'T -- I
24 WOULD REQUEST THAT YOU MAKE ABSOLUTELY SURE THAT THAT EXPERT
25 IS GOING TO BE READY TO DO THE WORK BECAUSE IF YOU'RE NOT

1 ABSOLUTELY SURE OF IT, YOU CAN GO GET A DIFFERENT EXPERT, AND
2 IF YOU COME TO ME ON THE MORNING OF JURY SELECTION AND SAY,
3 "OOPS, THE EXPERT WAS NOT ABLE TO GET THE WORK DONE," I'M
4 GOING TO BE INCLINED TO SAY, "TOUGH." AND SO YOU -- YOU
5 KNOW, KNOWING THAT YOU FACE THAT PROBLEM, YOU MAKE SURE
6 THAT'S NOT GOING TO BE A PROBLEM.

7 MS. KIMBROUGH: IT WILL NOT BE A PROBLEM. IF IT IS,
8 WE'LL TAKE CARE OF IT IN THE NEXT WEEK.

9 THE COURT: OKAY. AND NOW WE GET TO THE QUESTION OF
10 WHETHER OR NOT I HAVE THE AUTHORITY TO FORCE THE EXPERT TO
11 WRITE A REPORT THAT THE EXPERT WOULD NOT OTHERWISE WRITE AND,
12 IF I DO, SHOULD I EXERCISE IT? ANYTHING YOU WANT TO SAY?

13 MR. GRAHAM: I KNOW THAT THE LAST TRIAL WE HAD THE
14 JUDGE ORDERED IT. I DON'T KNOW OF ANY STATUTE THAT GIVES YOU
15 THE AUTHORITY. I BELIEVE THAT THERE'S REFERENCE TO IT IN
16 SOME CASE LAW THAT SAYS THAT IT'S BEEN DONE, BUT I CAN'T CITE
17 ANYTHING TO YOU AT THIS TIME.

18 MR. MYERS: STATE VERSUS HALL.

19 THE COURT: STATE VERSUS WHAT?

20 MR. MYERS: HALL. H-A-L-L.

21 THE COURT: ALL RIGHT. I WILL -- I'LL BE HAPPY TO
22 READ STATE VERSUS HALL. WHY DON'T WE PUT THAT DOWN AS
23 SOMETHING TO DEAL WITH? LET'S SEE. IF WE DID IT ON THE
24 23RD, THAT LEAVES TWO AND A HALF WEEKS BEFORE TRIAL -- BEFORE
25 JURY SELECTION. AND YOUR CONCERN IS GETTING IT IN TIME TO --

1 TO UNDERSTAND WHAT IS THE SUBSTANCE OF THE EXPERT'S OPINION
2 TO AVOID HAVING TO TAKE A BREAK IN THE MIDDLE OF TRIAL SO
3 THAT IF YOU GOT IT -- IF YOU GOT IT OVER THE WEEKEND BEFORE,
4 SAY, THE 14TH, 15TH, 16TH OF APRIL, THAT WOULD BE GOOD
5 ENOUGH, WOULDN'T IT?

6 MR. GRAHAM: THE SOONER THE BETTER BUT, YES, YOUR
7 HONOR. I THINK WE WOULD JUST NEED AN OPPORTUNITY SO THAT WE
8 DON'T SLOW DOWN THE TRIAL SO WE DON'T HAVE TO MAKE -- SO THAT
9 WE DON'T SEE SOMETHING THAT WE HAVE TO GO TALK TO OUR OWN
10 EXPERT ON. SO OBVIOUSLY THE SOONER THE BETTER.

11 THE COURT: YEAH. I KEEP SAYING THE 23RD, AND THE
12 CLERK JUST POINTED OUT TO ME THAT IT'S MARCH THE 30TH THAT WE
13 HAVE ANOTHER SET OF HEARINGS SCHEDULED. NO, I DIDN'T CHANGE
14 IT; I JUST WAS WRONG ABOUT THE DATE. THANK YOU.

15 MR. GRAHAM: YOUR HONOR, THE ONLY THING I COULD
16 SUGGEST IS IF YOU WANT TO TRY TO DO THE CONFLICT, IF WE COULD
17 TAKE A FEW-MINUTE BREAK, MAYBE WE COULD CALL BACK OVER TO THE
18 PUBLIC DEFENDER'S OFFICE AND SEE IF WE COULD GET A HOLD OF
19 MS. FULLWOOD AND MS. MCPHERSON---

20 THE COURT: SHE'S HERE.

21 MR. GRAHAM: ONE OF THEM IS. AND THEN IN THE
22 MEANTIME, I CAN GO PULL THAT COPY OF THE CASE LAW FOR YOU.

23 THE COURT: THAT'S OKAY. WE'LL -- WE'LL -- I DON'T
24 THINK THAT'S SOMETHING WE HAVE TO -- I THINK I HAVE TIME -- I
25 WANT TIME TO THINK ABOUT THAT BEFORE I DECIDE WHAT TO DO

1 ABOUT THAT: SO ANYTHING FURTHER OTHER THAN THE CONFLICT
2 QUESTION?

3 MR. GRAHAM: NO, YOUR HONOR.

4 THE COURT: OKAY. FROM THE DEFENSE?

5 MS. KIMBROUGH: NOT AT THIS TIME, YOUR HONOR.

6 THE COURT: OKAY. THEN LET'S DEAL WITH THE CONFLICT
7 QUESTION. IS IT -- DO WE THINK EVERYBODY IS HERE? I MEAN,
8 YOU REP -- YOU REPRESENT MR. MERCER, AND YOU'RE INVOLVED IN
9 THE -- EVEN THOUGH YOU DON'T -- EVEN THOUGH YOU'RE NOT
10 APPOINTED IN THE LYNCHING CASE, YOU -- YOU REPRESENT HIM
11 HERE. CAN YOU -- CAN YOU REPRESENT HIM IN ALL RESPECTS THAT
12 ARE NECESSARY IN ORDER TO DEAL WITH THIS NOW?

13 MS. KIMBROUGH: I'M NOT SURE I UNDERSTAND YOUR
14 QUESTION EXACTLY.

15 THE COURT: ARE WE READY TO GO FORWARD WITHOUT MS.
16 MCPHERSON?

17 MS. KIMBROUGH: I BELIEVE WE ARE. I MEAN, I'VE
18 SPOKEN TO HER AND, YOU KNOW, EXPRESSED TO HER WHAT MY
19 CONCERNS WERE ABOUT THE CONFLICT. I THINK MS. FULLWOOD CAN
20 CERTAINLY ANSWER -- FILL IN ANY GAPS. SHE REPRESENTS A MAN
21 WHO IS A WITNESS AGAINST MR. MERCER. OBVIOUSLY MS. FULLWOOD
22 AND MS. MCPHERSON ARE IN THE SAME OFFICE.

23 THE COURT: SHE REPRESENTS -- YOU REPRESENT -- DO
24 YOU KNOW WHAT WE'RE TALKING ABOUT, MS. FULLWOOD?

25 MS. FULLWOOD: NOT A THING, NO, SIR.

1 THE COURT: SOMEBODY EXPLAIN THE CONTEXT TO HER SO
2 SHE'S UP TO SPEED REAL QUICKLY.

3 MR. GRAHAM: YOUR HONOR, THERE IS -- ONE OF THE
4 INMATES WHO WAS IN JAIL WITH MR. MERCER AT THE TIME IS AN
5 INDIVIDUAL NAMED DARRELL WILLIAMS. HE HAS PENDING CHARGES IN
6 OUR OFFICE, AND MS. FULLWOOD REPRESENTS MR. WILLIAMS ON THE
7 CHARGES THAT ARE PENDING IN OUR OFFICE, AND HE IS A POTENTIAL
8 WITNESS IN MR. MERCER'S CASE.

9 THE COURT: ALL RIGHT. DOES THAT RING A BELL TO
10 YOU?

11 MS. FULLWOOD: I DO REPRESENT DARRELL WILLIAMS. I
12 WAS NOT AWARE THAT HE WAS A WITNESS IN THIS CASE.

13 THE COURT: I MEAN, IN THE COURSE OF YOUR
14 REPRESENTATION OF DARRELL WILLIAMS HAVE YOU KEPT -- HAVE YOU
15 BEEN GIVEN ANY INFORMATION AT ALL THAT RELATES TO HIS
16 TESTIMONY IN THE LYNCHING AND ABWIK CASE THAT MR. MERCER HAS
17 PENDING BEFORE THE COURT THAT'S EXPECTED TO BE TRIED ON
18 MARCH 13TH?

19 MS. FULLWOOD: WITHOUT REVIEWING THE FILE, I CANNOT
20 TELL YOUR HONOR FOR SURE. I DON'T RECOLLECT ANYTHING THOUGH.

21 THE COURT: ALL RIGHT. WHAT'S -- WHAT'S -- WHAT'S
22 THE STATUS OF MR. WILLIAMS' CASES? ARE THEY UP FOR TRIAL
23 RIGHT AWAY?

24 MR. GRAHAM: NO, YOUR HONOR. I DON'T KNOW HIS DATE
25 OF ARREST EVEN. I CAN'T TELL YOU -- I KNOW THEY'RE NOT

1 PENDING FOR TRIAL AT THIS MOMENT.

2 MS. FULLWOOD: IT'S AN OLDER CASE. AT THIS TIME
3 HE'S OUT ON BOND. I KNOW MS. AVINGER HAS LET ME KNOW SHE
4 WANTS TO TRY TO DISPOSE OF THE MATTER IN THE FORESEEABLE
5 FUTURE. I BELIEVE THERE'S AN OUTSTANDING MOTION TO ENFORCE A
6 PLEA BARGAIN IN THE CASE.

7 THE CLERK: YOUR HONOR, LISA MCPHERSON IS ON HER
8 WAY.

9 THE COURT: OKAY. OKAY. HAVE YOU HAD ANY -- ANY
10 CONVERSATIONS WITH -- HAVE YOU BEEN INVOLVED IN ANY
11 DISCUSSIONS WITH THE STATE ABOUT THE STATE VERSUS KEVIN
12 MERCER, THE ABWIK AND LYNCHING CHARGES?

13 MS. FULLWOOD: NOT THAT I RECOLLECT, YOUR HONOR.
14 THE REASON I'M HESITATING IS THAT I HAVEN'T REVIEWED THE
15 FILE. MR. WILLIAMS' CASE IS AN OLD CASE. IT'S SEVERAL YEARS
16 OLD, SO I CAN'T TELL YOU FOR SURE IF THREE OR FOUR YEARS BACK
17 I DIDN'T, BUT NOTHING RECENTLY.

18 THE COURT: WELL, THIS -- THE LYNCHING CASE IS
19 BRAND-NEW, ISN'T IT?

20 MR. GRAHAM: 2004, YOUR HONOR. IT'S APPROXIMATELY
21 TWO YEARS OLD. JANUARY 14TH, I THINK, OF 2004.

22 MS. FULLWOOD: AND I THINK I CAN FAIRLY CONFIDENTLY
23 SAY THAT I HAVE NOT.

24 THE COURT: YOU HAVE NOT?

25 MS. FULLWOOD: THAT'S CORRECT.

1 THE COURT: HAVE YOU HAD ANY CONVERSATION WITH MS.
2 MCPHERSON THAT YOU KNOW OF ABOUT THE CASE OF STATE VERSUS
3 KEVIN MERCER, THE LYNCHING AND ABWIK CASE?

4 MS. FULLWOOD: YES, SIR.

5 THE COURT: YOU HAVE?

6 MS. FULLWOOD: YES, SIR.

7 THE COURT: HAVE YOU TALKED ABOUT YOUR CLIENT'S
8 TESTIMONY IN THAT CASE?

9 MS. FULLWOOD: NO. UP UNTIL I WAS HERE THIS
10 AFTERNOON I HAD NO IDEA THAT HE WAS A WITNESS.

11 THE COURT: OKAY.

12 MS. FULLWOOD: WE JUST BASICALLY DISCUSSED THE
13 GENERAL FACTUAL SCENARIO OF HIS CASE.

14 THE COURT: AND IN THOSE DISCUSSIONS THERE WAS
15 OBVIOUSLY NO DISCUSSION ABOUT YOUR CLIENT BEING A WITNESS
16 BECAUSE YOU DIDN'T KNOW IT.

17 MS. FULLWOOD: THAT'S RIGHT. WE DID NOT NAME THE
18 INDIVIDUALS INVOLVED, JUST---

19 THE COURT: OKAY.

20 MS. FULLWOOD: ---GENERAL SPEAKING.

21 THE COURT: ALL RIGHT. MS. MCPHERSON, DO YOU HAVE
22 SOMETHING YOU WANT TO SAY?

23 MS. MCPHERSON: YOUR HONOR, I APOLOGIZE. I WASN'T
24 AWARE THAT THERE WAS A HEARING. I HAD JUST GONE TO LUNCH
25 BUT---

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1 THE COURT: IT'S OKAY.

2 MS. MCPHERSON: I DID BECOME AWARE FOR THE FIRST
3 TIME WHEN MS. KIMBROUGH TOLD ME THIS MORNING - I SAW HER HERE
4 JUST AT FIRST APPEARANCES - THAT THERE WAS A POSSIBLE
5 CONFLICT WITHIN OUR OFFICE. I HAVE NOT HAD A CHANCE TO TALK
6 TO MS. FULLWOOD ABOUT IT. I DID TALK TO THE SOLICITOR AND
7 TELL HIM THAT THERE MAY BE SOME ISSUE ABOUT THAT.

8 THE COURT: NOW, BASED ON WHAT WE'VE HEARD, IS IT
9 NOT TRUE THAT WHAT WE'RE DEALING WITH IS A POTENTIAL CONFLICT
10 AT THIS MOMENT AND -- AND -- AND THAT CAN BE -- THAT COULD
11 NOT -- THAT COULD BE RESOLVED BY -- THAT COULD BE RESOLVED
12 AND KEEP MS. MCPHERSON ON THE CASE?

13 MS. KIMBROUGH: I AM NOT ABSOLUTELY CERTAIN OF THAT.
14 I WILL TELL YOU THAT OUR INVESTIGATOR -- OBVIOUSLY MS.
15 FULLWOOD HASN'T GOTTEN A COPY OF THE LETTER YET, BUT SHE HAS
16 SENT A LETTER ASKING TO SPEAK TO MR. WILLIAMS, AND OBVIOUSLY
17 MS. FULLWOOD IS GOING TO HAVE TO MAKE A DETERMINATION AS TO
18 WHETHER OR NOT SHE'S GOING TO LET HER CLIENT SPEAK TO US.
19 BUT, I MEAN, ESSENTIALLY WHAT YOU'RE GOING TO HAVE IS TWO
20 ATTORNEYS IN THE SAME OFFICE REPRESENTING MUTUALLY-
21 CONFLICTING INTERESTS. WE ARE GOING TO WANT TO TALK TO MR.
22 WILLIAMS.

23 THE COURT: WELL---

24 MS. KIMBROUGH: MS. FULLWOOD IS GOING TO HAVE TO
25 MAKE THE DETERMINATION---

1 THE COURT: ALL RIGHT. IF I RELIEVE MS. FULLWOOD
2 AND APPOINT -- AND APPOINT COUNSEL TO REPRESENT MR. WILLIAMS
3 OUTSIDE OF THE PUBLIC DEFENDER'S OFFICE, WOULD THAT NOT TAKE
4 CARE OF ALL THE PROBLEMS?

5 MS. KIMBROUGH: ASSUMING THERE ARE NO WITNESSES
6 REPRESENTED BY THE PUBLIC DEFENDER'S OFFICE. I MEAN,
7 OBVIOUSLY---

8 THE COURT: THAT WOULD SOLVE THE PROBLEM.

9 MS. MCPHERSON: JUDGE, THERE'S ONE OTHER ISSUE. I
10 APOLOGIZE. I DON'T KNOW WHETHER IT'S BEEN BROUGHT UP AT ALL.
11 I WILL BE LEAVING THE PUBLIC DEFENDER'S OFFICE THE END OF
12 MARCH, AND I'VE TALKED TO THE SOLICITOR. I MEAN, I CERTAINLY
13 WOULD BE PREPARED TO GO FORWARD ON THE 13TH, YOU KNOW, IN A
14 VACUUM. I'M NOT SURE WHAT ALL HAS OCCURRED HERE TODAY. I
15 KNOW THERE IS A SITUATION -- I'VE TALKED TO THE SOLICITOR
16 ABOUT THE FACT THAT HE'S BEING EVALUATED AND THAT THAT IS
17 SOMETHING WE'RE GOING TO HAVE TO CONSIDER AND GET REPORTS
18 BACK BEFORE WE CAN EVEN GO FORWARD ON THE LYNCHING WHICH IS
19 SCHEDULED FOR THE 13TH OF MARCH.

20 I WILL BE LEAVING THE END OF MARCH. THE PUBLIC
21 DEFENDER -- OF COURSE, WE'RE APPOINTED STILL ON THE LYNCHING.
22 I JUST WANT TO BRING THAT TO THE COURT'S ATTENTION BECAUSE
23 THAT'S -- WHETHER I WOULD TAKE THAT CASE WITH ME WHEN I LEAVE
24 THE PUBLIC DEFENDER'S OFFICE IS AN ISSUE, IF IT ISN'T TRIED
25 THE 13TH, OR WHETHER IT WOULD REMAIN IN THE PUBLIC DEFENDER'S

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1 OFFICE, I DON'T KNOW. I'M CERTAINLY HAPPY TO---

2 THE COURT: OKAY.

3 MS. MCPHERSON: ---REMAIN ON IT.

4 THE COURT: I THINK THAT'S A SEPARATE QUESTION

5 ALTOGETHER. THE QUESTION AT THIS POINT IS -- IS: IS THERE A
6 CONFLICT? IS IT ACTUAL OR POTENTIAL? AND CAN IT BE RESOLVED
7 IN THE MANNER THAT I JUST PROPOSED OR IN SOME OTHER WAY? YOU
8 REPRESENT MR. MERCER NOW. DOES IT -- DOES WHAT I JUST
9 PROPOSED RESOLVE THE CONFLICT?

10 MS. KIMBROUGH: BEG THE COURT'S INDULGENCE.

11 THE COURT: CERTAINLY.

12 (WHEREUPON, AN OFF-THE-RECORD DISCUSSION TOOK PLACE
13 BETWEEN MR. LITTLEJOHN, MS. KIMBROUGH, MS. FULLWOOD, AND MS.
14 MCPHERSON.)

15 MS. FULLWOOD: IF YOUR HONOR PLEASE, IF I COULD BE
16 HEARD.

17 THE COURT: CERTAINLY.

18 MS. FULLWOOD: I HAVE PROBLEMS WITH MY OFFICE
19 REPRESENTING MR. MERCER ON THIS CHARGE. EVEN IF YOU CONFLICT
20 OUT DARRELL WILLIAMS AND HAVE SOMEONE FROM MY OFFICE REMAIN
21 ON THE CASE, THE FACT REMAINS THAT THERE REMAINS IN MY OFFICE
22 A FILE ON DARRELL WILLIAMS. THERE WILL BE THE APPEARANCE
23 THAT THE LAWYER REPRESENTING MR. MERCER WOULD HAVE ACCESS TO
24 THAT FILE TO DEVELOP CROSS-EXAMINATION, TO DEVELOP LINES OF
25 IMPEACHMENT, AND TO GENERALLY DISCREDIT HIM THROUGH THE USE

1 OF CLIENT CONFIDENCES THAT ARE CONTAINED IN THAT FILE. IN
2 ADDITION, JUDGE, I THINK THERE'S---

3 THE COURT: LET'S -- TAKING IT ONE STEP AT A TIME, I
4 CERTAINLY ANTICIPATED THAT. THAT'S WHY I ASKED THE QUESTION
5 -- THE QUESTIONS RELATED TO WHETHER YOU ALL HAD TALKED ABOUT
6 IT, WHETHER OR NOT MS. MCPHERSON HAS IN THE PAST HAD ACCESS
7 TO ANY OF THAT INFORMATION, AND APPARENTLY AS OF NOW THE
8 ANSWER IS NO.

9 MS. FULLWOOD: THAT'S RIGHT.

10 THE COURT: ALL RIGHT. SO I -- I DON'T THINK
11 THERE'S ANY PROBLEM WITH ME ORDERING THAT THOSE CONVERSATIONS
12 NOT TAKE PLACE, THAT THAT FILE NOT BE AVAILABLE TO MS.
13 MCPHERSON OR TO ANYONE ELSE THAT MIGHT REPRESENT MR. MERCER,
14 AND TAKING WHATEVER OTHER STEPS ARE NECESSARY TO PREVENT
15 THERE BEING ANY ACCESS TO THE CONFIDENCES THAT MR. WILLIAMS
16 HAD AND ALSO TO MAKE IT CLEAR IN THE PUBLIC RECORD THAT THERE
17 HAS NOT BEEN ANY SUCH ACCESS. THAT'S THE OLD CONCEPT OF A
18 CHINESE WALL, I THINK.

19 MS. FULLWOOD: I UNDERSTAND THAT, YOUR HONOR. WHAT
20 CONCERNS ME IS THAT THERE ARE GOING TO BE THOSE TYPE OF
21 IMPLICATIONS PERHAPS IN THE MIND OF DARRELL WILLIAMS IF HE
22 TESTIFIES AS A WITNESS IN THIS CASE. FURTHER, YOUR HONOR, IF
23 A LAWYER IN MY OFFICE REPRESENTS MR. MERCER IN THE LYNCHING
24 TRIAL, THAT LAWYER IS GOING TO BE PRECLUDED FROM DOING
25 EVERYTHING THEY CAN TO DEVELOP CROSS-EXAMINATION AGAINST MR.

1 WILLIAMS BECAUSE, YOU KNOW, IF THEY DID EVERYTHING THEY COULD
2 THEY WOULD GO IN THAT FILE. OF COURSE, THEY CAN'T GO IN THAT
3 FILE. SO MR. MERCER IS GOING TO BE IN A POSITION OF SAYING,
4 WELL, THAT---

5 THE COURT: I'M NOT -- I'M NOT -- I'M NOT GOING TO
6 ALLOW YOU TO SPEAK ON MR. MERCER'S BEHALF. OKAY? LET'S STOP
7 THAT RIGHT NOW. IF MS. MCPHERSON WANTS TO SPEAK ON MR.
8 MERCER'S BEHALF, I'LL BE HAPPY TO HEAR FROM HER.

9 MS. FULLWOOD: I'M SORRY. I'M TRYING TO SPEAK
10 THEORETICALLY. I GUESS I'M...

11 THE COURT: I UNDERSTAND.

12 MS. FULLWOOD: THAT THE CLIENT WHO IS GOING
13 REPRESENTED BY THE LAW OFFICE THAT IS IN THE POSITION OF
14 CROSS-EXAMINATION -- CROSS-EXAMINING A FORMER CLIENT, THAT
15 TYPE OF A CLIENT MIGHT LATER SAY THAT THEY WERE NOT GIVEN A
16 VIGOROUS DEFENSE BECAUSE OF THAT FACT. I THINK THAT COULD BE
17 A PROBLEM IN THE FUTURE.

18 THE COURT: OKAY. ALL RIGHT.

19 MS. FULLWOOD: IF I COULD SAY ONE MORE THING.

20 THE COURT: ALL RIGHT.

21 MS. FULLWOOD: I THINK ANOTHER PROBLEM THAT MIGHT
22 ARISE IN THAT GENERAL TYPE OF SITUATION---

23 THE COURT: WELL, THIS IS WHAT I WANT TO DO AND I --
24 IF YOU WANT -- ANYTHING YOU WANT TO SAY ON BEHALF OF MR.
25 WILLIAMS, I WANT TO HEAR FROM YOU. ANYTHING THAT THE OFFICE

1 OF THE PUBLIC DEFENDER WANTS TO SAY ON BEHALF OF MR. MERCER,
2 I WANT TO HEAR FROM MS. MCPHERSON.

3 MS. FULLWOOD: YES, SIR. THAT'S FINE. I THINK MR.
4 WILLIAMS IS ENTITLED TO OUR COMPLETE LOYALTY, AND HE IS ALSO
5 ENTITLED FOR US TO DO EVERYTHING WE CAN ON HIS BEHALF TO GET
6 HIM A FAVORABLE RESOLUTION OF HIS CASE. IF WE REPRESENT BOTH
7 OF THEM SIMULTANEOUSLY, WE CANNOT DO THAT ON BEHALF OF MR.
8 WILLIAMS.

9 THE COURT: AND FROM -- CAN I ASK YOU A QUESTION?
10 FROM THE STANDPOINT OF MR. WILLIAMS, WOULD -- AND YOUR -- IF
11 I SAY THAT I BELIEVE THAT THE PUBLIC DEFENDER SHOULD BE
12 RELIEVED OF REPRESENTATION OF MR. WILLIAMS IN ORDER TO INSURE
13 THAT HE GETS JUST WHAT YOU SAID HE IS ENTITLED TO, WOULD YOU
14 HAVE ANY RESPONSE TO THAT?

15 MS. FULLWOOD: NO, SIR. I THINK THAT WOULD BE A
16 MATTER WITHIN -- WITHIN YOUR DISCRETION---

17 THE COURT: ALL RIGHT.

18 MS. FULLWOOD: ---OBVIOUSLY.

19 THE COURT: ALL RIGHT. WELL, I THINK -- I THINK
20 THAT'S WHAT I'M GOING TO DO. I THINK I'M GOING TO RELIEVE
21 THE PUBLIC DEFENDER, RELIEVE YOU, RELIEVE YOUR OFFICE, FROM
22 REPRESENTING MR. WILLIAMS AND INSTRUCT THE CLERK OF COURT TO
23 APPOINT COUNSEL FROM OUTSIDE YOUR OFFICE, AND THEN THAT --
24 THEN IT BECOMES A QUESTION NOW OF HEARING ON BEHALF OF MR.
25 MERCER AS TO WHAT ELSE---

1 MS. FULLWOOD: YES, SIR.

2 THE COURT: ---AS TO WHAT ELSE WE DO.

3 MS. FULLWOOD: ALL RIGHT. THANK YOU, SIR.

4 THE COURT: AND NOW -- NOW THAT WE'VE CLEARED UP THE

5 FACT THAT THERE HAS NOT BEEN ANY TYPE OF COMMUNICATION

6 BETWEEN YOU AND MS. MCPHERSON ABOUT MR. WILLIAMS' INVOLVEMENT

7 IN MR. MERCER'S CASE, I THINK YOU'RE FREE TO DO WHATEVER YOU

8 -- YOU KNOW, YOU CAN SAY WHATEVER YOU WANT NOW ON BEHALF OF

9 MR. MERCER OR I'LL HEAR FROM MS. MCPHERSON OR FROM MS.

10 KIMBROUGH OR MR. LITTLEJOHN OR WHATEVER, WHOEVER.

11 MS. FULLWOOD: WELL, IF I COULD BEG THE COURT'S

12 INDULGENCE AND---

13 THE COURT: SURE.

14 MS. FULLWOOD: ---CONSULT WITH THOSE FOLKS.

15 THE COURT: ALL RIGHT. I'M GOING TO STEP OFF THE

16 BENCH FOR ONE SECOND AND BE RIGHT BACK.

17 (PAUSE IN PROCEEDINGS.)

18 THE COURT: KEEP YOUR SEATS. OKAY. LET ME -- LET

19 ME SAY BEFORE Y'ALL -- BEFORE YOU NEXT GO TO SPEAK ON BEHALF

20 OF MR. MERCER, LET ME -- LET ME SAY WHAT I THINK HAS JUST

21 HAPPENED AND SEE IF ANYBODY DISAGREES. THERE WAS A --

22 BECAUSE OF THE REPRESENTATION BY THE PUBLIC DEFENDER'S OFFICE

23 OF MR. MERCER ON THE LYNCHING AND -- IS IT ABWIK?

24 MR. LITTLEJOHN: YES, YOUR HONOR.

25 THE COURT: ALL RIGHT. ON THE LYNCHING AND ABWIK

1 CHARGE AND BECAUSE OF THE REPRESENTATION BY THE PUBLIC
2 DEFENDER'S OFFICE OF SOMEONE NAMED WILLIAMS -- MARCUS
3 WILLIAMS?

4 MS. FULLWOOD: DARRELL WILLIAMS.

5 THE COURT: DARRELL WILLIAMS? WHO IS A POTENTIAL
6 WITNESS IN THAT CASE, IN THE LYNCHING AND ABWIK CASE, THERE
7 EXISTED A POTENTIAL CONFLICT OF INTEREST. THAT CONFLICT
8 NEVER BECAME AN ACTUAL CONFLICT BECAUSE Y'ALL NEVER KNEW
9 ABOUT IT REALLY AND YOU NEVER REPRESENTED -- YOU NEVER
10 ACTIVELY REPRESENTED THOSE CONFLICTING INTERESTS. BY
11 RELIEVING MS. FULLWOOD OF HER REPRESENTATION OF DARRELL
12 WILLIAMS AND NOW APPOINTING SOMEONE NAMED THERESA JOHNS WHICH
13 THE CLERK IS GOING TO ISSUE AN ORDER THIS AFTERNOON
14 APPOINTING THERESA JOHNS, THAT CONFLICT IS RESOLVED AND IS NO
15 LONGER AN ISSUE IN THE -- IN THE KEVIN MERCER CASE. IS THAT
16 TRUE OR NOT? IS THAT -- AM I RIGHT OR WRONG?

17 MR. LITTLEJOHN: YOUR HONOR, TWO THINGS. I DON'T
18 KNOW THAT WE'RE IN A POSITION, BASED ON MS. KIMBROUGH AND MY
19 REPRESENTATION OF MR. MERCER, TO CONCEDE THAT THERE IS --
20 THAT THAT COMPLETELY OBTVIATES THE CONFLICT. I UNDERSTAND THE
21 COURT'S RULING, BUT I DON'T KNOW THAT WE CAN CONCEDE THAT.
22 THE SECOND ISSUE: I NOTICE THE CLERK HAS APPOINTED THERESA
23 JOHNS TO REPRESENT MR. WILLIAMS. IN ORDER TO AVOID ANY OTHER
24 CONFLICTS, MS. JOHNS AND I SHARE OFFICE SPACE. WE ARE NOT
25 PARTNERS, BUT WE'VE GOT ENOUGH CONFLICTS AND I WOULD ASK

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1 MAYBE IF THE CLERK---

2 THE COURT: ALL RIGHT. WHO IS NEXT?

3 MR. LITTLEJOHN: ---COULD GET SOMEBODY -- GIVE MS.
4 JOHNS THE NEXT CASE.

5 THE CLERK: YOUR HONOR, I APOLOGIZE. I FORGOT ALL
6 ABOUT HIM AND THERESA JOHNS SHARING OFFICE SPACE---

7 THE COURT: THAT'S OKAY.

8 THE CLERK: ---UNTIL HE LOOKED AT ME SORT OF FUNNY.

9 THE COURT: NO PROBLEM. WHO IS NEXT?

10 THE CLERK: CHARLIE JOHNSON.

11 THE COURT: CHARLIE JOHNSON. ANY PROBLEM WITH
12 CHARLIE JOHNSON?

13 MR. LITTLEJOHN: NO, YOUR HONOR.

14 THE COURT: ALL RIGHT. CHARLIE JOHNSON WILL BE
15 THE---

16 MR. LITTLEJOHN: AS FAR AS I KNOW, WE DON'T SHARE
17 OFFICE SPACE.

18 THE COURT: CHARLIE JOHNSON WILL REPRESENT DARRELL
19 WILLIAMS. OKAY. BUT NOW THE CONFLICT EXISTED, THE POTENTIAL
20 CONFLICT EXISTED, IN THE LYNCHING AND ABWIK CASE, NOT IN THIS
21 CASE, AND BECAUSE -- BECAUSE DARRELL WILLIAMS IS NOT A
22 WITNESS IN THIS CASE. SO THE CONFLICT EXISTED IN THE OTHER
23 CASE.

24 MR. LITTLEJOHN: TRUE, YOUR HONOR, BUT INSOFAR AS
25 THIS -- THIS CASE, THE LYNCHING AND ABWIK MIGHT BE USED IN

1 THE PENALTY PHASE OF THE MURDER CASE.

2 THE COURT: THAT WOULDN'T MAKE IT A CONFLICT THOUGH.

3 MR. LITTLEJOHN: IT MAY NOT. I JUST DON'T KNOW THAT
4 I'M IN A POSITION TO CONCEDE FOR THE RECORD THAT THAT IS NOT
5 AN ISSUE THAT -- THAT -- THAT MIGHT BE POTENTIALLY RAISED
6 SOMEWHERE DOWN THE ROAD---

7 THE COURT: ALL RIGHT.

8 MR. LITTLEJOHN: ---IF YOU UNDERSTAND WHAT I'M
9 TALKING ABOUT.

10 THE COURT: RIGHT NOW WHERE WE ARE IS WE'RE IN A
11 HEARING IN THE CASE OF STATE VERSUS KEVIN MERCER; ABWIK AND
12 LYNCHING CASE NUMBERS I'M NOT SURE. BUT THAT'S THE HEARING
13 WE'RE IN RIGHT NOW. AND THE QUESTION IS: IS THERE ANY
14 REASON THAT I SHOULD CONSIDER RIGHT NOW TO DO ANYTHING
15 FURTHER WITH REGARD TO COUNSEL IN THAT CASE BECAUSE OF A
16 CONFLICT OF INTEREST REGARDING MR. DARRELL WILLIAMS?

17 MR. LITTLEJOHN: YOUR HONOR, I THINK MS. MCPHERSON
18 WOULD HAVE TO ADDRESS THAT.

19 THE COURT: OKAY.

20 MS. MCPHERSON: THANK YOU, YOUR HONOR. AND I WILL
21 BE PICKING UP ON SOME OF THE POINTS THAT MS. FULLWOOD WAS
22 BEGINNING TO MAKE OR ALLUDED TO WHEN SHE WAS BEFORE YOU.

23 THE COURT: AND I'M -- WELL, ALL RIGHT. I'M GOING
24 TO SAY I WANT THAT FILE CLOSED AND -- AND -- AND SENT ON TO
25 MR. CHARLIE JOHNSON WHO CAN RETAIN CUSTODY OF IT. IF THE

1 PUBLIC DEFENDER'S OFFICE NEEDS TO RETAIN ANYTHING, THEN THE
2 PUBLIC DEFENDER SHALL MAKE SURE THAT THAT FILE IS CLOSED AND
3 SEALED AND THAT THERE'S NOBODY ELSE INSIDE THE PUBLIC
4 DEFENDER'S OFFICE WHO HAS ANY ACCESS TO WHAT'S INSIDE IT.
5 OBVIOUSLY ANYBODY WHO WORKED ON THE DARRELL WILLIAMS CASE
6 SHALL HAVE NO COMMUNICATION WITH ANYONE WHO'S WORKING ON THE
7 KEVIN MERCER CASE ABOUT IT, AND THERE IS ESSENTIALLY A
8 COMPLETE AND IMPENETRABLE CHINESE WALL THAT IS SET UP BETWEEN
9 THOSE TWO REPRESENTATIONS AND SO THAT -- WITH THAT NOW, WHAT
10 ELSE?

11 MS. MCPHERSON: YOUR HONOR, I WOULD SAY, OF COURSE
12 -- AND I UNDERSTAND THE COURT'S RULING ON THAT. WE ARE A
13 SMALL OFFICE, AND I WILL TELL YOU THAT WITH FOUR ATTORNEYS
14 AND MS. FULLWOOD THERE, IT IS VERY COMMON. I WOULD SAY IT
15 PROBABLY HAPPENS ON ANY CASE, ESPECIALLY THIS ONE BEING
16 PARTICULARLY SIGNIFICANT IN THE CONTEXT OF A DEATH PENALTY
17 CASE, THAT I OR ANYBODY IN THE OFFICE WOULD GO TO MS.
18 FULLWOOD TO BOUNCE THINGS OFF OF HER ESSENTIALLY AND TO TALK
19 ABOUT ANY RESEARCH SHE'S BEEN AWARE OF OR OTHER CASES SHE'S
20 BEEN INVOLVED IN. SO---

21 THE COURT: ARE YOU TALKING ABOUT IN THE -- IN THE
22 FUTURE?

23 MS. MCPHERSON: IN THE LYNCHING CASE.

24 THE COURT: WELL, THAT'S NOT A CONFLICT QUESTION.

25 MS. MCPHERSON: NO, SIR.

1 THE COURT: THAT'S GOT -- THAT'S GOT NOTHING TO DO
2 WITH CONFLICT BECAUSE YOU CAN'T DO THAT.

3 MS. MCPHERSON: I AGREE.

4 THE COURT: YOU CAN'T GO TO MS. FULLWOOD RIGHT NOW
5 AND TALK TO HER ABOUT ANYTHING THAT SHE MAY KNOW ABOUT
6 DARRELL WILLIAMS.

7 MS. MCPHERSON: AND, JUDGE, I UNDERSTAND THAT. IN
8 THE CONTEXT THAT GENERALLY I MAY GO OR SOMEBODY MAY GO TO HER
9 AND SAY, "WHAT DO YOU THINK ABOUT THIS?" I THINK IT
10 ELIMINATES SOME RESOURCE OF WHOEVER IS HANDLING IT. IT
11 CERTAINLY APPEARS THAT IT'S GOING TO BE ME AND I'M HAPPY TO
12 DO THAT, BUT IT DOES ELIMINATE A RESOURCE WITHIN THE OFFICE
13 THAT WE RELY ON REGULARLY, THAT BEING---

14 THE COURT: I UNDERSTAND THAT, BUT WE'RE NOT TALKING
15 ABOUT THAT RIGHT NOW BECAUSE THAT'S NOT A CONFLICT QUESTION.
16 THAT IS A WILL-YOU-RELIEVE-ME-FOR-SOME-OTHER-REASON QUESTION.
17 THAT IS -- THAT HAS NOTHING TO DO WITH CONFLICT OF INTEREST
18 SO -- AND I DON'T MEAN TO BE CUTTING YOU OFF, BUT LET'S FOCUS
19 ON THE CONFLICT QUESTION AND LET'S GET THAT RESOLVED. THEN
20 WE'LL MOVE ON TO WHATEVER ELSE WE MIGHT NEED TO MOVE ON TO.
21 YES, MA'AM.

22 MS. FULLWOOD: A CONCERN I HAVE THAT I THINK DOES
23 RELATE TO THE CONFLICT IS I AM THE SUPERVISOR OF ALL OF THE
24 ATTORNEYS IN THE OFFICE. IF ANY ATTORNEY IN MY OFFICE
25 REPRESENTS MR. MERCER ON THIS CHARGE, IN EFFECT, BECAUSE I

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1 HAVE AN ACTUAL CONFLICT, THERE IS GOING TO BE ABSOLUTELY NO
2 ONE SUPERVISING---

3 THE COURT: WHOA, WHOA, WHOA. I'M GOING TO -- I'M
4 GOING TO BACK UP BECAUSE I DON'T THINK YOU HAVE AN ACTUAL
5 CONFLICT. IF YOU THINK YOU DO, LET'S GO BACK AND RESOLVE
6 THAT. I THINK IT WAS A POTENTIAL CONFLICT BECAUSE YOU TWO
7 NEVER EVEN KNEW THAT YOU REPRESENTED THESE COMPETING
8 INTERESTS.

9 MS. FULLWOOD: BUT I HAVE A CONFLICT IN THE SENSE
10 THAT BY VIRTUE OF HAVING REPRESENTED MR. WILLIAMS I CANNOT
11 HAVE ANY INPUT INTO MR. MERCER'S DEFENSE.

12 THE COURT: THAT'S -- RESPECTFULLY, THAT'S NOT A
13 CONFLICT ISSUE. THE CONFLICT ISSUE IS RESOLVED ONCE YOUR
14 REPRESENTATION OF MR. WILLIAMS IS TERMINATED UNLESS IN THE
15 PAST YOU OR MS. MCPHERSON ACTIVELY REPRESENTED THE COMPETING
16 INTERESTS THAT YOU USED TO REPRESENT, AND IF MS. MCPHERSON
17 CAME TO YOU AND GOT INFORMATION FROM YOU ABOUT DARRELL
18 WILLIAMS IN ORDER TO ASSIST HER IN REPRESENTING KEVIN MERCER,
19 THAT WAS AN ACTUAL CONFLICT. UNTIL THAT CONVERSATION TOOK
20 PLACE, THE CONFLICT WAS POTENTIAL. AM I RIGHT ABOUT THAT?

21 MS. FULLWOOD: JUDGE, THAT'S NOT THE WAY I
22 UNDERSTAND IT. THE WAY I UNDERSTAND IT AND I MIGHT BE
23 COMPLETELY OFF TRACK, BUT I HAVE AN ACTUAL CONFLICT OF
24 INTEREST WITH KEVIN MERCER SIMPLY BY VIRTUE OF HAVING
25 REPRESENTED A WITNESS IN A CASE AGAINST HIM.

1 THE COURT: BUT YOU DON'T REPRESENT KEVIN MERCER.

2 MS. FULLWOOD: NO, I DO NOT. WHAT I'M TRYING TO
3 TELL YOUR HONOR IS THAT I SUPERVISE ANY ATTORNEY IN MY OFFICE
4 THAT REPRESENTS KEVIN MERCER. BECAUSE OF MY PRIOR
5 REPRESENTATION OF DARRELL WILLIAMS AND ANY CONFIDENCES OR
6 COMMUNICATIONS THAT I MIGHT HAVE HAD WITH HIM ON ANY SUBJECT,
7 I CANNOT SUPERVISE THE REPRESENTATION OF MR. MERCER IN THE
8 LYNCHING CASE.

9 THE COURT: I AGREE WITH THAT, BUT THAT DOES NOT --
10 I RESPECTFULLY THINK THAT'S NOT A CONFLICT QUESTION. THAT IS
11 A QUESTION ABOUT HOW YOU RUN YOUR OFFICE WHICH IS NOT A
12 QUESTION OF CONFLICT OF INTEREST. IF SHE NEEDS A SUPERVISOR
13 WHICH I RESPECTFULLY DON'T THINK SHE NEEDS, THEN SHE CAN GO
14 TO SOME PRIVATE ATTORNEY AND GET THAT ASSISTANCE OR THAT
15 CONSULTATION OR THAT -- OR THAT ADVICE AND NOT COME TO YOU.

16 SO I BELIEVE THAT WHAT WE'RE TALKING ABOUT NOW IS
17 NOT RELATED TO THE CONFLICT OF INTEREST THAT DID EXIST.
18 WE'RE NOT TALKING ABOUT YOUR CONFLICT WITH REPRESENTATION OF
19 MR. WILLIAMS. THAT'S BEEN RESOLVED. WE'RE TALKING ABOUT
20 WHETHER OR NOT MS. MCPHERSON HAS A CONFLICT AT THIS POINT IN
21 TIME IN HER REPRESENTATION OF MR. MERCER.

22 MS. FULLWOOD: AND I WAS MERELY -- I REALLY WANTED
23 TO BRING TO THE COURT'S ATTENTION THAT DUE TO MY CONFLICT
24 THAT HAS TO DO WITH MR. WILLIAMS AND THE FACT THAT I
25 SUPERVISE EVERY ATTORNEY IN THE OFFICE, IT COULD WELL BE

1 UNDER THE LAW THAT MY ENTIRE OFFICE HAS A CONFLICT IN
2 REPRESENTING MR. MERCER AND I -- I JUST WANTED TO HAVE THAT
3 ON THE RECORD SO THAT EVERYTHING HAS BEEN TAKEN INTO
4 CONSIDERATION.

5 THE COURT: BUT NOW IN YOUR OFFICE YOU COME ACROSS
6 THIS ON A DAILY BASIS.

7 MS. FULLWOOD: UNTIL THE SUPREME COURT IN THE PAST
8 FEW MONTHS AMENDED THE CONFLICT RULE, WHAT WE NORMALLY DID
9 WHEN WE WERE APPOINTED TO REPRESENT CO-DEFENDANTS IS WE
10 ROUTINELY GOT OUTSIDE COUNSEL APPOINTED FOR ALL BUT ONE. NOW
11 WE DO IT ON A CASE-BY-CASE BASIS, AND WE SET UP A PRETTY
12 COMPLICATED PROCEDURE ABOUT CHINESE WALLING AND MAKING SURE
13 THERE'S NO CROSS-ACCESS TO FILES BY PARALEGALS. IN OTHER
14 WORDS, ATTORNEYS WHO SHARE -- WHO SHARE A PARALLEL DO NOT
15 REPRESENT CO-DEFENDANTS, THINGS OF THAT NATURE.

16 THOSE TYPE OF PROCEDURES WERE NOT IN PLACE AT THE
17 TIME WE BEGAN REPRESENTING MR. WILLIAMS AND AT THE TIME WE
18 BEGAN REPRESENTING MR. MERCER. SO WHILE I GUESS THE ANSWER
19 TO THE QUESTION IS, "YES, SIR. THAT'S RIGHT. WE DO ALL THE
20 TIME," IN THE PAST WE -- WE RESOLVED THOSE PROBLEMS IN A
21 DIFFERENT WAY WHEN THEY CAME TO OUR ATTENTION.

22 THE COURT: OKAY. ANYTHING FURTHER ON THE QUESTION
23 OF WHETHER OR NOT MS. MCPHERSON HAS A CONFLICT OF INTEREST IN
24 THE -- IN HER REPRESENTATION OF MR. MERCER ON THE LYNCHING
25 AND ABWIK CHARGES?

1 MS. MCPHERSON: YOUR HONOR, NOTHING OTHER THAN I
2 WOULD JUST BASICALLY INCORPORATE MS. FULLWOOD'S ARGUMENT ON
3 BEHALF OF MR. MERCER IN THE LYNCHING BUT NOTHING ADDITIONAL;
4 NO, YOUR HONOR.

5 THE COURT: I DON'T THINK THERE'S A CONFLICT. DOES
6 ANYBODY -- ANYBODY ELSE HAVE ANYTHING TO SAY? I DON'T THINK
7 THERE'S A CONFLICT, AND WITH THE INSTRUCTIONS THAT I HAVE
8 GIVEN WHICH I DIDN'T NEED TO GIVE BECAUSE MS. FULLWOOD
9 ARTICULATED THE SAME CONCEPTS HERSELF JUST NOW AS PART OF THE
10 WAY THE PUBLIC DEFENDER'S OFFICE DOES ITS BUSINESS, AS LONG
11 AS THAT CHINESE WALL IS NOT CROSSED, THERE ISN'T A CONFLICT.
12 ALL RIGHT. ANYTHING FURTHER ON THAT SUBJECT?

13 MS. KIMBROUGH: NO, YOUR HONOR.

14 MR. LITTLEJOHN: NO, YOUR HONOR.

15 THE COURT: ALL RIGHT. ANYTHING FURTHER ON ANY
16 SUBJECT?

17 MR. GRAHAM: NOT FROM THE STATE, YOUR HONOR.

18 THE COURT: I HAVE REVIEWED THE -- FROM THE DEFENSE?

19 MS. KIMBROUGH: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. I REVIEWED THE FILE OF
21 MARCUS THOMPSON. THERE WAS A \$50,000 BOND ORDER SIGNED BY
22 JUDGE JEFFCOAT, AND THAT APPEARS TO BE THE BOND THAT HE
23 POSTED AND SO Y'ALL CAN MAKE -- HERE'S THE FILE. Y'ALL CAN
24 LOOK AT IT YOURSELVES AND MAKE WHATEVER OTHER INQUIRY YOU
25 WANT, AND IF ANYTHING EVER -- IF I EVER NEED TO DEAL WITH

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2021

1 ANYTHING ON THAT, LET ME KNOW. OKAY?

2 MR. LITTLEJOHN: THANK YOU, YOUR HONOR.

3 THE COURT: I'LL SEE Y'ALL ON THE 30TH OF MARCH IF I
4 DON'T HEAR FROM YOU BEFORE THEN.

5 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE
6 WERE NO EXHIBITS INTRODUCED.)

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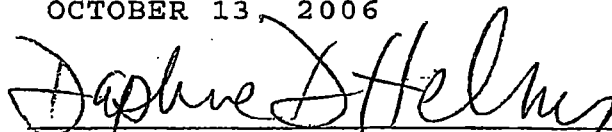
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25

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 23RD DAY OF FEBRUARY, 2006.

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

OCTOBER 13, 2006



DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

2003-GS-32-409

THE STATE OF SOUTH CAROLINA

-VS-

KEVIN J. MERCER

:
:
: TRANSCRIPT OF RECORD
:
:

MARCH 30, 2006

LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN C. FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
S. RICK HUBBARD, III, ESQUIRE
D. SHAWN GRAHAM, ESQUIRE
ATTORNEYS FOR THE STATECAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANTDAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: BE SEATED. OKAY. LET'S MAKE SURE WE
2 HAVE A LIST OF EVERYTHING THAT WE NEED TO ACCOMPLISH TODAY.
3 WE HAVE A -- I WANT TO MAKE SURE THAT WE'RE SQUARE ON
4 EVERYTHING THAT RELATES TO DISCOVERY. THAT'S ONE. WE HAVE
5 THE MOTION FOR FAIR TRIAL PROCEDURES THAT WAS FILED BY THE
6 DEFENSE THIS WEEK. THAT'S TWO. AND WE HAVE THE ISSUE OF
7 WHETHER OR NOT THE DEFENDANT IS GOING TO HAVE ANY TYPE OF --
8 OR WHAT TYPE OF RESTRAINT HE MIGHT HAVE ON HIM DURING THE
9 COURSE OF THE TRIAL. THAT'S THREE. ANYTHING ELSE?

10 MR. MYERS: WE HAD FILED A MOTION ABOUT THE
11 REVEALING OF THE LIST OF JURORS FOR JURY QUALIFICATION, YOUR
12 HONOR, AND I SERVED THAT ON THE DEFENSE THIS MORNING. WE CAN
13 HANDLE THAT TODAY OR ANY OTHER TIME THAT THEY'RE READY.

14 THE COURT: ALL RIGHT. I'M NOT FAMILIAR WITH THAT.

15 MR. MYERS: DO YOU WANT TO HANDLE IT TODAY, CAM, OR
16 NOT?

17 MR. LITTLEJOHN: THE LIST OF WITNESSES?

18 MR. MYERS: I'M SORRY. THE LIST OF WITNESSES.

19 THE COURT: OH, OKAY. ALL RIGHT. WE'LL PUT THAT
20 DOWN AS THE FOURTH ONE. ANYTHING MORE?

21 MS. KIMBROUGH: NOT FROM THE DEFENSE, YOUR HONOR,
22 ALTHOUGH I THINK WE CAN GO AHEAD AND RESOLVE THE RESTRAINT
23 QUESTION. WE'VE SPOKEN TO MR. MERCER, AND WE WOULD CERTAINLY
24 CONSENT TO GOING AHEAD AND HAVING THE BELT.

25 THE COURT: ALL RIGHT. THEN -- AND BECAUSE OF THE

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1 USE OF THE BELT, THERE WILL BE NO NEED FOR ANY FURTHER
2 RESTRAINT, NO HANDCUFFS, NO LEG IRONS. IS THAT CORRECT?

3 SERGEANT ANDERSON: YES, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. LITTLEJOHN: YOUR HONOR, WE HAVE NO PROBLEM WITH
6 THAT. IT'S OUR UNDERSTANDING THAT THE BELT WILL BE OUT OF
7 SIGHT. IT WILL BE UNDER HIS SHIRT, AND THE JURORS WILL NOT
8 SEE THAT.

9 THE COURT: THAT'S CORRECT?

10 SERGEANT ANDERSON: THAT IS CORRECT, YOUR HONOR.

11 THE COURT: OKAY. WE'RE PROBABLY GOING TO BE HAVING
12 A HOPEFULLY BRIEF HEARING NEXT FRIDAY AFTERNOON? SO WHY
13 DON'T YOU ANTICIPATE THAT YOU WOULD GO AHEAD AND OUTFIT MR.
14 MERCER WITH THAT BELT FRIDAY AFTERNOON FOR THE HEARING AND --
15 AND -- AND Y'ALL CAN GO AHEAD AND GET HIM FOR THAT HEARING
16 SOME -- SOME CIVILIAN CLOTHES THAT HE'LL BE WEARING SO THAT
17 YOU ALL CAN BE SURE AND WE CAN ALL BE SURE THAT THE BELT IS
18 GOING TO WORK LIKE EVERYBODY ANTICIPATES OR -- I DON'T MEAN
19 WORK, BUT, I MEAN, FIT HIM AND BE HIDDEN LIKE EVERYBODY
20 ANTICIPATES.

21 MS. KIMBROUGH: YES, SIR.

22 THE COURT: ALL RIGHT? AND IN TERMS OF CLOTHES, I
23 MEAN, HAVE Y'ALL GOT THAT ALL LINED UP?

24 MS. KIMBROUGH: WE HAVE NOT. WE'RE WORKING ON IT,
25 BUT WE'LL -- WE'LL FIGURE SOMETHING OUT. WE HAVE AT LEAST

1 ONE OUTFIT THAT WE'LL TEST BY NEXT FRIDAY.

2 THE COURT: OKAY.

3 MS. KIMBROUGH: WE NEED TO SPEAK TO MR. MERCER'S
4 FAMILY AND SEE WHAT THE DECISION IS ABOUT THAT---

5 THE COURT: OKAY.

6 MS. KIMBROUGH: ---BUT WE'LL TAKE CARE OF THAT.

7 THE COURT: ALL RIGHT. ANYTHING ELSE? OKAY. WELL,
8 THIS OUGHT TO GO FAIRLY QUICKLY. LET'S -- LET'S GO THROUGH
9 THE -- LET'S TALK ABOUT DISCOVERY REAL QUICK. TELL ME --
10 TELL ME THE STATUS OF DISCOVERY. FROM THE STATE'S
11 STANDPOINT, IS THERE ANYTHING THAT YOU KNOW OF THAT HAS NOT
12 BEEN PRODUCED?

13 MR. GRAHAM: NO, YOUR HONOR. I'M NOT AWARE OF
14 ANYTHING.

15 THE COURT: HAVE YOU -- HAVE YOU WITHHELD ANY
16 DOCUMENTS OR EVIDENCE BECAUSE OF ANY PRIVILEGE?

17 MR. GRAHAM: NO, SIR.

18 THE COURT: DOES THE DEFENSE HAVE ANY SPECIFIC
19 COMPLAINT THAT YOU WANT TO MAKE? I MEAN, IS THERE ANYTHING
20 SPECIFIC THAT YOU -- THAT YOU KNOW ABOUT THAT IS NOT -- WAIT
21 A MINUTE. DID YOU HAVE SOMETHING TO SAY?

22 MR. GRAHAM: WE ARE STILL TRYING TO GET A TAPE OF A
23 DISCIPLINARY HEARING THAT OCCURRED AT THE SOUTH CAROLINA
24 DEPARTMENT OF CORRECTIONS, AND WE HAVEN'T GOT THAT YET. I
25 DON'T EVEN KNOW IF IT EXISTS. WE'RE TRYING TO LOCATE IT.

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1 THE COURT: ALL RIGHT. BUT AS FAR AS -- AS FAR AS
2 ANYTHING THAT YOU KNOW TO EXIST AND HAVE IN YOUR POSSESSION,
3 YOU'VE PRODUCED IT.

4 MR. GRAHAM: THE ONLY THING THAT I HAVE IN MY OFFICE
5 THAT I HAVEN'T LOOKED THROUGH IS WE GOT A COPY OF THE
6 RICHLAND COUNTY SOLICITOR'S OFFICE FILES ON THE CASES THAT
7 WERE PROSECUTED AGAINST MR. MERCER EARLIER, AND I HAVEN'T HAD
8 A CHANCE TO GO THROUGH THERE AND SEE IF THERE'S ANYTHING THAT
9 NEEDS TO BE TURNED OVER ON THAT.

10 THE COURT: WELL, TELL ME JUST REAL BRIEFLY ABOUT
11 THAT.

12 MR. GRAHAM: THAT WOULD BE THINGS USED IN THE
13 PENALTY... IT WAS THEIR -- IT'S THE RICHLAND COUNTY
14 SOLICITOR'S OFFICE; WE GOT A COPY OF THEIR FILE.

15 THE COURT: WHAT WAS HE PROSECUTED FOR?

16 MR. GRAHAM: ALL OF THE CONVICTIONS THAT WE WOULD
17 USE IN THE PENALTY PHASE. THERE'S A POSSESSION WITH INTENT
18 TO DISTRIBUTE MARIJUANA, UNLAWFUL CARRYING OF A FIREARM, THE
19 BURGLARY AND A ROBBERY, AND THEN I THINK WE EVEN GOT SOME
20 STUFF ON A DISMISSED CASE THAT'S IN THERE.

21 THE COURT: ARE YOU AWARE OF ALL THOSE CHARGES?

22 MS. KIMBROUGH: YES, YOUR HONOR.

23 MR. GRAHAM: THEY'VE HAD ALL THE REPORTS FROM THE --
24 WE GOT THE REPORTS FROM THE AGENCIES AND TURNED THOSE OVER A
25 LONG TIME AGO. THIS WOULD BE JUST ANYTHING THAT WE DIDN'T

1 INCLUDE IN THE REPORTS OR ANYTHING ELSE THAT'S IN THAT FILE.
2 WE JUST HAVEN'T LOOKED THROUGH IT YET.

3 THE COURT: OKAY. IS THERE ANYTHING SPECIFIC THAT
4 YOU ALL KNOW ABOUT RELATING TO DISCOVERY THAT YOU WOULD LIKE
5 TO DISCUSS? ANYTHING THAT YOU THINK MAY EXIST THAT HASN'T
6 BEEN PRODUCED OR ANY CONCERNS THAT YOU HAVE ABOUT ANYTHING
7 THAT MIGHT NOT HAVE BEEN PRODUCED?

8 MR. LITTLEJOHN: YOUR HONOR, I DON'T THINK SO AT
9 THIS TIME. OF COURSE, WE TAKE THE POSITION THAT IF THEY HAVE
10 THE RICHLAND COUNTY SOLICITOR'S FILES REGARDING INCIDENTS
11 THAT THEY'RE GOING TO TRY AND BRING OUT DURING THE PENALTY
12 PHASE THAT WE'D BE ENTITLED TO THOSE FILES, IF IT RELATES TO
13 HIS CONVICTION.

14 MR. GRAHAM: I'LL COPY THE WHOLE FILE AND GIVE IT TO
15 HIM FOR ALL THOSE -- EVERYTHING WE GOT FROM RICHLAND COUNTY I
16 WILL COPY AND PROVIDE.

17 THE COURT: ALL RIGHT. AND WHEN DO YOU ANTICIPATE
18 THAT YOU CAN GET THAT DONE?

19 MR. GRAHAM: PROBABLY BY THE END OF THE DAY
20 TOMORROW.

21 THE COURT: ALL RIGHT. LET'S -- LET'S JUST SAY THAT
22 YOU GET THAT COPIED AND DELIVERED BY THE END OF THE DAY
23 TOMORROW IN WHATEVER WAY Y'ALL CAN AGREE ON SO THEY HAVE AT
24 LEAST A FULL WORKWEEK IN WHICH TO LOOK THROUGH THOSE FILES.
25 NOW, ANYTHING FURTHER?

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1 MR. LITTLEJOHN: YOUR HONOR, THE ONLY FURTHER
2 THING---

3 THE COURT: WITH REGARD TO DISCOVERY.

4 MR. LITTLEJOHN: YES, SIR. MS. KIMBROUGH REMINDED
5 -- I TRIED TO CONTACT SCOTT FRIER WHO'S A CASE AGENT - I
6 DON'T KNOW IF HE'S HERE OR NOT - TO SEE ABOUT PHYSICALLY
7 LOOKING AT THE EXHIBITS, AND I WASN'T ABLE TO GET IN TOUCH
8 WITH HIM. AND PERHAPS I CAN WORK THROUGH MR. GRAHAM AND MAKE
9 ARRANGEMENTS TO DO THAT.

10 THE COURT: ANY PROBLEM WITH THAT?

11 MR. MYERS: WHAT KIND OF -- I DON'T KNOW WHAT KIND
12 OF EXHIBITS YOU'RE TALKING ABOUT.

13 MR. LITTLEJOHN: ANY -- ANYTHING THAT WAS SEIZED
14 DURING THE INVESTIGATION.

15 MR. MYERS: OH, SURE. HE CAN LOOK AT -- AND I
16 THOUGHT THEY ALREADY WENT OVER -- THEY CAN LOOK AT ANYTHING
17 THE SHERIFF'S DEPARTMENT HAD AS FAR AS STUFF THAT WAS SEIZED.

18 MR. LITTLEJOHN: I'LL MAKE THOSE ARRANGEMENTS WITH
19 MR. FRIER. IF THAT DOESN'T WORK OUT, I'LL CONTACT THE
20 SOLICITOR'S OFFICE.

21 THE COURT: NOW, ESPECIALLY NOW THAT WE'RE ONE --
22 WE'RE FIVE WORKDAYS AWAY FROM THE BEGINNING OF JURY SELECTION
23 OR SIX REALLY, BUT IF -- IF ANYTHING REGARDING DISCOVERY
24 ARISES, DO NOT HESITATE TO PICK UP THE PHONE AND CALL ME AND
25 LET'S GET -- LET'S DO NOT LET ANYTHING LIKE THAT BECOME AN

1 ISSUE. ALL RIGHT. SO AS FAR AS RIGHT NOW THOUGH, DISCOVERY
2 FROM THE STATE IS RESOLVED. THERE'S NO ISSUE THAT YOU ALL
3 KNOW OF REGARDING DISCOVERY, AS LONG AS YOU GET THOSE FILES
4 ABOUT THE SOLICITOR'S OFFICE -- FROM THE SOLICITOR'S OFFICE
5 IN THE FIFTH CIRCUIT.

6 MR. LITTLEJOHN: THAT'S CORRECT, YOUR HONOR.

7 THE COURT: OKAY. IS THERE ANY RECIPROCAL DISCOVERY
8 ISSUE?

9 MR. GRAHAM: WE HAVEN'T RECEIVED ANY.

10 MS. KIMBROUGH: WE HAVE NO WRITTEN REPORTS.

11 THE COURT: WELL, LET'S BE MORE -- LET'S BE MORE --
12 LET'S BROADEN THAT JUST A LITTLE BIT. IS THERE ANYTHING THAT
13 YOU ALL HAVE THAT IS SUBJECT TO RECIPROCAL DISCOVERY THAT YOU
14 HAVE NOT PRODUCED?

15 MS. KIMBROUGH: TO MY KNOWLEDGE, NO. THERE ARE SOME
16 PHOTOGRAPHS THAT WE MIGHT INTEND TO USE IN THE PENALTY PHASE,
17 IF WE GET THERE. I'LL BE GLAD TO PROVIDE THOSE. I THINK
18 THAT'S COVERED, BUT WE DON'T HAVE ANY -- WE HAVEN'T PRODUCED
19 ANY REPORTS. OUR EXPERTS ARE STILL WORKING. OBVIOUSLY IF WE
20 NEED A REPORT FROM SOMEBODY, WE WOULD TURN IT OVER
21 IMMEDIATELY. AS IT STANDS RIGHT NOW, WE DON'T HAVE ANYTHING
22 THAT FALLS UNDER THE SCOPE OF RECIPROCAL RULE 5.

23 THE COURT: OKAY. ALL RIGHT. NOW, HOW ABOUT THE
24 DISCLOSURE OF WITNESSES? YOU'VE SEEN THE SOLICITOR'S MOTION.

25 MS. KIMBROUGH: YES, YOUR HONOR. WE THINK IT WOULD

1 PROBABLY BE IN EVERYONE'S BEST INTEREST FOR US TO ALL PRODUCE
2 OUR WITNESSES AT THE BEGINNING OF TRIAL. WHILE THERE IS NO
3 SPECIFIC LAW THAT SAYS TO DO SO, THERE IS, YOU KNOW, THE
4 PROVISION OF A FAIR TRIAL. AND IF THESE JURORS KNOW ANY --
5 ANYBODY'S WITNESSES, I THINK WE NEED TO KNOW THAT SO THAT WE
6 CAN, YOU KNOW, DETERMINE WHETHER OR NOT THEIR KNOWLEDGE OF
7 ANY PARTICULAR WITNESS IS GOING TO AFFECT THEIR JUDGMENT.
8 THE ONLY WAY TO DO THAT IS TO OBVIOUSLY AT THE BEGINNING OF
9 THE TRIAL SAY, "THESE ARE OUR WITNESSES," AND WE'RE PREPARED
10 TO GO ALONG WITH THAT.

11 THE COURT: OKAY.

12 MR. MYERS: YOU SAID SOMETHING ABOUT HAVING A
13 WITNESS LIST TO PROVIDE FOR JURORS ON APRIL THE 10TH WHEN WE
14 START THE JURY SELECTION?

15 THE COURT: YES, SIR.

16 MR. MYERS: WOULD YOU LIKE FOR US TO SEND YOU A LIST
17 OF THOSE WITNESSES BEFORE APRIL THE 10TH OR DO YOU WANT THEM
18 THAT MORNING?

19 THE COURT: WELL, AS I'M -- AS I HEARD WHAT -- AS I
20 READ YOUR MOTION AND HEAR WHAT MS. KIMBROUGH SAID, THERE IS
21 CONSENT FROM BOTH SIDES TO DISCLOSE THEIR LISTS OF POTENTIAL
22 WITNESSES. AND WITH THAT, Y'ALL SHOULD BE ABLE TO COORDINATE
23 IN PRODUCING A LIST THAT WE CAN ALL USE.

24 MR. MYERS: OKAY.

25 THE COURT: SO IF YOU ALL WILL MUTUALLY EXCHANGE

1 YOUR LISTS, THEN THE SOLICITOR'S OFFICE CAN TAKE THOSE TWO
2 LISTS AND COMBINE THEM INTO ONE OR YOU CAN, WHOEVER, AND WE
3 USE IT -- AND WE'LL HAVE ONE WITNESS LIST THAT WE CAN USE.

4 MR. MYERS: WE'LL BE GLAD TO DO IT.

5 THE COURT: ALL RIGHT. SO---

6 MR. MYERS: THAT WILL BE FOR THE CASE IN CHIEF, FOR
7 THE GUILT AND THE PENALTY PHASE.

8 THE COURT: RIGHT.

9 MS. KIMBROUGH: YES, YOUR HONOR.

10 THE COURT: OKAY. WHY DON'T Y'ALL SAY THAT YOU'LL
11 GET THAT DONE BY TUESDAY OR SO OR DO Y'ALL WANT TO SAY
12 THURSDAY?

13 MR. MYERS: THURSDAY.

14 THE COURT: THURSDAY.

15 MR. MYERS: GETTING BACK TO THE DISCOVERY, YOUR
16 HONOR, I'VE RUN INTO THIS BEFORE. THE LAST SEVERAL CASES
17 WE'VE TRIED, THE JUDGES HAVE ORDERED REPORTS FROM EXPERT
18 WITNESSES FROM BOTH SIDES. AND I UNDERSTAND THAT IT'S BEEN
19 SAID THEY HAVE NO REPORTS, BUT WE'VE ALSO RUN INTO THE
20 PROBLEM OF EXPERTS BEING -- SAYING WE DON'T GENERATE A REPORT
21 AND DON'T PROVIDE A REPORT. WE WOULD LIKE TO HAVE REPORTS
22 FROM THEIR EXPERTS DELIVERED TO US PRIOR TO TRIAL.

23 THE COURT: RESPONSE?

24 MS. KIMBROUGH: YOUR HONOR, TO MY KNOWLEDGE WE'RE
25 NOT REQUIRED TO ASK OUR EXPERTS TO PRODUCE A REPORT, AND IF

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1 THERE'S SOME RULE THAT SAYS THAT IF YOU USE AN EXPERT THEY
2 BETTER GIVE YOU A WRITTEN REPORT, WE'RE UNAWARE OF IT. WE
3 WOULD TAKE THE POSITION THAT WE DON'T HAVE TO OR WE SHOULD
4 NOT BE COMPELLED TO PRODUCE OUR CASE EITHER IN MITIGATION OR
5 IN REBUTTAL OF THE STATE'S CASE FOR GUILT IN ADVANCE OF THE
6 TRIAL IF WE HAVEN'T REQUESTED THAT INFORMATION. IF WE HAVE
7 IT, THEN OBVIOUSLY -- I MEAN, WE'RE OFFICERS OF THE COURT.
8 WE KNOW WHAT RULE 5 MEANS, AND WE WILL PRODUCE IT. BUT I
9 DON'T THINK WE'RE OBLIGATED TO GENERATE IT FOR THE BENEFIT OF
10 THE STATE, AND SO WE WOULD -- WE WOULD OPPOSE IT.

11 MR. MYERS: THAT'S JUST PLAYING THE SHELL GAME, AND
12 IN THE LAST -- THERE'S BEEN A TREND THAT THE JUDGES SAY YOU
13 HAVE TO HAVE REPORTS, PARTICULARLY FROM EXPERT WITNESSES.
14 AND I MENTIONED BEFORE THIS WAS RAISED IN STATE VERSUS HALL,
15 AND THE STATE JUDGE UP THERE DID IT. I THINK IT WAS VIC
16 PYLE, THE JUDGE THERE, AND THERE WASN'T A FULL-BLOWN OPINION
17 BY THE SUPREME COURT ON IT. BUT I THINK THAT'S JUST PLAYING
18 A HIDE-AND-SEEK GAME, PARTICULARLY WITH THE EXPERT WITNESSES.
19 AND BY SAYING AFFIRMATIVELY DON'T GIVE US A REPORT OR BEING
20 MUTE ABOUT REPORTS, WE THINK THAT'S NOT IN THE INTEREST OF
21 JUSTICE, AND IT WOULD ALSO DELAY THE TRIAL BECAUSE IF THAT
22 WERE TO HAPPEN, THEN I'M GOING TO ASK THAT EXPERT TO PUT OUT
23 ON THE TABLE HERE EVERYTHING HE RELIED ON AND EVERYTHING HE
24 HAD. THEN WE'RE GOING TO HAVE TO TAKE A BREAK FOR US TO GO
25 THROUGH IT.

1 MS. KIMBROUGH: YOUR HONOR, I WOULD SIMPLY POINT OUT
2 THAT IN THE PENALTY PHASE THAT'S WHERE WE WOULD ANTICIPATE
3 THIS TYPE OF INFORMATION WILL COME OUT, AND THE STATE
4 CERTAINLY HASN'T ASKED ALL THEIR VICTIMS TO GIVE VICTIM
5 IMPACT STATEMENTS FOR OUR BENEFIT. AND I DON'T THINK WE
6 SHOULD BE REQUIRED TO FORK OVER OUR MITIGATION CASE IN
7 ADVANCE OF THE TRIAL.

8 MR. MYERS: I'M SORRY. I DIDN'T GET THAT. TO FORK
9 OVER WHAT?

10 THE COURT: THEIR MITIGATION CASE.

11 MR. MYERS: WELL, IF THEY HAVE EXPERTS, THOSE
12 EXPERTS HAVE TO BE CROSS-EXAMINED. AND ON VICTIM IMPACT,
13 YES, SIR, WE HAVE DELIVERED STUFF TO THEM ON VICTIM IMPACT.

14 THE COURT: OKAY.

15 MS. KIMBROUGH: YOUR HONOR, TO MY KNOWLEDGE, WE'VE
16 NEVER RECEIVED ANY VICTIM IMPACT STATEMENTS AT ALL.

17 MR. MYERS: WE PROVIDED THEM WITH THE MILITARY FILE
18 AND ALSO A TAPE OF A MEMORIAL SERVICE, AND IN THAT FILE WAS
19 VARIOUS STUFF ABOUT HIS MILITARY BACKGROUND AND SO FORTH. IN
20 ANY EVENT, WHY PLAY THIS HIDE-AND-SEEK STUFF?

21 THE COURT: WELL, LET'S -- LET'S -- HERE'S SOMETHING
22 I WANT TO -- HERE'S SOMETHING I WANT TO MAKE CLEAR. BOTH
23 SIDES ARE PROPERLY AND EXPECTEDLY ENGAGED IN MAKING STRATEGIC
24 MOVES THAT BENEFIT THEIR CLIENTS. I DON'T THINK THERE'S ANY
25 MYSTERY ABOUT THE FACT THAT IT'S IN THE DEFENSE BEST INTEREST

1 THAT THEIR EXPERTS NOT PREPARE REPORTS BECAUSE BY DOING SO
2 THEY MIGHT NOT HAVE TO DISCLOSE THE CONTENT OF THEIR EXPERTS'
3 OPINIONS. BUT ON THE OTHER HAND, I'M SURE THAT THERE ARE
4 PLENTY OF THINGS THAT THESE WISE GENTLEMEN OVER HERE HAVE
5 DONE OR NOT DONE IN ORDER TO IMPROVE THEIR STRATEGIC
6 POSITION.

7 I DON'T WANT TO HEAR ANY PEJORATIVE CHARACTERIZATION
8 OF STRATEGIC MOVES BY EITHER SIDE; THERE'S NO REASON FOR IT.
9 SO WE CAN JUST KIND OF -- WE JUST NEED TO GET PAST THAT.

10 NOW, THE QUESTION IS THE -- IS THE LEGAL QUESTION: AM I
11 REQUIRED TO OR IS THE DEFENSE REQUIRED TO PRODUCE REPORTS? I
12 EXPECT THE ANSWER TO THAT QUESTION IS PROBABLY NOT. THEN THE
13 QUESTION THEN BECOMES: IS IT WITHIN MY DISCRETION TO REQUIRE
14 THEM TO PRODUCE REPORTS AND, IF SO, AM I GOING TO DO IT? AND
15 SO IF ANYBODY WANTS TO HAVE -- IF ANYBODY WANTS TO SAY
16 ANYTHING ABOUT EITHER OF THOSE THREE QUESTIONS REGARDING THE
17 PRODUCTION OF EXPERT REPORTS, THEN I'LL BE HAPPY TO HEAR IT.

18 MR. MYERS: THE EXPERT RULE - I THINK IT'S EITHER
19 702, 703, IN THE 700'S - SAYS AN EXPERT CAN RELY ON JUST
20 ABOUT ANYTHING, AND IF AN EXPERT IS RELYING ON JUST ABOUT
21 ANYTHING, THEN I'M GOING TO HAVE TO SEE WHAT HE RELIED ON.
22 AND IF I DON'T HAVE THAT BEFORE TRIAL, THEN THIS TRIAL WILL
23 BE DELAYED AFTER HE TESTIFIES ON DIRECT BECAUSE I'M GOING TO
24 WANT TO SEE WHAT ALL HE HAD. AND SO IF WE WANT TO DELAY THE
25 TRIAL AND DO THAT AND THEN HE SAYS, "I DON'T HAVE IT," AND WE

1 HAVE TO TAKE A DELAY FOR HIM TO GO GET IT, THAT'S JUST A
2 DELAY IN TACTIC THAT WE DON'T NEED TO GO THROUGH.

3 AND A REPORT IS A REPORT. THERE'S NO SECRET ABOUT
4 IT. SOMEBODY IS GOING TO TESTIFY. AND IF YOU ORDER IT, I'LL
5 PROBABLY GET A ONE-PARAGRAPH REPORT, BUT I NEED SOMETHING AND
6 I NEED SOMETHING ON WHAT THEY HAVE. YOU SEE, WE GET S.L.E.D.
7 REPORTS. THEY MAKE REPORTS, AND WE GIVE IT TO THEM. IF YOU
8 GO TO THE STATE HOSPITAL, WE GET REPORTS AND WE DELIVER IT TO
9 THEM. WE GET EXPERT REPORTS. WE GET IT AND WE GET IT TO
10 THEM. WE'RE JUST ASKING FOR THEM TO GIVE US THE SAME THING
11 FROM THEIR EXPERTS.

12 THE COURT: ALL RIGHT. FROM THE DEFENSE?

13 MS. KIMBROUGH: YOUR HONOR, I WOULD NOTE THAT ANY
14 WITNESS -- ANY EXPERT WITNESS WE PUT ON THAT STAND WILL HAVE
15 EVERYTHING THEY'VE RELIED UPON IN THEIR POSSESSION. THERE'S
16 NOT GOING TO BE ANY DELAY IN THE TRIAL, AT LEAST NONE THAT I
17 CAN ANTICIPATE WOULD TAKE A REALLY LONG TIME FOR THE STATE TO
18 HAVE TO REGROUP FROM. THEY'LL HAVE THAT INFORMATION THERE.
19 YOU KNOW, IT WILL CERTAINLY BE MADE TO -- AVAILABLE TO THE
20 PROSECUTION AFTER THAT PERSON TESTIFIES. WE THINK THAT'S THE
21 APPROPRIATE PROCEDURE, AND WE WOULD SIMPLY ASK THAT WE NOT BE
22 COMPELLED TO PRODUCE REPORTS THAT WE DON'T HAVE.

23 MR. MYERS: AND THEN AFTER WE LOOK AT IT AND CROSS-
24 EXAMINE THEM, WE'RE GOING TO HAVE TO TAKE A BREAK AND WE'LL
25 HAVE TO GET SOME EXPERT WITNESSES IN REBUTTAL, SO IT'S GOING

1 TO DELAY IT.

2 THE COURT: I'LL -- I'LL LET Y'ALL KNOW PROBABLY
3 MONDAY WHETHER OR NOT I'M GOING TO REQUIRE REPORTS, BUT YOU
4 ALL -- BOTH SIDES SHOULD BE PREPARED TO DISCLOSE -- TO HAVE
5 YOUR EXPERTS DISCLOSE THE SUBSTANCE OF THE OPINIONS THAT THEY
6 INTEND TO OFFER IN TRIAL. AND IF I DECIDE TO REQUIRE IT,
7 THEN THE DISCLOSURE CAN BE DONE QUICKLY. ESPECIALLY AT THIS
8 LATE DATE I WOULD NOT ANTICIPATE THAT THE REPORTS, IF I ORDER
9 THEM, ARE GOING TO BE ALL THAT EXTENSIVE. BUT -- BUT, YOU
10 KNOW, ALSO THE -- ONCE THE LIST OF WITNESSES IS DISCLOSED,
11 MUCH -- MUCH OF THE MYSTERY OF WHAT THE EXPERTS' OPINIONS ARE
12 GOING TO BE IS GOING TO BE REMOVED, AND THE SOLICITOR'S
13 OFFICE IS GOING TO BE ABLE TO TELL FROM WHO THE DEFENSE
14 EXPERTS ARE A GREAT DEAL ABOUT WHAT THEIR OPINIONS ARE AND
15 VICE VERSA. SO -- BUT I'LL -- I'LL RULE BY MONDAY AS TO
16 WHETHER OR NOT I'M GOING TO REQUIRE THAT BOTH SIDES PRODUCE
17 REPORTS. NOW, ANYTHING ELSE REGARDING DISCOVERY FROM EITHER
18 SIDE?

19 MR. GRAHAM: YOUR HONOR, THERE WAS -- AND I DON'T
20 KNOW -- I GUESS NOW IS A GOOD TIME TO HANDLE IT. IN THE
21 COMPETENCY EVALUATIONS WHEN MR. MERCER WENT TO THE DEPARTMENT
22 OF MENTAL HEALTH AND ALSO WENT TO THE DEPARTMENT OF
23 DISABILITIES AND SPECIAL NEEDS AND SERVICES, I KNOW IN THE
24 PAST THAT MS. KIMBROUGH SAYS THERE'S NOT GOING TO BE ANY
25 ISSUE WITH ANY OF THAT. I DIDN'T KNOW WHETHER WE COULD JUST

1 SUBMIT THOSE REPORTS OR WHETHER WE ACTUALLY NEED TO HAVE THE
2 DOCTORS WHO DID THE EXAMINATIONS HERE FOR ANY TYPE OF
3 HEARING. I DIDN'T KNOW WHETHER WE WERE GOING TO HAVE ANY
4 HEARINGS RELATED TO THAT ISSUE OR WHETHER WE WERE---

5 THE COURT: FOR COMPETENCE?

6 MR. GRAHAM: FOR COMPETENCY, CRIMINAL
7 RESPONSIBILITY, CAPACITY TO CONFORM, OR MENTAL RETARDATION.

8 MR. MYERS: I GUESS A BLAIR HEARING.

9 MR. GRAHAM: THAT'S MY QUESTION.

10 MS. KIMBROUGH: YOUR HONOR, WE'LL GO ALONG WITH
11 WHATEVER THE COURT THINKS. IT MAY BE IN EVERYBODY'S BEST
12 INTEREST TO HAVE A FULL-BLOWN BLAIR HEARING, ALTHOUGH WE ARE
13 NOT CONTESTING ANY OF THOSE -- ANY OF THOSE THINGS:
14 COMPETENCY, CRIMINAL RESPONSIBILITY, MENTAL RETARDATION.
15 WE'RE NOT RAISING AN INSANITY DEFENSE.

16 MR. MYERS: IF IT'S NOT CONTESTED, THE LAW SAYS WE
17 CAN PUT IN THE WRITTEN REPORT, BUT IF THEY WANT THE DOCTOR
18 HERE, WE'LL GO AHEAD AND BRING HIM HERE, WHATEVER THE COURT
19 DESIRES. BUT IF WE DO THAT, I'D LIKE TO DO IT THE WEEK OF
20 JURY SELECTION SO WE CAN GO AHEAD AND GET THAT OUT OF THE
21 WAY, IF IT'S CONVENIENT WITH THE COURT.

22 THE COURT: YES, SIR. WELL, OF COURSE, IN TERMS OF
23 COMPETENCE AND IN TERMS OF ALL THREE -- WELL, IN TERMS OF
24 COMPETENCE, THE BURDEN TO PROVE INCOMPETENCE WOULD BE ON THE
25 DEFENSE, AND IF THERE'S -- IF THERE'S NO ARGUMENT THAT HE IS

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1 NOT COMPETENT, THEN IT SEEMS TO ME THAT JUST SUBMITTING THE
2 WRITTEN REPORTS WILL ADEQUATELY FILL OUT THE RECORD ON THE
3 QUESTION AND WE CAN JUST -- I CAN REVIEW THOSE REPORTS AND
4 MAKE A RULING AND GO ON. DOES ANYBODY DISAGREE WITH THAT?

5 MR. MYERS: NO, SIR, AND WE WOULD AGREE TO THAT SO
6 THEY DON'T HAVE TO PUT UP WITNESSES TO CARRY THEIR BURDEN OF
7 PROOF. WE WOULD AGREE TO THAT.

8 MR. LITTLEJOHN: JUDGE, COULD WE GET BACK WITH YOU
9 ON THAT? WE'RE NOT SURE -- WE THINK WE CAN GO ALONG WITH
10 THAT, BUT FOR PURPOSES OF THE RECORD, WE THINK IT MIGHT BE A
11 BETTER IDEA TO HAVE A SHORT HEARING PERHAPS THE WEEK OF JURY
12 SELECTION, AND SOLICITOR MYERS---

13 THE COURT: ALL RIGHT. WELL, THIS IS WHAT WE'LL DO
14 THEN. WE'RE GOING TO HAVE -- WE'LL HAVE A HEARING THAT WE
15 WILL SET TOWARD THE END OF THE WEEK OF JURY SELECTION, AND
16 WE'LL SET IT AS WE SEE HOW JURY SELECTION IS UNFOLDING AND
17 THE SCHEDULING OF IT. AT THAT HEARING I WILL ADDRESS THE
18 DEFENDANT'S COMPETENCY TO STAND TRIAL. THE STATE WILL BE
19 PREPARED TO PRODUCE WHATEVER TESTIMONY -- WHATEVER EVIDENCE
20 THEY WISH TO PRESENT AND SO WILL THE DEFENSE. WHAT YOU WILL
21 LET US KNOW IS WHETHER OR NOT YOU CONSENT TO THE
22 ADMISSIBILITY OF THE DEPARTMENT OF MENTAL HEALTH AND THE
23 DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS REPORTS AS
24 EVIDENCE IN THAT HEARING. IF YOU DO CONSENT TO IT, IT WILL
25 BE UNNECESSARY FOR THE STATE TO BRING THOSE WITNESSES. IF

1 YOU DON'T CONSENT TO IT, THEN THE STATE WILL BRING THOSE
2 WITNESSES AND WE'LL HEAR FROM THEM AND THEN I'LL RULE.

3 MR. LITTLEJOHN: ALL RIGHT, SIR.

4 THE COURT: DOES THAT COVER IT?

5 MR. LITTLEJOHN: THAT SOUNDS LIKE A GOOD PLAN.

6 MR. GRAHAM: ONE -- I KNOW ONE PROBLEM WE HAVE. THE
7 DOCTOR FROM THE DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS
8 IS NOT -- SHE'S GOING TO BE OUT OF STATE THAT WEEK OF
9 APRIL 10TH.

10 THE COURT: WELL, THEN WE CAN -- ALL RIGHT. THEN
11 WE'LL -- WE'LL DO IT THIS WAY.

12 MR. GRAHAM: THEY'RE TELLING ME THAT THERE WERE TWO
13 DOCTORS, I THINK, THAT SIGNED OFF ON THE D.D.S.N. REPORT, AND
14 THE SECOND DOCTOR, I GUESS, IS AVAILABLE? SO I GUESS WE
15 WOULD BE ABLE TO HANDLE -- AND IF WE NEED TO, I BELIEVE WE
16 WOULD BE ABLE TO HAVE A REPRESENTATIVE FROM D.D.S.N. TO
17 TESTIFY.

18 THE COURT: IS THAT A REPRESENTATIVE THAT'S
19 QUALIFIED TO OFFER THE OPINIONS THAT ARE SET FORTH IN THAT
20 REPORT?

21 MR. GRAHAM: I BELIEVE THAT THERE ARE TWO DOCTORS
22 THAT DID THE REPORT TOGETHER. I DON'T HAVE IT IN FRONT OF
23 ME. I BELIEVE THEY BOTH SIGNED OFF ON IT, BUT I DON'T KNOW
24 THAT, YOUR HONOR.

25 THE COURT: ALL RIGHT. I HAD THE D.D.S.N. REPORT IN

1 FRONT OF ME. IT'S SIGNED BY DONNA CULLEY, PH.D., AND THEN
2 THERE'S A COVER LETTER THAT'S SIGNED BY MICHELLE FORD, PH.D.

3 MR. GRAHAM: OUR INVESTIGATOR WHO HAD ACTUALLY
4 TALKED TO THEM JUST LEFT, SO I DON'T KNOW. IT DOESN'T SOUND
5 FROM THAT THAT TWO PEOPLE SIGNED. WE'D HAVE TO CALL AND
6 VERIFY WHETHER SOMEBODY -- I CAN'T GIVE YOU AN ANSWER RIGHT
7 NOW.

8 THE COURT: ALL RIGHT. WELL, THEN Y'ALL CHECK ON
9 THAT AND WE'LL -- IF NECESSARY, WE CAN SCHEDULE THE HEARING
10 FOR THE 7TH OF APRIL IN THE AFTERNOON WHEN WE ALREADY HAVE
11 SOME -- A COURT DATE SET ASIDE. IF THAT -- IF IT'S DOABLE,
12 WE CAN DO IT DURING THE WEEK OF THE 10TH AFTER JURY
13 SELECTION, AND IF NEITHER OF THOSE WORK, WE CAN ALWAYS DO IT
14 THE MORNING OF THE 17TH BEFORE WE ACTUALLY IMPANEL THE JURY.

15 SO Y'ALL CHECK ON THE SCHEDULING OF YOUR WITNESSES,
16 AND Y'ALL DECIDE, THE DEFENSE DECIDE, WHETHER OR NOT YOU WILL
17 CONSENT AND THAT'S -- THE SPECIFIC QUESTION THAT YOU HAVE TO
18 DECIDE IS: WILL YOU CONSENT TO THE ADMISSIBILITY OF THOSE
19 TWO REPORTS IN EVIDENCE IN THE BLAIR HEARING OR WILL YOU NOT?
20 AND THAT MEANS CONSENTING TO THEIR AUTHENTICITY, TO THE
21 QUALIFICATIONS OF THE EXPERTS WHO OFFERED THE OPINIONS, AND
22 TO ALL OF THE OTHER EVIDENTIARY FOUNDATION QUESTIONS THAT
23 MIGHT OTHERWISE EXIST BEFORE THE INTRODUCTION OF THOSE
24 REPORTS FOR THE LIMITED PURPOSE OF THAT HEARING. THAT'S NOT
25 TO SAY YOU WOULD CONSENT TO THEM FOR THE -- FOR THE -- BEFORE

1 THE JURY, BUT JUST FOR PURPOSES OF THAT HEARING. ALL RIGHT.

2 MR. GRAHAM: YOUR HONOR, THE ONLY THING IS DID --
3 DID YOU GIVE THEM A TIME LIMIT OF WHEN TO GET A RESPONSE BACK
4 ON WHETHER THEY NEEDED TO DO THAT OR NOT?

5 THE COURT: WHEN CAN YOU GET US THAT RESPONSE?

6 MS. KIMBROUGH: MONDAY.

7 THE COURT: MONDAY. ALL RIGHT. SO -- EXCUSE ME.
8 SO THAT WE HAVE THE RECORD CLEAR, WHY DON'T YOU ALL WRITE A
9 LETTER THAT SAYS THAT EITHER YOU DO OR YOU DO NOT CONSENT TO
10 THE ADMISSIBILITY OF THOSE TWO REPORTS? AND YOU NEED TO USE
11 THE WORD ADMISSIBILITY BECAUSE THAT WILL ENCOMPASS ALL OF THE
12 EVIDENTIARY FOUNDATIONS THAT -- THAT WOULD OTHERWISE EXIST.
13 AND IF YOU TELL THEM YOU CONSENT TO THEIR ADMISSIBILITY, THAT
14 MEANS THEY'LL BE MARKED AS EXHIBITS AND THEY'LL BE ENTERED AS
15 EVIDENCE AND THERE WILL BE NO OPPORTUNITY FOR ANY OBJECTION
16 WHATSOEVER TO THEIR ADMISSION.

17 ALL RIGHT. ANYTHING ELSE BEFORE WE MOVE INTO THE
18 DEFENSE MOTION FOR FAIR TRIAL PROCEDURES? OKAY. THERE'S
19 SEVERAL THINGS THAT WE CAN GO THROUGH QUICKLY HERE. THE
20 FIRST IS THAT YOU MOVE TO ALLOW THE DEFENSE TO OCCUPY THE
21 TABLE NEAREST THE JURORS. I'M GOING TO DENY THAT MOTION. I
22 AM WILLING TO, IF YOU WOULD LIKE ME TO, EXPLAIN TO THE JURY
23 THE OBVIOUS FACT THAT ONLY ONE SIDE CAN SIT IN THE TABLE
24 CLOSEST TO THE JURY AND THAT -- AND THAT EITHER IT WAS MADE
25 AS A RANDOM CHOICE OR - WHICH IS NOT TRUE - OR THAT IT IS

1 DONE PURSUANT TO TRADITION IN THE COURTS, WHICH IS TRUE. AND
2 SO I'LL LET YOU LET ME KNOW IF YOU WOULD LIKE FOR ME TO TELL
3 THE JURY EITHER ONE OF THOSE TWO THINGS. YOU DON'T HAVE TO
4 TELL ME NOW, BUT THE MOTION TO CHANGE THE ARRANGEMENT OF THE
5 -- OF PLACEMENT OF COUNSEL IS DENIED.

6 AS FAR AS ALLOWING THE JURORS TO CHOOSE THEIR OWN
7 FOREPERSON, THAT IS A TASK THAT I WILL DECIDE HOW THAT IS TO
8 TAKE PLACE, BUT I DO ALMOST ALWAYS ALLOW THE JURY TO CHOOSE
9 THEIR OWN FOREPERSON. WHAT I LIKE TO DO, ESPECIALLY IN A
10 CASE THAT -- WHERE THE JURY WILL HAVE ENOUGH TIME, LIKE THEY
11 WILL HERE, TO WORK TOGETHER, IS TO TRY TO -- BECAUSE ONE OF
12 THE OTHER THINGS THAT I THINK IS A RISK IS IF YOU GET
13 SOMEBODY ON THE JURY THAT IS SORT OF A, YOU KNOW, MAYBE A
14 LOUD-MOUTH OR AN OVERLY AGGRESSIVE PERSON WHO JUST JUMPS
15 RIGHT OUT AND SAYS, "I WANT TO BE THE FOREPERSON," AND OTHER
16 MORE QUALIFIED PEOPLE, PERHAPS BECAUSE OF THEIR POLITENESS OR
17 BECAUSE OF WHATEVER, DON'T SPEAK UP.

18 SO WHAT I -- WHAT I ANTICIPATE DOING IS TO CONSIDER
19 DURING THE COURSE OF THE TRIAL WHO ARE THE APPROPRIATE
20 FOREPEOPLE -- FOREPERSONS, PERHAPS GETTING SOME INPUT FROM
21 THE JURORS AS TO WHO WANTS TO BE A FOREPERSON, MAYBE TAKE A
22 -- SOME SORT OF A PRIVATE -- GET A PRIVATE RESPONSE FROM EACH
23 JUROR AS TO WHETHER OR NOT THEY WANT TO BE FOREPERSON, AND
24 THEN -- AND THEN I CAN LOOK AT WHETHER OR NOT I MIGHT WANT TO
25 NOMINATE CERTAIN PEOPLE AND LET THE JURY CHOOSE BETWEEN

1 THOSE. THERE ARE RISKS GOING BOTH WAYS, SO THAT'S -- THAT'S
2 HOW I ANTICIPATE HANDLING IT.

3 AS FAR AS JUROR -- WHETHER OR NOT THEY'RE GOING TO
4 BE SEQUESTERED, I'M GOING TO HEAR ARGUMENTS FROM YOU ALL IN
5 JUST A SECOND, AND THAT WOULD INCLUDE ARGUMENTS ON -- SECTION
6 4 OF YOUR MOTION IS WHETHER OR NOT LAW ENFORCEMENT -- STATE
7 LAW ENFORCEMENT DIVISION OFFICERS WOULD BE PERMITTED TO OR
8 ASKED TO -- I DON'T WANT TO USE THE WORD GUARD BECAUSE THAT'S
9 NOT CORRECT BUT SUPERVISE AND TO MANAGE AND TO TAKE CARE OF
10 THE JURY. NOW, AS FAR AS THE SECTION 5 OF THE MOTION---

11 MR. MYERS: YOU DON'T HAVE TO -- YOU DON'T HAVE TO
12 -- I'LL AGREE TO THAT.

13 THE COURT: THANK YOU. ALL RIGHT.

14 MR. MYERS: THAT'S NEVER BEEN A PROBLEM IN FRONT OF
15 THE JURY.

16 THE COURT: WELL, WHAT I WAS GOING TO SAY IS THAT --
17 IS THAT I HAVE ENOUGH EXPERIENCE WITH ALL OF THE LAWYERS IN
18 THE COURTROOM IN THIS CASE TO KNOW THAT EACH OF YOU WILL
19 CONDUCT YOURSELF IN A PROFESSIONAL MANNER, AND I DON'T THINK
20 IT'S NECESSARY FOR ME TO INTERJECT INTO HOW YOU HANDLE
21 YOURSELF ON THAT LEVEL. AND IF I DO SEE A SITUATION WHERE
22 ONE OF YOU IS NOT BEHAVING IN AN APPROPRIATE WAY, THEN, OF
23 COURSE, I WILL ADDRESS IT IN THE -- IN THE APPROPRIATE
24 MANNER.

25 I DON'T SEE A NEED TO SPECIFICALLY TELL ANYBODY THAT

MARCH 30, 2006, HEARING

25-0-10

1 THEY CAN'T CHEW TOBACCO OR WHATEVER, BUT NOW I NEVER HAVE --
2 I NEVER HAVE NOTICED ANYBODY DOING ANYTHING IN HERE THAT WAS
3 INAPPROPRIATE, AND SO I DON'T THINK THAT'S GOING TO BE A
4 PROBLEM. YOU KNOW, BACK IN THE OLD DAYS BEFORE MY TIME WHEN
5 THERE WERE SPITTOONS AT THE CORNERS OF ALL COUNSEL TABLES AND
6 THE LAWYERS WOULD WALK OVER AND OVERTLY SPIT INTO THE
7 SPITTOON, NOW THAT -- IF SOMEBODY WERE TO TRY TO DO SOMETHING
8 LIKE THAT IN THIS DAY AND AGE, IT MIGHT NOT FIT, AND SO...
9 BUT I DON'T THINK THAT'S GOING TO BE A PROBLEM, SO I DON'T
10 REALLY SEE THE NEED FOR ANY FURTHER ATTENTION TO THAT -- TO
11 THAT QUESTION.

12 NOW, SO I'LL HEAR FROM YOU ALL ABOUT YOUR REQUESTS
13 OR YOUR THOUGHTS ON WHETHER OR NOT THE JURY SHOULD BE
14 SEQUESTERED, AND BEFORE WE GET INTO THAT, WE'VE BEEN TALKING
15 ABOUT THIS FOR AWHILE. I HAVE KNOWN, BECAUSE YOU ALL HAVE
16 DISCLOSED IT IN PRIVATE MEETINGS OR I SHOULD SAY MEETINGS OFF
17 THE RECORD THAT WE HAVE ALL BEEN INVOLVED IN, THAT YOU ALL
18 DON'T WANT THE JURY TO BE SEQUESTERED. I WANT TO HEAR ALL
19 YOUR ARGUMENTS AND HEAR ALL YOUR THOUGHTS FROM BOTH SIDES,
20 BUT I'M NOT GOING TO MAKE A DECISION TODAY BECAUSE MUCH OF
21 WHAT GOES INTO MY MAKING THAT DECISION IS GOING TO DEPEND ON
22 THE TYPE OF AND THE QUANTITY OF PRESS COVERAGE THAT OCCURS
23 BETWEEN NOW AND THE TIME THE JURY WOULD BE SEQUESTERED. SO
24 I'LL HEAR FROM YOU.

25 MS. KIMBROUGH: THANK YOU, YOUR HONOR. MAY IT

1 PLEASE THE COURT? OUR MOTION TO SEQUESTER ACTUALLY DOESN'T
2 REALLY ADDRESS THE WHOLE QUESTION OF PRETRIAL PUBLICITY.
3 HOWEVER, OBVIOUSLY THAT'S GOING TO FACTOR IN AT SOME POINT.
4 HOWEVER, OUR CONCERNS REALLY ARE MORE GENERAL. YOU KNOW,
5 WE'VE CONSULTED WITH OTHER PEOPLE WHO HAVE DONE CAPITAL
6 TRIALS AND WHO HAVE GREATER ACADEMIC KNOWLEDGE OF THE IMPACT
7 OF SEQUESTRATION ON A JURY, AND, YOU KNOW, QUITE FRANKLY, WE
8 HAVE SEVERAL CONCERNS ABOUT IT.

9 WE DO -- WE DON'T THINK IT IS A PRO-DEFENDANT
10 POLICY. THESE FOLKS ARE CUT OFF FROM THEIR FAMILY AND
11 FRIENDS. THEY ARE, YOU KNOW, UNDERSTANDABLY PROBABLY
12 SOMEWHAT RESENTFUL. AND, YOU KNOW, THE REASON THAT THEY'RE
13 THERE, THE REASON THAT THEY'RE AWAY AND TAKEN, YOU KNOW, AND
14 SHUT OFF FROM THE OUTSIDE WORLD IS BECAUSE OF THE DEFENDANT.
15 WE CERTAINLY THINK THAT THAT -- YOU KNOW, THAT DOESN'T
16 BENEFIT HIM.

17 THE OTHER THING IS: THESE FOLKS WANT TO GET OUT.
18 SORRY. WE THINK IT ENCOURAGES QUICKER DELIBERATIONS. THESE
19 FOLKS KNOW THAT WHEN THEY'RE DONE THEY GET TO GO HOME RATHER
20 THAN WHEN WE'RE DONE FOR THE NIGHT WE CAN GO HOME AND THEN
21 COME BACK AND DO IT AT A SLOWER PACE. WE CERTAINLY THINK
22 THAT THAT BENEFITS MR. MERCER.

23 WE ALSO THINK IT ENCOURAGES A CERTAIN AMOUNT OF
24 IDENTIFICATION BETWEEN THE JURORS AND LAW ENFORCEMENT. AND,
25 TRAGICALLY, THE VICTIM IN THIS CASE WAS A MILITARY OFFICER,

1 AND I THINK THERE'S A FAIRLY CLOSE ASSOCIATION IN THE MINDS
2 OF MOST PEOPLE BETWEEN THE MILITARY AND LAW ENFORCEMENT. AND
3 THE MILITARY ESSENTIALLY ENFORCES LAWS OR POLICIES OF THE
4 UNITED STATES AND, YOU KNOW, FOREIGN COUNTRIES WHEREAS LAW
5 ENFORCEMENT IS HERE LOCALLY. THEY'RE -- THEY'RE OUR DOMESTIC
6 PROTECTORS. AND SO WE CERTAINLY THINK THAT THAT MIGHT
7 ENGENDER NOT ONLY A GREATER SENSE OF THEM -- WELL, A
8 HEIGHTENED SENSE OF LAW ENFORCEMENT PRESENCE IS PROBABLY NOT
9 TO MR. MERCER'S BENEFIT IS WHAT I'M TRYING TO SAY. I DIDN'T
10 SAY IT VERY WELL. BUT CERTAINLY IN THIS CASE, UNIQUE TO THE
11 CIRCUMSTANCES OF THIS VICTIM, WE THINK THAT THAT IS A REAL
12 PROBLEM.

13 YOU KNOW, THE OTHER THING IS -- I WOULD POINT OUT IS
14 THESE JURORS ARE GOING TO BE TOLD THAT THEY CAN'T READ THE
15 NEWSPAPERS OR WATCH TELEVISION OR DO ANYTHING LIKE THAT, AND
16 THEY'RE GOING TO BE SWORN TO UPHOLD WHAT THEY'RE TOLD TO DO.
17 AND IT'S MY SUSPICION THAT, YOU KNOW, AFTER WE GET THROUGH
18 THOROUGHLY QUESTIONING THESE PEOPLE THAT WE'LL KNOW WHO WE
19 CAN TRUST AND WHO WE CAN'T, AND WE'RE GOING TO PICK THE 12
20 BEST WHO COME BEFORE US. AND I THINK THAT, YOU KNOW, WE
21 SHOULD BE ABLE TO TRUST THEM TO FOLLOW THEIR OATH, AND IF
22 THEY'RE THE TYPES OF PEOPLE WHO AREN'T GOING TO DO IT, I
23 DON'T THINK PUTTING THEM IN A ROOM WITH A BUNCH OF OTHER
24 JURORS IS NECESSARILY GOING TO PRODUCE A BETTER RESULT THAN
25 IF THEY HAD JUST BEEN LEFT ON THEIR OWN.

1 WE CERTAINLY THINK THAT, YOU KNOW, SEQUESTRATION IS
2 ALSO SOMEWHAT UNIQUE TO SOUTH CAROLINA CAPITAL TRIALS. IN
3 GEORGIA AND NORTH CAROLINA THEY DON'T DO THAT. I MEAN,
4 THEY'RE NOT SEQUESTERING PEOPLE. THERE'S SOME HUGE TRIALS
5 THAT HAVE GONE ON IN THIS COUNTRY WHERE PEOPLE AREN'T
6 SEQUESTERED. I MEAN, THERE ARE GOOD AND SOLID REASONS FOR
7 NOT SEQUESTERING JURORS, AND SO WE WOULD SIMPLY ASK THAT YOUR
8 HONOR CONSIDER ALL THAT AND NOT SEQUESTER THE JURORS.

9 MR. MYERS: WHEN WE FIRST STARTED THIS PROCESS IN
10 THE SEVENTIES, I HAD SOME DOUBTS ABOUT SEQUESTRATION, BUT IT
11 ONLY TOOK A FEW CASES FOR ME TO BE CONVINCED THAT THAT WAS
12 THE WAY TO GO IN CAPITAL TRIALS. THIS IS NOT GOING TO BE A
13 VERY LONG CASE. WE'RE GOING TO HAVE JURY SELECTION THE WEEK
14 OF THE 10TH AND START THE TRIAL THE WEEK OF THE 17TH WHICH
15 FURTHER REDUCES DOWN THE TIME FOR SEQUESTRATION.

16 I KNOW THAT YOU TELL JURORS, "DON'T READ THE
17 NEWSPAPERS. DON'T TALK WITH PEOPLE. DON'T LISTEN TO THE
18 TELEVISION. DON'T LISTEN TO THE RADIO," BUT THERE'S TOO MANY
19 TRIALS EVEN WITH JURY SEQUESTRATION THAT THAT'S VIOLATED. I
20 WAS JUST READING A SUPREME COURT CASE THIS WEEK THAT A JURY
21 WAS SEQUESTERED, THAT THE JUDGE HAD TOLD THE JURY OVER AND
22 OVER, "DON'T TALK WITH PEOPLE ABOUT THE CASE. YOU'LL BE ABLE
23 TO TALK WITH YOUR FAMILY MEMBERS, AND IT WILL BE MODIFIED BY
24 WHOEVER IS THE CUSTODIAN, BUT DON'T DISCUSS THE CASE." WELL,
25 LO AND BEHOLD A JUROR DISCUSSED THE CASE, A WIFE AND HUSBAND,

MARCH 30, 2006, HEARING

1 ABOUT THEM HAVING PROPERTY NEAR WHERE THE DEFENDANT WAS AND
2 WHERE THE CRIME WAS. THAT JUROR HAD TO BE REMOVED FROM THE
3 TRIAL.

4 RIGHT IN LEXINGTON COUNTY, EVEN WITH SEQUESTERED
5 JURORS, THE JURORS WERE GOING TO EAT LUNCH. THERE'S BEEN
6 SOME COMMENTS BY OTHERS TO THE JURY THAT'S CAUSED PROBLEMS.
7 THE NEWS MEDIA IS GUARDED BY SEQUESTRATION. ANYTHING IN THE
8 PAPERS ARE REMOVED. THEY'RE GUARDED BY TELEVISION AND RADIO
9 BECAUSE THEY ARE MONITORED ON WHAT THEY CAN SEE AND WHAT THEY
10 CAN'T SEE.

11 PEOPLE ARE OUT TO EAT LUNCH. THEY'RE OUT
12 UNCONTROLLED AT NIGHT. THERE'S TOO MUCH OF A RISK OF JURORS
13 BECOMING INFLUENCED BY WHAT OTHER PEOPLE SAY, WHAT OTHER
14 PEOPLE SAY AROUND THEM, NOT DIRECTLY TO THEM OR MAYBE
15 DIRECTLY TO THE JURORS. BUT PRIOR INSTANCES WE HAVE ALMOST
16 DEMAND SEQUESTRATION.

17 UNFORTUNATELY, IN CASES IN LEXINGTON COUNTY FOR MANY
18 YEARS NOW, AFTER TRIALS HAVE CONCLUDED THERE HAVE BEEN
19 LAWYERS NOT NECESSARILY INVOLVED IN THE TRIAL OF THE CASE
20 THAT GO OUT AND INTERVIEW JURORS SAYING, "WHO DID YOU TALK
21 WITH? WHAT DID Y'ALL DO IN THE JURY ROOM? DID YOU LISTEN TO
22 THE JUDGE'S INSTRUCTION? WHAT WAS SAID? DID ANYBODY TALK
23 WITH YOU?" THINGS OF THAT NATURE, TO TRY TO PUT IN AN
24 APPELLATE ISSUE. THERE'S JUST TOO MUCH OF A CHANCE OF
25 CAUSING SOME KIND OF LEGAL ISSUE THAT WOULD REQUIRE A SECOND

1 TRIAL.

2 THE ONLY SAFE WAY IS TO HAVE THE JURORS TOGETHER, TO
3 HAVE THE JURORS WITH SOMEBODY MONITORING THEIR ACTIVITIES AS
4 FAR AS WHERE THEY GO, WHO THEY'RE EXPOSED TO, WHAT THEY READ,
5 WHAT THEY HEAR ON THE NEWS MEDIA, WHETHER IT BE T.V. OR
6 RADIO, AND TO MAKE SURE THAT THEY ARE NOT EXPOSED TO ANY
7 UNDUE PREJUDICIAL OUTSIDE INFLUENCE. THE JURORS SEEM TO GIVE
8 THE CASE MORE CONSIDERATION BECAUSE THEY'RE TOGETHER, AND
9 THEY GIVE WHAT'S GOING ON IN THE COURTROOM PLENTY OF
10 CONSIDERATION AND THEIR ATTENTION IS DIRECTED ON THAT AND NOT
11 OUTSIDE MATTERS.

12 NOW, THEY WILL HAVE OPPORTUNITIES TO SOCIALIZE IN A
13 CONTROLLED ENVIRONMENT. THEY'RE GOING TO HAVE OPPORTUNITIES
14 TO TALK WITH FAMILY MEMBERS IN A CONTROLLED ENVIRONMENT.
15 THEY'RE GOING TO HAVE OPPORTUNITIES TO GO OUT WHEN COURT
16 BREAKS DOWN OR DURING A BREAK AND HAVE RECREATIONAL
17 ACTIVITIES IN A CONTROLLED ENVIRONMENT. THERE'S TOO MUCH OF
18 A CHANCE THAT WITHOUT THAT CONTROLLED ATMOSPHERE THAT
19 EVERYTHING WE DO HERE WILL HAVE TO BE DONE OVER AGAIN
20 UNNECESSARILY. SO WE SUBMIT TO YOU THAT SEQUESTRATION IS NOT
21 ONLY APPROPRIATE BUT THAT IT IS HIGHLY NECESSARY IN A CASE OF
22 THIS NATURE.

23 THE COURT: ANY RESPONSE?

24 MS. KIMBROUGH: BRIEFLY, YOUR HONOR. I NOTICE THE
25 CASES MR. MYERS IS CITING WHERE THERE'S BEEN JURY

1 IMPROPRIETY, THOSE FOLKS WERE SEQUESTERED. IT SEEMS TO RUN
2 COUNTER TO THE ARGUMENT THAT SEQUESTRATION IS A GOOD THING.
3 I REALIZE THAT THAT ARGUMENT WAS COINED IN TERMS OF EVEN
4 WITH SEQUESTRATION THIS HAPPENED, BUT THE BOTTOM LINE IS IT'S
5 OBVIOUS THAT SEQUESTRATION IS NOT SOME MAGIC BULLET THAT
6 CURES ANY POSSIBLE PROBLEM WITH AN OUTSIDE INFLUENCE.

7 I WOULD FURTHER NOTE THAT WHEN WE WERE IN OUR
8 INITIAL MEETING TALKING ABOUT SECURITY ISSUES, ONE OF THE
9 FOLKS WHO HAD HELPED CHAPERONE A GROUP OF JURORS MENTIONED
10 THAT THEY TOOK THEM TO A LAW ENFORCEMENT HOT DOG ROAST. I
11 MEAN, THIS IS EXACTLY THE TYPE OF SUBTLE LAW ENFORCEMENT -- I
12 DON'T THINK IT WAS INTENTIONALLY INAPPROPRIATE, BUT IT ALLOWS
13 THE JURORS TO COME VERY CLOSELY ALIGNED WITH AND ASSOCIATED
14 WITH LAW ENFORCEMENT AND THAT IS -- YOU KNOW, OBVIOUSLY LAW
15 ENFORCEMENT AND THE SOLICITOR'S OFFICE ARE -- YOU KNOW,
16 THEY'RE SORT OF A TEAM IN THE PROCESS OF A TRIAL. AND, YOU
17 KNOW, THAT'S -- THAT'S CLEARLY NOT GOING TO HELP MR. MERCER.
18 WE WANT THEM TO REMAIN NEUTRAL AND IMPARTIAL AND -- BEG THE
19 COURT'S INDULGENCE VERY BRIEFLY.

20 THE ONE CASE THAT'S CITED -- AND I APOLOGIZE.
21 THERE'S A -- THERE'S A FOOTNOTE 1 ON PAGE 8. THIS IS A REAL
22 CASE, THE CASE OF WILLIAM BELL. THESE FOLKS WERE SEQUESTERED
23 AND THEY WERE DRINKING AND THEY WERE ALL HANGING OUT TOGETHER
24 AND, YOU KNOW, THERE WAS NOTHING ELSE FOR THEM TO DO BUT BE
25 WITH EACH OTHER. AND OBVIOUSLY IN THAT CASE, AS WELL AS THE

1 ONE THAT MR. MYERS JUST CITED, SEQUESTRATION ACTUALLY WORKED
2 AGAINST THE JURORS DOING WHAT THEY WERE TOLD TO DO. AND SO,
3 YOU KNOW, WE JUST -- WE JUST DON'T THINK IT'S, A., NECESSARY
4 OR, B., THAT IT PROMOTES ANY HEIGHTENED DEGREE OF SECURITY
5 THAT THE CASE WILL GO FORWARD IN AN APPROPRIATE FASHION.

6 AND AS FAR AS PEOPLE INTERVIEWING JURORS AFTER THE
7 FACT, I MEAN, I THINK THAT'S NEITHER HERE NOR THERE. JURORS
8 ARE -- THEY HAVE A FIRST AMENDMENT RIGHT. THEY CAN TALK TO
9 YOU OR THEY CAN SAY, "GET OFF MY FRONT DOOR AND LEAVE ME
10 ALONE." AND SO I DON'T THINK SEQUESTRATION AND POST-TRIAL
11 INTERVIEWS REALLY HAVE A WHOLE LOT IN COMMON, AND WE JUST
12 THINK FOR THE REASONS STATED THAT SEQUESTRATION IS NOT IN MR.
13 MERCER'S BEST INTEREST.

14 MR. MYERS: AND WHEN THAT JURY PANEL THAT WAS
15 SEQUESTERED WENT TO A RESTAURANT, SOMEBODY YELLED OUT. JUST
16 THINK OF WHAT WOULD HAVE HAPPENED IF THE S.L.E.D. AGENTS AND
17 THE PEOPLE WHO HAD CUSTODY OF THE JURY HADN'T BEEN THERE.
18 HOW FAR WOULD THAT HAVE GONE? WHAT IF THEY GO OUT TO A
19 MOVIE, AS AN INCIDENT HAPPENED, AND SOMEBODY YELLS OUT,
20 WITHOUT PEOPLE THERE TAKING CONTROL OF THE SITUATION? IT WAS
21 DIFFUSED. IT WASN'T ALLOWED TO GET OUT OF HAND. WITH PEOPLE
22 OUT ON THEIR OWN TO LEAVE THIS COURTHOUSE, THAT'S A REAL
23 DANGEROUS SITUATION.

24 WE HAD A CASE HERE THIS YEAR WHERE A JURY WAS NOT
25 SEQUESTERED, A NON-CAPITAL CASE, AND A JUROR WAS LEAVING THE

1 COURTHOUSE AND SOMEBODY CALLED AND SAID, "I SAW YOU LEAVING
2 THE COURTHOUSE. WHAT ARE YOU DOING?" "WELL, I'M A JUROR."
3 THEN THERE WAS CONFLICTING THINGS ABOUT WHETHER SOMETHING WAS
4 DISCUSSED ABOUT THE CASE. THERE'S JUST TOO MUCH OF AN
5 OPPORTUNITY FOR THINGS TO GO AWRY WHEN THEY ARE NOT
6 SEQUESTERED.

7 THE COURT: I WAS THE PRESIDING JUDGE IN THAT CASE,
8 I THINK.

9 MR. MYERS: YOU WERE.

10 THE COURT: ALL RIGHT. ANYTHING FURTHER ON THAT
11 QUESTION?

12 MS. KIMBROUGH: NO, YOUR HONOR.

13 THE COURT: ALL RIGHT. NOW, YOU HAVE RAISED THE
14 ALTERNATIVE QUESTION, I SUPPOSE, OF: IF THERE IS GOING TO BE
15 SEQUESTRATION, WHETHER OR NOT RETIRED S.L.E.D. AGENTS SHOULD
16 HANDLE IT AS THEY TRADITIONALLY DO. DO YOU WANT TO ADDRESS
17 THAT?

18 MS. KIMBROUGH: YES, YOUR HONOR. YOU KNOW, THAT
19 ARGUMENT'S KIND OF A FIRST COUSIN TO THE MAIN ARGUMENT, AND
20 THAT IS, YOU KNOW, WHEN THESE FOLKS ARE TOGETHER FOR TWO
21 WEEKS AND THEY'RE SEPARATED FROM EVERYBODY ELSE, ESPECIALLY
22 WHEN YOU'VE GOT A VICTIM WHO WAS A MILITARY OFFICER, THAT,
23 YOU KNOW, HAVING SOME OF THE OVERWHELMING LAW ENFORCEMENT
24 PRESENCE AROUND THESE JURORS MAY EXERT A SUBTLE INFLUENCE,
25 YOU KNOW. THE S.L.E.D. AGENTS ARE PROBABLY WONDERFUL PEOPLE

1 WHO ARE GOING TO TAKE GOOD CARE OF THEM. THE JURORS ARE
2 GOING TO COME TO LIKE THEM OR PRESUMABLY SO. AND HAVING A
3 NEUTRAL PARTY WATCHING OVER THE JURORS WILL INSURE THAT THERE
4 ISN'T THAT UNDUE INFLUENCE. YOU KNOW, WE CERTAINLY DON'T
5 THINK S.L.E.D. HAS SOME BIG CONSPIRACY TO TRY TO HURT MR.
6 MERCER, BUT THERE ARE THOSE SUBTLE INFLUENCES THAT HAVING A
7 LOT OF LAW ENFORCEMENT AROUND IS GOING TO EXERT OVER THEM.

8 THE COURT: WELL, IF I WERE TO ORDER SEQUESTRATION,
9 WHAT ALTERNATIVES WOULD I HAVE TO USING RETIRED S.L.E.D.
10 AGENTS AS THOSE WHO WOULD -- WHO WOULD BE WITH THE JURY AND
11 DO WHATEVER IT IS THAT HAS TO BE DONE IN THE COURSE OF -- OF
12 THEIR SERVICE?

13 MS. KIMBROUGH: WELL, THE FIRST THING THAT COMES TO
14 MIND WOULD BE A PRIVATE SECURITY FIRM, YOU KNOW, FOLKS WHO
15 ESSENTIALLY COME AND WATCH BUSINESSES. THEY COULD BE GIVEN
16 INSTRUCTIONS VERY CLEARLY BY S.L.E.D. AS TO WHAT SHOULD AND
17 SHOULD NOT HAPPEN, AND LET THOSE FOLKS WITH NO ACTUAL LAW
18 ENFORCEMENT CONNECTION - THESE ARE PEOPLE WITHOUT BADGES -
19 LET THEM COME AND USHER THE JURORS TO WHERE THEY NEED TO BE.
20 YOU KNOW, IT CERTAINLY DOESN'T TAKE A LAW ENFORCEMENT
21 BACKGROUND TO TRANSPORT FOLKS AND TO MAKE SURE THAT NOBODY
22 GETS NEAR THEM AND TO, YOU KNOW, ESSENTIALLY MONITOR WHAT'S
23 GOING ON.

24 THE COURT: OKAY. WHO -- HOW -- HOW ARE THE
25 S.L.E.D. AGENTS COMPENSATED FOR THEIR TIME? DOES THE COUNTY

1 PAY THAT EXPENSE?

2 THE CLERK: THE STATE PAYS IT.

3 THE COURT: THE STATE PAYS IT? IT COMES OUT OF THE
4 S.L.E.D. BUDGET?

5 THE CLERK: IT DOES BECAUSE I ASKED THE QUESTION
6 LAST WEEK.

7 THE COURT: ALL RIGHT. IS THERE -- IS THERE ANY
8 STATUTORY OR OTHER LEGAL AUTHORITY THAT RELATES TO HOW A JURY
9 IS TO BE MANAGED DURING SEQUESTRATION OR IS IT JUST TRADITION
10 THAT S.L.E.D. TAKES CARE OF IT?

11 MR. MYERS: IT'S JUST A TRADITION. I DON'T KNOW OF
12 ANY STATUTORY OR CASE LAW ON IT. THERE'S A MENTALITY IN
13 COLUMBIA AND HIGH GOVERNMENT OFFICES OVER THE LAST THREE
14 YEARS THAT IT'S GOOD TO HAVE INEXPERIENCED PEOPLE IN HIGH
15 PLACES AND NEW IDEAS AND ALL THAT, BUT I DON'T NECESSARILY
16 AGREE WITH THAT. I THINK THAT'S DANGEROUS. BECAUSE OF
17 THINGS THAT HAVE HAPPENED EARLY ON - LIKE THEY CITED ONE CASE
18 - CHIEF STEWART AND THEM, I AM TOLD, HAVE GONE TO THE PROCESS
19 OF MAYBE HAVING AN ACTIVE S.L.E.D. AGENT WORKING WITH RETIRED
20 S.L.E.D. AGENTS WHO HAVE BEEN INSTRUCTED, WHO HAVE BOOKLETS,
21 WHO HAVE TAKEN CLASSES, WHO HAVE BEEN TOLD HOW TO TAKE
22 CUSTODY OF JURORS. NOT ONLY THAT, THEY HAVE EXPERIENCE IN
23 DOING THAT. I GO WITH EXPERIENCE AND TRIED AND TRUE METHODS,
24 AND PEOPLE WHO KNOW WHAT TO DO, WHO KNOW HOW TO FOLLOW THE
25 LAW, WHO ARE SWORN TO UPHOLD THE LAW, I THINK THOSE ARE THE

1 PEOPLE WHO SHOULD BE DOING IT.

2 THE COURT: ALL RIGHT. LET'S -- LET'S LOOK AT THE
3 MIDDLE GROUND, THE POTENTIAL MIDDLE GROUND, OF HAVING THE
4 S.L.E.D. PEOPLE DO IT BUT THAT FACT NEVER BE KNOWN TO THE
5 JURY. IS THAT POSSIBLE? IS IT POSSIBLE THAT THEY NOT BE
6 INFORMED THAT THESE ARE LAW ENFORCEMENT AGENTS?

7 MS. KIMBROUGH: YOUR HONOR, THEORETICALLY I WOULD
8 THINK IT IS POSSIBLE, I MEAN, IN THE SAME WAY THAT WE'RE
9 GOING TO HAVE SERGEANT -- IS IT SERGEANT ANDERSON?

10 SERGEANT ANDERSON: I'M SORRY?

11 MS. KIMBROUGH: I'M SORRY. IN THE SAME WAY THAT THE
12 BAILIFFS---

13 THE COURT: WILL BE IN PLAIN CLOTHES.

14 MS. KIMBROUGH: RIGHT. WILL BE IN PLAIN CLOTHES. I
15 MEAN, I THINK THEORETICALLY THAT'S POSSIBLE, BUT YOU'RE STILL
16 DEALING WITH FOLKS WHO ARE LAW ENFORCEMENT AND THEY'RE -- YOU
17 KNOW, THEY'RE GOING TO HAVE SOME CONTACT WITH THESE JURORS
18 AND THAT CONTACT IS GOING TO BE DAILY AND ALMOST CONSTANT,
19 AND I THINK THERE MAY BE A TENDENCY TO HAVE A SORT OF PRO LAW
20 ENFORCEMENT ATTITUDE---

21 THE COURT: WELL, YOU KNOW, IN EFFECT, IF I ORDER
22 THAT THE JURY BE SEQUESTERED, THEN THOSE PEOPLE INTO WHOSE
23 CARE AND CUSTODY I PUT THE JURY IT SEEMS TO ME HAVE TO HAVE
24 SOME SORT OF AUTHORITY TO DO WHAT THEY ARE GOING TO DO, AND
25 OBVIOUSLY A S.L.E.D. AGENT WITH A -- WITH A -- WITH A LAW

1 ENFORCEMENT OFFICER'S COMMISSION AND THE -- AND THE AUTHORITY
2 OF THE STATE GOVERNMENT BEHIND THEM WITH MY ORDER HAVE THE
3 AUTHORITY TO DIRECT JURORS AND SAY, "NO, YOU CAN'T DO THIS,"
4 OR, "YES, YOU CAN DO THAT." WOULD IT BE POSSIBLE FOR ME TO
5 AUTHORIZE A PRIVATE PERSON, WHETHER THEY BE A SECURITY
6 OFFICER OR NOT, TO DIRECT A JUROR AS TO HOW THE JUROR IS TO
7 BEHAVE AND NOT TO BEHAVE DURING SEQUESTRATION?

8 JUST, FOR EXAMPLE, LET'S SAY THAT THEY TAKE THEM OUT
9 TO DINNER ONE NIGHT AND A COUPLE OF THE GUYS SAY, "YOU KNOW,
10 I THINK WE'RE JUST GOING TO GO NEXT DOOR AND HAVE A DRINK
11 WHILE WE WAIT ON DINNER RATHER THAN SIT HERE AND TALK TO YOU
12 PEOPLE WHILE WE WAIT ON DINNER." OBVIOUSLY A S.L.E.D. AGENT
13 -- I MEAN, I THINK IT'S OBVIOUS A S.L.E.D. AGENT WITH THE
14 AUTHORITY OF STATE GOVERNMENT BEHIND HIM COULD SAY, "NO, YOU
15 CAN'T DO THAT." COULD A PRIVATE PERSON DO THAT LEGALLY?

16 MS. KIMBROUGH: YOUR HONOR, I DON'T THINK THEY HAVE
17 THE LAWFUL AUTHORITY TO DO IT, BUT WHAT THEY DO HAVE IS THE
18 POWER TO COME BACK -- FIRST, THE POWER TO SAY, "LISTEN. YOU
19 HEARD WHAT THE JUDGE SAID. YOU KNOW, THIS IS CONTEMPT OF
20 COURT IF YOU DON'T DO WHAT THE JUDGE HAS ASKED YOU TO DO."
21 THEY CAN ADMONISH THEM AND THEY CAN COME BACK AND THEY CAN
22 TELL YOU THE NEXT MORNING, "THESE TWO JURORS ARE NOT FIT TO
23 SERVE BECAUSE THEY WENT OVER AND HAD A DRINK WHEN WE TOLD
24 THEM NOT TO." I MEAN, ESSENTIALLY, YOU KNOW, WE'RE
25 SUBSTITUTING LAW ENFORCE -- WE'RE SUBSTITUTING SOMEONE WHO IS

1 SORT OF A DE FACTO BABY-SITTER FOR A LAW ENFORCEMENT OFFICER,
2 BUT THEY CERTAINLY CAN REPORT BACK TO YOUR HONOR ANYTHING
3 THAT HAPPENS WHEN THEY'RE THERE.

4 MR. LITTLEJOHN: JUDGE, IT SEEMS TO ME THE POWER TO
5 RESTRICT THE JURORS' MOVEMENTS, ACTIVITIES, ET CETERA, WOULD
6 HAVE TO COME FROM THE COURT BECAUSE JUST A LAW ENFORCEMENT
7 OFFICER COULDN'T SAY, "I'M GOING TO ARREST YOU IF YOU GO NEXT
8 DOOR TO HAVE A DRINK."

9 THE COURT: YOU'RE DEFINITELY CORRECT ABOUT THAT.
10 IT HAS TO COME -- THE POWER HAS TO COME FROM ME, BUT I'M
11 QUESTIONING WHETHER OR NOT I HAVE THE POWER TO AUTHORIZE A
12 PRIVATE CITIZEN TO CONTROL THE BEHAVIOR OF A JUROR WHEREAS I
13 THINK IT'S CLEAR THAT I HAVE THE POWER TO AUTHORIZE A STATE
14 GOVERNMENT OFFICIAL TO CONTROL THE BEHAVIOR OF A JUROR.

15 MR. LITTLEJOHN: JUDGE, IT SEEMS TO ME THAT YOU
16 COULD MAKE THEM COURT BAILIFFS OPERATING UNDER THE AUTHORITY
17 OF THE CIRCUIT COURT.

18 THE COURT: OKAY. WELL, THAT MAY BE TRUE. IT WAS
19 JUST -- IT WAS JUST A QUESTION THAT POPPED IN MY MIND.

20 MR. LITTLEJOHN: JUDGE, I THINK YOU COULD -- YOU
21 COULD DO THAT FOR A GROUP OF RETIRED CRIMINAL DEFENSE
22 ATTORNEYS.

23 THE COURT: DO YOU KNOW OF ANY WHO ARE WILLING TO
24 SERVE?

25 MR. LITTLEJOHN: PROBABLY NOT AT THE RATES THE

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1 COUNTY WOULD PAY THEM.

2 MS. KIMBROUGH: WE COULD ROUND UP SOME RECRUITS.

3 THE COURT: ALL RIGHT. ANYTHING FURTHER ON EITHER
4 OF THESE TWO QUESTIONS?

5 MR. MYERS: NO, SIR.

6 MS. KIMBROUGH: NONE, YOUR HONOR.

7 THE COURT: OKAY. I DON'T KNOW THAT THE AMOUNT OF
8 OR THE CHARACTER OF PRETRIAL PUBLICITY IS GOING TO
9 SUBSTANTIALLY AFFECT MY DECISION, BUT IT HAS THE POTENTIAL TO
10 SUBSTANTIALLY AFFECT THE DECISION. SO I'M GOING TO -- I'M
11 GOING TO WITHHOLD, AS I SAID I WOULD, MAKING A DECISION ON
12 THIS UNTIL SOME TIME THE WEEK OF THE 10TH. ALL RIGHT.
13 ANYTHING FURTHER FOR TODAY?

14 MR. MYERS: YES, SIR. WHEN WE MET EARLIER THIS
15 MORNING, TALKING ABOUT THE JURORS...

16 THE COURT: YES, SIR.

17 MR. MYERS: I HAVE GONE THROUGH THE LIST OF JURORS
18 THAT HAVE EXCUSES OR LIVE OUTSIDE THE COUNTY OR THEY COULDN'T
19 BE LOCATED AND I'VE GIVEN THOSE TO THE CLERK, THE ONES THAT
20 WE AGREE TO, AND THAT'S A PRETTY GOOD CHUNK THAT WE AGREE TO
21 ON THERE. THERE'S JUST A FEW OF THEM THAT WE DIDN'T AGREE TO
22 THAT MAYBE YOU SHOULD DETERMINE THAT ABOUT WORK PROBLEMS AND
23 THINGS LIKE THAT. AND THEN SECONDLY THIS MORNING YOU SAID
24 YOU WANT US TO SUBMIT SOME QUESTIONS ABOUT HOW TO HANDLE THE
25 JURY ON MONDAY MORNING AND WHAT THE COURT SHOULD SAY.

1 I KNOW YOU DON'T NEED ANY ADVICE ON THAT, BUT I
2 WOULD LIKE TO SUBMIT TO YOU HOW JUDGE WESTBROOK HANDLED STATE
3 VERSUS NORTHCUTT AND HOW JUDGE RALPH KING ANDERSON HANDLED
4 BENJI POWERS, TWO CAPITAL CASES, AND WE WOULD SUBMIT THOSE TO
5 YOU RATHER THAN ME TRYING TO MAKE UP QUESTIONS.

6 THE COURT: I'D BE HONORED TO HAVE THOSE SUBMISSIONS
7 MADE.

8 MR. MYERS: THANK YOU, SIR.

9 THE COURT: ALL RIGHT. SO DO WE -- ARE WE IN A
10 POSITION THEN TO -- FOR ME TO SIGN ANOTHER ORDER AUTHORIZING
11 THE CLERK TO EXCUSE A LIST OF JURORS?

12 THE CLERK: I HAVEN'T RECEIVED MR. LITTLEJOHN'S
13 RESPONSE. MR. MYERS GAVE ME HIS JUST BEFORE HE LEFT OUT OF
14 THE ROOM.

15 MR. LITTLEJOHN: AND I GOT IT JUST BEFORE THE
16 HEARING, BEFORE THIS HEARING BEGAN.

17 THE CLERK: AND THERE'S ONLY JUST A FEW OF THEM,
18 YOUR HONOR, THAT I THINK THEY'RE -- THAT'S ON THIS UPDATED
19 LIST THAT YOU'VE GOT THAT -- LIKE MR. MYERS SAID THAT THEY'VE
20 GOT A WORK PROBLEM OR EDUCATION LEVEL THAT I'M GOING TO NEED
21 YOU TO LOOK AT AND TELL ME WHAT TO DO.

22 THE COURT: ALL RIGHT. THEN I WILL -- LET'S PUT
23 TOGETHER AN ORDER NOW AND I'LL AUTHORIZE -- I'LL SIGN THAT
24 ORDER NOW AND THEN I'LL LOOK AT THE OTHER JURORS BEFORE I
25 LEAVE TODAY AND SEE WHETHER OR NOT I WANT TO DO ANYTHING

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1 ABOUT ANY OF THOSE JURORS.

2 THE CLERK: WHAT I WILL DO IS TAKE ALL OF THESE THAT
3 THEY AGREED UPON AND PUT THEM IN YOUR CONSENT ORDER AND TAKE
4 THE ONES STILL WITH PROBLEMS AND THAT WILL BE ALL THAT'S LEFT
5 ON THIS LIST.

6 THE COURT: CAN YOU PREPARE THE CONSENT ORDER?

7 THE CLERK: YES, SIR.

8 THE COURT: DO YOU HAVE -- DO YOU HAVE A DRAFT OF
9 IT? I MEAN...

10 THE CLERK: YES.

11 THE COURT: OKAY.

12 THE CLERK: IT WON'T TAKE ME JUST A FEW MINUTES TO
13 GO DOWN AND CHANGE IT.

14 THE COURT: WELL, GO -- YOU GO DO THAT. WE'LL TAKE
15 A BREAK AND I WILL -- IS IT POSSIBLE FOR ME TO KNOW WHO TO
16 LOOK AT NOW WHILE YOU'RE DOING THAT, TO LOOK AT THE OTHER
17 ONES?

18 THE CLERK: YES, SIR. WHERE DID I PUT IT? I'VE PUT
19 LITTLE RED MARKS BESIDE SOME OF THESE.

20 THE COURT: AND THE RED MARKS ARE THE ONES THAT I
21 NEED TO LOOK---

22 THE CLERK: RED STARS. LITTLE RED STARS. YES, SIR.

23 THE COURT: THEY'RE THE ONES THAT I NEED TO LOOK AT.

24 THE CLERK: LET ME SEE, JUDGE. HOLD ON JUST A
25 MOMENT.

1 THE COURT: ALL RIGHT. WE'LL TAKE A -- WHY DON'T WE
2 JUST TAKE A SHORT BREAK AND Y'ALL HANG OUT FOR A FEW MINUTES
3 AND THEN WE'LL SEE IF WE NEED TO DO ANYTHING FURTHER?

4 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

5 THE COURT: BE SEATED, PLEASE. ALL RIGHT. WHILE
6 WE'RE WAITING ON HOPE TO GET THE ORDER FOR THE JURORS THAT
7 YOU CONSENT TO, I WANT TO DISCUSS SOME OF THE JURORS THAT
8 HAVE NOT BEEN CONSENTED TO TO SEE IF WE CAN MAKE ANY
9 PROGRESS. Y'ALL WANT THE SOLICITOR IN HERE, DON'T YOU?

10 MR. HUBBARD: I'M FINE WITH IT, YOUR HONOR.

11 MR. LITTLEJOHN: WE'RE FINE WITHOUT HIM, YOUR HONOR.

12 THE CLERK: I THINK HE WAS GETTING JURY INFORMATION.

13 THE COURT: GETTING WHAT?

14 THE CLERK: JURY INFORMATION THAT HOWARD HAD.

15 THE COURT: OKAY.

16 THE CLERK: THAT'S WHAT I HEARD IN THE HALL, RICK.

17 I DON'T KNOW THAT FOR SURE.

18 MR. HUBBARD: I'M SURE.

19 (PAUSE IN PROCEEDINGS.)

20 THE COURT: ALL RIGHT. WELL, I'M NOT GOING TO
21 EXCUSE NUMBER 10, I MEAN NOT -- NOT TODAY. I'LL LISTEN TO
22 HER WHEN IT COMES TIME FOR US TO MEET ON THE 10TH. I CAN'T
23 READ THE WHOLE REQUEST FROM DALE CANNON -- DALE CANNER.
24 SOMEBODY STUCK A STICKY NOTE OVER IT. STAFF RETREAT IN
25 ORLANDO? A MANDATORY...

1 THE CLERK: IT SAYS THE WEEK OF APRIL THE 10TH
2 REQUESTS TO BE EXCUSED. WE HAVE SCHEDULED A STAFF RETREAT IN
3 ORLANDO FOR THIS WEEK. THIS IS MANDATORY FOR ME. THANK YOU.
4 THAT'S IT. IT DOESN'T HAVE A...

5 THE COURT: ANY COMMENT?

6 MS. KIMBROUGH: (SHOOK HEAD FROM SIDE TO SIDE.)

7 MR. LITTLEJOHN: NO, YOUR HONOR.

8 THE COURT: ALL RIGHT. IS THERE ANY OBJECTION TO ME
9 MAKING MY DECISION BASED ON HIS AFFIDAVIT AND HIS NOTE?

10 MR. LITTLEJOHN: NO, YOUR HONOR.

11 THE COURT: ALL RIGHT. I'M GOING TO TRANSFER HIM TO
12 A DIFFERENT WEEK. ALL RIGHT. I WOULD NOT EXCUSE OR TRANSFER
13 NUMBER 55. MOLLY COOK, NUMBER 64, THAT DOES NOT APPEAR TO
14 QUALIFY UNDER THE AUTOMATIC OPPORTUNITY TO BE TRANSFERRED TO
15 A DIFFERENT TERM OF COURT BECAUSE SHE WORKS AT A -- WHAT
16 LOOKS LIKE A MILITARY DAY CARE CENTER, AND SO I WOULD NOT
17 TRANSFER HER. DANIEL COURTENAY, NUMBER 69, I WOULD NOT
18 EXCUSE OR TRANSFER HIM. I'M GOING TO LET MR. DAWKINS, NUMBER
19 76, COME IN. I MIGHT EXCUSE HIM WHEN HE GETS HERE, BUT HE
20 HASN'T GIVEN ME ANY EVIDENCE THAT HE'S ENROLLED IN SCHOOL
21 THIS CURRENT TERM, AND SO I'M GOING TO LET HIM COME IN BEFORE
22 I DO THAT.

23 THE CLERK: JUDGE, DO YOU NOT HAVE HIS SCHEDULE
24 ATTACHED?

25 THE COURT: I GOT A -- I'VE GOT A -- WHAT LOOKS LIKE

1 SOMETHING FROM THE FALL SEMESTER OF LAST YEAR.

2 THE CLERK: THE ONE I'VE GOT IN HERE SHOWS HIM
3 ENROLLED FROM JANUARY '06 TO MAY 10TH OF '06.

4 THE COURT: YEAH, I SEE IT. WELL, YOU'RE RIGHT.
5 IT'S A STATEMENT THAT'S DATED OCTOBER 24TH OF '05, AND I JUST
6 THINK THAT HE'S PROBABLY GOING TO -- HE JUST NEEDS TO COME IN
7 AND EXPLAIN THAT WHEN HE'S UNDER OATH. AND IF HE -- IF HE IS
8 IN SCHOOL, I'LL EXCUSE HIM. LAURA DAY, I WOULD -- I WOULD
9 NOT EXCUSE BASED ON WHAT SHE SUBMITTED. OKAY. MS. DENNIS
10 WILL HAVE TO COME IN BECAUSE IT MAY VERY WELL BE THAT SHE
11 MEETS THE EQUIVALENCY REQUIREMENT FOR A SIXTH GRADE
12 EDUCATION. THAT'S NUMBER 79.

13 MR. LITTLEJOHN: JUDGE, DID I MISS 72 SOMEWHERE
14 ALONG THE WAY? MS. DARBY?

15 THE COURT: NO, I DIDN'T LOOK AT 72. I'LL GO BACK
16 AND LOOK AT IT. 72, YOU KNOW, THAT MIGHT QUALIFY, BUT I JUST
17 DON'T THINK THAT'S ENOUGH INFORMATION FOR ME TO EXCUSE HER AT
18 THIS TIME. SO SHE'S GOING TO HAVE TO COME IN AND EXPLAIN HER
19 SITUATION. NEXT IS NUMBER 88, AND I WILL NOT -- WOULD NOT
20 EXCUSE MS. EDWARDS FOR THAT PARTICULAR PROBLEM. NOW, THIS
21 AFFIDAVIT, WHICH IS NOT SWORN, SAYS THAT -- ACTUALLY IT'S NOT
22 EVEN SIGNED BY THE JUROR. IT SAYS HE DOESN'T LIVE IN SOUTH
23 CAROLINA ANYMORE.

24 MR. HUBBARD: WHICH ONE IS THAT?

25 THE COURT: IT'S NUMBER 95, JOSEPH FELICIANO. HOW

1 WOULD Y'ALL LIKE FOR ME TO FURTHER VERIFY THAT STATEMENT, IF
2 AT ALL? HOW ABOUT IF I ASK THE CLERK OF COURT TO TRY TO
3 CONTACT THIS PERSON AND YOU CAN USE THE, YOU KNOW, THE -- AS
4 THE SHERIFF'S DEPARTMENT HAS BEEN TRYING TO FOLLOW UP, THIS
5 JUST MUST BE ONE THAT WAS FORWARDED, AND IF YOU CAN GET SOME
6 INFORMATION THAT WOULD VERIFY THAT HE LIVES OUT OF STATE,
7 THEN WE CAN -- I'LL -- I'LL PROBABLY EXCUSE HIM.

8 OKAY. FOR FOLKS LIKE NUMBER 131, YOU KNOW, HE CAN
9 -- HE SAYS HE DOESN'T HAVE -- HE DOESN'T HAVE ANYBODY TO TAKE
10 CARE OF THEM AFTER SCHOOL. HE CAN -- HE CAN JUST COME IN
11 THAT MORNING AND EXPLAIN HIS SITUATION, BUT FOR OTHER FOLKS
12 WHO CLAIM THE CHILD CARE EXEMPTION, THERE'S AN AFFIDAVIT THAT
13 I THINK COURT ADMINISTRATION MAKES AVAILABLE TO THE CLERKS OF
14 COURT. IS THAT WHERE YOU GET IT? AND IF THEY WERE TO
15 PROPERLY FILL OUT THAT AFFIDAVIT, WOULD THERE BE ANY
16 OBJECTION TO ME EXCUSING THEM BASED ON THAT AFFIDAVIT?

17 MS. KIMBROUGH: NO, YOUR HONOR.

18 MR. LITTLEJOHN: NO, YOUR HONOR.

19 MR. HUBBARD: NO, SIR, YOUR HONOR.

20 THE COURT: ALL RIGHT. WELL, DO YOU WANT TO TELL
21 MR. HARVEY THAT, MADAM CLERK, AND ANY OTHERS WHO CLAIM THE
22 CHILD-UNDER-SEVEN EXEMPTION? AND IF THEY WANT TO -- IF THEY
23 SUBMIT THE AFFIDAVIT TO YOU BEFORE MONDAY THE 10TH, YOU CAN
24 RUN IT BY ME AND I'LL EXCUSE THEM.

25 MR. LITTLEJOHN: JUDGE, WHAT ABOUT NUMBER 121?

1 THE COURT: ALL RIGHT. I DIDN'T SEE 121. I'LL GO
2 BACK TO IT. THAT DOESN'T QUALIFY FOR BEING EXCUSED. SO HE'S
3 NOT EXCUSED. WHAT DO Y'ALL SAY ABOUT 132?

4 MR. LITTLEJOHN: JUDGE, 132? WE'VE GOT IT AS
5 KERSHAW COUNTY?

6 THE COURT: YEAH.

7 MR. HUBBARD: WE CONSENT.

8 THE COURT: THE SOLICITOR AGREES TO EXCUSE THEM.

9 MR. LITTLEJOHN: JUDGE, WE -- IF HE'S -- IF HE'S
10 PROPERLY FILLED OUT THE AFFIDAVIT, WE HAVE NO OBJECTION.

11 THE COURT: NO, HE HASN'T FILLED OUT ANYTHING. ALL
12 I HAVE IS THAT THEY COULDN'T SERVE HIM, AND THE FORWARDING
13 ADDRESS THEY HAVE IS KERSHAW COUNTY.

14 MR. LITTLEJOHN: OH.

15 THE COURT: HAVE YOU SEEN THE AFFIDAVIT OF NON-
16 SERVICE? YOU'RE WELCOME TO COME LOOK AT THIS ONE.

17 MR. LITTLEJOHN: JUDGE, I'M SURE I HAVE IT IN HERE
18 BUT...

19 THE COURT: HERE. (THE COURT HANDS A DOCUMENT TO
20 MR. LITTLEJOHN.)

21 MR. LITTLEJOHN: JUDGE, WE HAVE NO OBJECTION TO
22 EXCUSING HIM.

23 THE COURT: OKAY.

24 MR. LITTLEJOHN: APPARENTLY HE HAS HIS DRIVER'S
25 LICENSE IN KERSHAW COUNTY.

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1 THE CLERK: JUDGE, DID YOU DO 122 AND I MISSED IT OR
2 DID THEY AGREE UPON IT AND THEY DIDN'T WANT AN AFFIDAVIT?

3 THE COURT: I THINK THE DEFENSE HAS AGREED TO 122.
4 SOMEBODY'S MADE A CHECK MARK ON MY LIST OR AN X. MARK. IS
5 THAT TRUE?

6 MR. LITTLEJOHN: YES, SIR, YOUR HONOR. YES, SIR.
7 THAT'S MY SIGNATURE.

8 THE COURT: WELL, SOMEBODY COPIED IT WITH JUST AN
9 X. ON MY LIST.

10 MR. LITTLEJOHN: THAT'S FINE.

11 THE COURT: ALL RIGHT. SO 132 IS A NONRESIDENT AND
12 IS NOT GOING TO BE IN THE JURY POOL. I DON'T KNOW WHETHER
13 YOU NOTIFY THEM THAT THEY'RE A NONRESIDENT OR NOT. 134,
14 THAT -- THAT DOES NOT QUALIFY, IN MY VIEW, FOR HIS BEING
15 EXCUSED. I'LL LET HIM EXPLAIN IT FURTHER TO ME WHEN HE SHOWS
16 UP FOR SERVICE IF HE WANTS TO. 143, IN MY VIEW, DOES NOT --
17 THAT DOES NOT QUALIFY FOR HIS BEING EXCUSED BASED ON WHAT
18 HE'S SUBMITTED SO FAR, SO I WOULD NOT EXCUSE HIM. AND 152 IF
19 THEY -- IF SHE FILLS OUT THE APPROPRIATE AFFIDAVIT AND HAS IT
20 SWORN, THEN SHE CAN BE -- YOU CAN RUN THAT BY ME AND I WILL
21 EXCUSE HER.

22 YOU KNOW, THIS 154 THAT -- THIS IS THE KIND OF
23 SITUATION THAT ALWAYS KIND OF SEEMS PUZZLING TO ME. THE
24 STATUTE SAYS THAT IF THEY HAVE A BUSINESS THAT CANNOT OPERATE
25 BECAUSE OF THEIR BEING ON JURY SERVICE, THEN THEY CAN BE

1 EXCUSED, BUT THERE ARE ALL SORTS OF PROFESSIONAL PEOPLE WHO
2 CAN'T DO THEIR WORK BECAUSE THEY'RE SERVING ON JURIES THAT WE
3 DON'T -- THAT I DON'T EXCUSE. AND I JUST THINK THAT JUST
4 BECAUSE SHE CAN'T DO HER WORK, THAT'S NO DIFFERENT FROM ANY
5 OTHER EMPLOYEE. I THINK THIS IS MORE LIKE A GUY WHO IS A
6 FOREMAN OF A -- OF A CARPENTRY CREW OR SOMETHING LIKE THAT,
7 AND WHEN HE CAN'T WORK, THEN THE CREW CAN'T WORK OR IF THEY
8 RUN A RETAIL STORE THAT CAN'T OPEN BECAUSE OF THE FACT THAT
9 THIS PERSON HAS TO SERVE JURY SERVICE... SO I'M NOT GOING TO
10 EXCUSE GLORIA JOYE BASED ON WHAT SHE HAS SUBMITTED HERE.
11 THAT'S JUROR NUMBER 154. 157, SHE'S NOT EXCUSED. NOW, HOW
12 -- HOW ARE Y'ALL HANDLING GETTING JUROR QUESTIONNAIRES FROM
13 THESE PEOPLE? ARE Y'ALL MAKING FOLLOW-UP PHONE CALLS?

14 THE CLERK: UH-HUH.

15 THE COURT: AND OBVIOUSLY SHE JUST HASN'T DONE IT
16 YET? CAN WE SEND -- I GUESS WE'LL JUST ADDRESS THAT WHEN
17 THOSE PEOPLE SHOW UP HERE ON MONDAY, THOSE WHO HAVEN'T FILLED
18 OUT QUESTIONNAIRES. IS THAT SUITABLE?

19 MR. LITTLEJOHN: YES, YOUR HONOR.

20 THE COURT: WE'LL GET THEM FILLED OUT THAT DAY AND
21 GET THEM TO Y'ALL. IS THAT OKAY?

22 MR. HUBBARD: WHAT WAS THAT AS FAR AS...

23 THE COURT: WE HAVE SEVERAL OF THESE PEOPLE LIKE
24 JUROR 157, DONNA KEFFER, WHO HAVE REQUEST TO BE -- REQUESTED
25 TO BE EXCUSED, AND CONTRARY TO THE INSTRUCTIONS I GAVE THEM

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1 IN THE LETTER THAT I WROTE, SHE HAS NOT SUBMITTED A JUROR --
2 A COMPLETED JUROR INFORMATION CARD OR A JUROR... NOW, SHE
3 DID SUBMIT THE INFORMATION CARD, BUT SHE HASN'T COMPLETED THE
4 QUESTIONNAIRE. SO I -- WE'LL JUST -- I PROPOSE THAT I JUST
5 TAKE THOSE FOLKS WHO HAVE NOT COMPLETED THE QUESTIONNAIRE AND
6 MAYBE JUST MAKE THEM STAY LATE ON MONDAY AND COMPLETE THE
7 QUESTIONNAIRE BEFORE THEY LEAVE.

8 MR. HUBBARD: DO YOU KNOW HOW MANY WE'VE GOT SO FAR
9 LIKE THAT? I'D HATE TO HAVE A HUGE POOL OF THEM AND THEN
10 WE'RE ALL KIND OF IN THE DARK UNTIL THE LAST MINUTE.

11 THE COURT: WELL, YOU'LL STILL HAVE IT A WEEK BEFORE
12 WE STRIKE THE JURY.

13 MR. HUBBARD: OKAY. OH, YOU'RE SAYING NEXT MONDAY?

14 THE COURT: YEAH.

15 MR. HUBBARD: OKAY.

16 THE COURT: NOW, GUESS WHAT I LEARNED TODAY? THE
17 SENATE HAS DELAYED CONSIDERATION OF THE BUDGET UNTIL
18 APRIL 10TH. WAIT A MINUTE NOW. SO THAT'S THE WEEK THAT HE
19 WOULD BE NEEDING TO BE HERE. THEY'RE SUPPOSED TO TAKE IT UP
20 APRIL 3RD, BUT APPARENTLY THEY'RE NOT GOING TO DO IT UNTIL
21 APRIL 10TH. HMM. WELL, IT MAY VERY WELL BE THAT I WOULD
22 EXCUSE HIM, BUT I THINK THAT WITHOUT CONSENT I NEED TO HAVE
23 HIM HERE AND SPEAK TO HIM AND ACTUALLY GET A BETTER
24 UNDERSTANDING OF HOW CRITICAL HIS ROLE IS IN THE SENATE'S
25 WORK THAT WEEK, AND SO I'M NOT GOING TO EXCUSE HIM AT THIS

1 TIME.

2 THE CLERK: WHAT NUMBER IS THAT?

3 THE COURT: 163. OKAY. 166 IS NOT EXCUSED AT THIS
4 TIME. WELL, WAIT A MINUTE. THERE'S ANOTHER NOTE. MR.
5 LITTLEJOHN?

6 MR. LITTLEJOHN: YES, YOUR HONOR.

7 THE COURT: I'VE GOT A NOTE HERE FROM A PHYSICIAN,
8 SIGNED BY A PHYSICIAN, WHOSE NAME I CAN'T READ, ELIZABETH
9 BOYSON, I GUESS, SAYING THAT THIS WOMAN'S HUSBAND IS A
10 SOMETHING DIABETIC IN RENAL FAILURE AND THAT SHE IS HIS
11 CARETAKER AND NEEDS TO BE AT HOME WITH HIM.

12 MR. LITTLEJOHN: JUDGE, THAT'S 171?

13 THE CLERK: 166.

14 THE COURT: 166.

15 MR. LITTLEJOHN: JUDGE, WE HAVE NO -- NO PROBLEM
16 WITH EXCUSING THAT JUROR.

17 THE COURT: ALL RIGHT. 166 THEN IS EXCUSED. IF YOU
18 WOULD LIKE TO -- WHAT'S THE -- WHAT WOULD YOU LIKE FOR 171 --
19 I WAS CONSIDERING HAVING THE CLERK CONTACT HIM TO GET AN
20 UPDATED MEDICAL EXCUSE? BECAUSE, YOU KNOW, FOR ALL WE KNOW
21 THE SURGERY DID NOT TAKE PLACE. WOULD THAT SUFFICE IF HE HAD
22 AN UPDATED MEDICAL EXCUSE?

23 MR. LITTLEJOHN: YES, YOUR HONOR.

24 THE COURT: CAN YOU DO THAT, MADAM CLERK? THANK
25 YOU.

MARCH 30, 2006, HEARING

1 THE CLERK: YOU'RE WELCOME.

2 THE COURT: VICKIE LEITNER, NUMBER -- NO, THIS IS
3 TONY -- TIMOTHY LEITNER, 177, HAS SUBMITTED NOTHING MORE THAN
4 AN AFFIDAVIT FROM HIS WIFE. WOULD YOU PLEASE CALL MR.
5 LEITNER AND INSTRUCT HIM THAT HE NEEDS TO HAVE A JUROR
6 INFORMATION CARD AND QUESTIONNAIRE RETURNED TO THIS -- TO
7 THIS OFFICE IMMEDIATELY AND THAT HE NEEDS TO BE HERE ON
8 MONDAY MORNING OR I WILL -- JUST TELL HIM THAT, PLEASE.

9 THE CLERK: I ALREADY DID IT.

10 THE COURT: YOU ALREADY DID IT?

11 THE CLERK: I HAD ALREADY INSTRUCTED HIM WE NEEDED
12 -- WE HAD ALREADY CALLED AND REQUESTED THE QUESTIONNAIRE AND
13 THE JURY FORM.

14 THE COURT: AND WHAT DID HE SAY?

15 THE CLERK: IT WAS LEFT ON THE ANSWERING MACHINE AT
16 THE HOUSE BECAUSE NOBODY ANSWERED. WE LEFT TWO MESSAGES. I
17 CAN GET THE SHERIFF'S DEPARTMENT TO GO BACK ON ONE OF THESE,
18 YOUR HONOR.

19 THE COURT: GET THEM TO GO BACK.

20 THE CLERK: YES, SIR. I'LL HAVE THEM TAKE A BLANK
21 PACKET OUT TO HIM AND HAVE HIM FILL IT OUT WHILE THEY WAIT.

22 THE COURT: THAT WOULD BE AWESOME. TODD LONG. ALL
23 RIGHT. WE GOT A PAYCHECK FOR TODD LONG SHOWING THAT HE IS AN
24 EMPLOYEE OF LEXINGTON SCHOOL DISTRICT ONE. SO UNLESS -- IT
25 SEEMS TO ME THAT UNLESS THAT PAYCHECK IS FRAUDULENTLY

1 PREPARED OR SOMETHING -- THEN I GUESS THE STATUTE ACTUALLY
2 SAYS THAT HIS SERVICES AS A JUROR MUST INTERFERE WITH HIS
3 WORK BUT... MR. LITTLEJOHN, DO YOU NEED ANY MORE INFORMATION
4 THAN THAT? HE'S ENTITLED TO BE TRANSFERRED UNDER THE
5 STATUTE, IF THAT'S TRUE. YOU DON'T HAVE TO CONSENT TO IT. I
6 MEAN, I'LL BRING HIM IN IF YOU WANT.

7 MR. LITTLEJOHN: JUDGE, NO. I MEAN, I'LL LEAVE IT
8 UP TO THE COURT.

9 THE COURT: WELL, DO YOU -- JUST LIKE BEFORE, DO YOU
10 HAVE ANY OBJECTION TO ME MAKING MY DECISION BASED ON HIS
11 PAYCHECK?

12 MR. LITTLEJOHN: NO, YOUR HONOR, NOT AT ALL.

13 THE COURT: ALL RIGHT. WELL, I'M SATISFIED THAT HE
14 IS AN EMPLOYEE OF A SCHOOL AND THAT HIS SERVICE AS A JUROR
15 WOULD INTERFERE WITH HIS WORK IN THE SCHOOL, AND SO I'M GOING
16 TO TRANSFER HIM TO THE SUMMER. THAT IS NUMBER 184, TODD
17 LONG.

18 WHAT ABOUT DEBORAH LUCAS? Y'ALL -- I MEAN, IF SHE
19 DOES RUN A DAY CARE CENTER FOR CHILDREN OTHER THAN HER OWN
20 AND IF SHE RUNS IT BY HERSELF, THEN HER BUSINESS WOULD HAVE
21 TO SHUT DOWN AS A RESULT OF HER JURY SERVICE, AND THAT WOULD
22 SEEM TO ME TO QUALIFY UNDER THE STATUTE. BUT THIS IS AN
23 UNVERIFIED -- IT'S ACTUALLY EVEN AN UNSIGNED JUROR
24 QUESTIONNAIRE.

25 THE CLERK: YOUR HONOR, SHE ALSO HAS THAT

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1 CERTIFICATE FROM THE DEPARTMENT OF SOCIAL SERVICES TO OPERATE
2 A BUSINESS.

3 THE COURT: YEAH, I SEE THAT, BUT THAT JUST SHOWS
4 THAT HE'S -- SHE'S AUTHORIZED TO OPERATE IT. IT DOESN'T SHOW
5 THAT SHE ACTUALLY OPERATES IT. SO I THINK THAT SHE'LL HAVE
6 TO COME IN. YOU CAN TELL HER THAT -- IF Y'ALL WANT TO, YOU
7 CAN TELL HER THAT IF SHE WANTS TO SUBMIT A SWORN -- WOULD
8 THAT BE SUFFICIENT? I'M JUST NOT GOING TO MESS WITH THAT.
9 I'M JUST GOING TO LET HER COME IN BECAUSE, I MEAN, WE GOT TOO
10 MANY PEOPLE TO GO BABY-SITTING ALL THESE JUROR REQUESTS.

11 THE CLERK: THAT'S SIX FAMILIES THAT'S GOT TO FIND
12 ALTERNATE DAY CARE.

13 THE COURT: WELL, DON'T ARGUE WITH ME. I'M GOING TO
14 MAKE MY DECISION -- AND THE BASIS OF HER REQUEST IS NOT
15 SUFFICIENT BECAUSE IT DOES NOT EXPLAIN ALL THE ELEMENTS THAT
16 ARE SET FORTH IN THE STATUTE THAT EXEMPTS HER, AND IF SHE
17 WANTED TO BE EXEMPT, SHE COULD HAVE CONSULTED SOMEBODY TO
18 HELP HER OUT WITH THAT. SO SHE'S GOING TO HAVE TO COME IN.

19 THE CLERK: JUDGE?

20 THE COURT: YES, MA'AM.

21 THE CLERK: NUMBER 186, THE CHILD CARE PROVIDER, WE
22 WILL HAVE TO ADD HER TO THE TRANSPORTATION LIST ALSO. I
23 NOTICE HERE SHE DOESN'T HAVE A DRIVER'S LICENSE AND SHE
24 DOESN'T HAVE A CAR.

25 THE COURT: OKAY.

1 THE CLERK: SO WE WILL HAVE TO PROVIDE
2 TRANSPORTATION FOR HER.

3 THE COURT: ALL RIGHT. I MEAN, YOU CAN TELL HER
4 THAT IF SHE WANTS TO---

5 THE CLERK: ARE YOU TALKING ABOUT THE AFFIDAVIT OF
6 SELF-EMPLOYMENT, YOUR HONOR?

7 THE COURT: ANYTHING THAT---

8 THE CLERK: IF WE MAIL HER THE AFFIDAVIT OF SELF-
9 EMPLOYMENT THAT...

10 THE COURT: WELL...

11 THE CLERK: AND THEN THAT LIST...

12 THE COURT: JUST ADD HER TO THE TRANSPORTATION LIST.

13 THE CLERK: YES, SIR.

14 THE COURT: WHEN DID THE JUROR SUMMONS GO OUT?

15 THE CLERK: WHEN WAS IT? WHAT WAS THE DATE OF THE
16 ORDER? WHEN WAS... FEBRUARY 13TH. WAS IT 13TH? THE DAY
17 BEFORE -- THE DAY BEFORE VALENTINE'S DAY, I'M PRETTY SURE,
18 YOUR HONOR, IS WHEN THEY WENT OUT. FEBRUARY 13TH.

19 THE COURT: OKAY. WHAT ABOUT 191, MR. LITTLEJOHN?
20 IT APPEARS THAT HE MADE THE DECISION TO ATTEND A TRIP AFTER
21 HE RECEIVED THE JUROR SUMMONS, BUT IT ALSO APPEARS THAT IT
22 WAS CONTEMPLATED BEFOREHAND THAT HE MIGHT GO.

23 MR. LITTLEJOHN: JUDGE, HOW EVER THE COURT WANTS TO
24 HANDLE IT.

25 THE COURT: WOULD YOU CONTACT MR. MARINELLI AND ASK

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1 HIM TO SUBMIT AN AFFIDAVIT THAT HE IS ATTENDING THAT
2 CONFERENCE? AND IF HE IS, I WILL EXCUSE HIM.

3 THE CLERK: YES, SIR.

4 THE COURT: ACTUALLY I NEED AN AFFIDAVIT THAT HE'S
5 ATTENDING IT FOR THE ENTIRE WEEK.

6 THE CLERK: YES, SIR.

7 THE COURT: CAROL MARONEY WILL HAVE TO COME IN. I
8 MAY EXCUSE HER WHEN SHE GETS HERE, AND YOU WILL HAVE TO PUT
9 HER ON THE TRANSPORTATION LIST.

10 THE CLERK: YES, SIR.

11 THE COURT: SUSAN HARTLEY WILL HAVE TO COME IN. I
12 WILL NOT EXCUSE HER BASED ON THAT. I DON'T THINK WHAT MR.
13 NOYES HAS SUBMITTED WOULD QUALIFY HIM FOR BEING EXCUSED.

14 MS. KIMBROUGH: YOUR HONOR, MAY I BE EXCUSED?

15 THE COURT: YES, MA'AM.

16 MS. KIMBROUGH: THANK YOU.

17 THE COURT: ALL RIGHT. MS. OXNER WILL HAVE TO COME
18 IN. WHAT DO YOU SAY ABOUT MR. RYAN REYNOLDS? RESIDENTIAL
19 CORPSMAN AT THE JOB CORPS IN BAMBERG, MENTALLY-DELAYED YOUNG
20 MAN.

21 THE CLERK: YOUR HONOR, I DID CONFIRM THROUGH JOB
22 CORPS CALLING THEM THAT HE IS A RESIDENT IN THEIR FACILITY
23 DOWN THERE.

24 THE COURT: IS THAT A -- IS THAT A TEMPORARY
25 RESIDENCE?

1 THE CLERK: NO, NOT -- I DON'T KNOW HOW TO SAY...
2 MAYBE YES, MAYBE NO, BUT HIS MENTAL CONDITION IS THEY'RE
3 TEACHING HIM THINGS ON HOW TO TAKE CARE OF HIMSELF, YOU KNOW,
4 BATHING AND WASHING AND THEY TAKE HIM OUT TO JOB SITES AND HE
5 BAGS GROCERIES AND THINGS LIKE THAT. HE IS A RESIDENT OF
6 THAT FACILITY, SORT OF LIKE -- I DON'T KNOW IF IT'S THE
7 BABCOCK CENTER THAT'S SIMILAR TO THAT. I THINK IT'S SORT OF
8 LIKE THE BABCOCK CENTER, BUT IT'S THE -- THEY TRY TO TRAIN
9 AND TEACH THEM A SKILL AND HOW TO TAKE CARE OF THEMSELVES A
10 LITTLE BIT, BUT HE IS A RESIDENT THERE.

11 MR. LITTLEJOHN: NO OBJECTION TO EXCUSING HIM. IF
12 MS. FRICK IS SATISFIED WITH THAT, THEN WE ARE, TOO.

13 THE CLERK: THANK YOU.

14 THE COURT: THERE'S NO NEED TO TAKE ANY ACTION ON
15 252. WE'LL JUST WAIT AND SEE IF HE SHOWS UP WHICH I DOUBT
16 BUT... WHATEVER I'M SEEING FOR JUROR NUMBER 256 IS
17 INSUFFICIENT, AND THEY'LL HAVE TO COME IN. I MEAN, THAT --
18 THE DOCTOR'S EXCUSE IS GOING TO HAVE TO EXPLAIN WHY IT IS
19 THAT THE HEALTH CONDITION OF THE PERSON RENDERS THEM UNABLE
20 TO SERVE JURY DUTY, AND IT NEEDS TO BE SIGNED BY SOMEONE I
21 CAN VERIFY IS A DOCTOR.

22 THE CLERK: YES, SIR. WE HAVE CALLED THIS PERSON.
23 THIS IS A RETURN THAT WE JUST GOT NOT TOO LONG -- I'D SAY
24 WITHIN THE LAST WEEK---

25 THE COURT: OKAY.

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1 THE CLERK: ---I BELIEVE, AND SHE HAS BEEN -- THE
2 RESIDENCE HAS BEEN CONTACTED, AND WE HAVE ADVISED THEM WE
3 DON'T CARE WHAT DOCTOR, BUT THE DOCTOR NEEDS TO PUT IT ON HIS
4 LETTERHEAD AND EXPLAIN TO US THE CONDITION.

5 THE COURT: OKAY. GOOD. THANK YOU. ALL RIGHT.
6 THE ONE FOR KILEY ROBINSON, DO YOU HAVE -- DO YOU HAVE A COPY
7 OF THE AFFIDAVIT AND THE ONE PAGE OF THE MEDICAL RECORD, MR.
8 LITTLEJOHN? I JUST WANT TO MAKE SURE YOU HAVE IT. I MEAN,
9 I'M NOT INCLINED TO EXCUSE HIM BASED ON WHAT I SEE, BUT I
10 JUST WANT TO MAKE SURE YOU HAD SEEN THAT---

11 MR. LITTLEJOHN: JUDGE---

12 THE COURT: ---UNLESS THERE'S CONSENT.

13 THE CLERK: THIS IS THE ONE THAT SHOULD HAVE BEEN IN
14 THAT STACK YOU EITHER GOT DAY BEFORE YESTERDAY OR THIS
15 MORNING, THE STACK I GAVE MS. KIMBROUGH. THIS ONE IS REALLY,
16 REALLY NEW, 262.

17 MR. LITTLEJOHN: JUDGE, I DON'T SEE IT RIGHT
18 OFFHAND. IF YOU'VE GOT IT THERE... JUDGE, I DID SEE HERE
19 THERE'S A MEDICAL EXCUSE. I DON'T KNOW THAT THAT'S ANY
20 BETTER THAN...

21 THE COURT: YEAH.

22 MR. LITTLEJOHN: THAT DOESN'T TELL YOU ANYTHING.

23 THE COURT: OKAY. I'M NOT GOING TO EXCUSE HER THEN.
24 SHE'LL HAVE TO COME IN.

25 THE CLERK: YES, SIR.

1 THE COURT: 264, I CAN'T -- I'M NOT GOOD AT READING
2 N.C.I.C., BUT IF Y'ALL DON'T CONSENT TO IT, HE'LL JUST HAVE
3 TO COME IN.

4 THE CLERK: YOUR HONOR, HE WAS CONVICTED OF UNLAWFUL
5 FIREARMS, SERVED THREE YEARS OUT OF A TEN OUT OF MICHIGAN IN
6 DISTRICT 31 COURT.

7 THE COURT: OKAY.

8 THE CLERK: IT IS IN THE RAP SHEET. IT'S ABOUT
9 MIDWAY THROUGH. THE WAY THIS THING IS, THIS IS CRAZY, THESE
10 OUT-OF-STATE ONES.

11 THE COURT: DID YOU SEE THAT? WERE YOU ABLE TO SEE
12 THAT, MR. LITTLEJOHN?

13 MR. LITTLEJOHN: I BELIEVE THAT'S THE ONE I SAW
14 EARLIER TODAY.

15 THE CLERK: THAT WAS THE ONE IN THE BATCH OF STUFF I
16 GAVE MS. KIMBROUGH. WE JUST HAD IT RAN THIS MORNING---

17 MR. LITTLEJOHN: RIGHT.

18 THE CLERK: ---BECAUSE HE CAME IN AND ADVISED US AND
19 I HAD IT RAN.

20 MR. LITTLEJOHN: JUDGE, I DID REVIEW THAT AND I'M IN
21 AGREEMENT WITH MS. FRICK THAT HE HAS BEEN CONVICTED OF A
22 FELONY THAT CARRIES ONE YEAR OR MORE.

23 THE COURT: OKAY. HE'S DISQUALIFIED. ALL RIGHT.
24 HOW ABOUT THE -- WILLIAM RUSS? I GOT A LETTER FROM THE
25 PRINCIPAL AT LEXINGTON HIGH SCHOOL SAYING THAT HE WORKS THERE

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57117

1 AS AN INSTRUCTIONAL ASSISTANT IN A SPECIAL NEEDS CLASSROOM.
2 HAVE YOU SEEN THAT?

3 MR. LITTLEJOHN: JUDGE, I'M NOT SURE THAT I SAW THAT
4 SPECIFICALLY. THAT WAS NUMBER 267?

5 THE COURT: FIVE.

6 MR. LITTLEJOHN: 265? JUDGE, WHATEVER YOU WANT TO
7 DO IS FINE WITH US.

8 THE COURT: ALL RIGHT. WELL, BASED ON WHAT I SEE, I
9 THINK THAT HE'S ENTITLED TO BE TRANSFERRED UNDER THE STATUTE,
10 SO I'LL TRANSFER HIM TO THE SUMMER.

11 THE CLERK: YES, SIR.

12 THE COURT: I WOULD NOT EXCUSE MR. SCHROEDER BECAUSE
13 I JUST DON'T BELIEVE THAT THEY WOULD HAVE TO CLOSE THE STORE.
14 THAT WAS 270. I DON'T THINK THAT MS. STALVEY'S EXCUSE
15 QUALIFIES UNDER THE CHILD CARE -- UNDER THE SEVEN -- CHILD-
16 UNDER-SEVEN EXEMPTION, SO I WOULD NOT EXCUSE HER. YOU KNOW,
17 NUMBER 300 SAYS IT LIVES IN KERSHAW COUNTY. I DON'T SEE ANY
18 NEED TO TAKE ANY ACTION ON THAT ONE RIGHT NOW. BUT IF YOU
19 WANT TO -- I MEAN, YOU'VE GOT AN AFFIDAVIT SIMPLY SAYING THAT
20 THE DRIVER'S LICENSE RECORDS INDICATE THAT HE LIVES IN CAMDEN
21 WHICH IS IN KERSHAW COUNTY.

22 MR. LITTLEJOHN: YES, SIR.

23 THE COURT: IS THAT GOOD ENOUGH FOR YOU?

24 MR. LITTLEJOHN: YES, YOUR HONOR.

25 THE COURT: ALL RIGHT. THEN THAT PERSON IS A NON-

1 RESIDENT AND IS NOT IN THE POOL. 304 COULD VERY WELL BE
2 DISQUALIFIED OR TRANSFERRED BUT NOT BASED ON THAT MEAGER
3 SUBMISSION, SO I'M NOT GOING TO DO IT AT THIS TIME. THE
4 MEDICAL EXCUSE SUBMITTED BY LINDA TORRI, NUMBER 317, IS
5 INADEQUATE AND I WILL NOT EXCUSE HER AT THIS TIME. THERE
6 WASN'T ANYTHING SUPPLEMENTAL, WAS THERE? NO.

7 THE CLERK: DO YOU WANT US TO CONTACT HER?

8 THE COURT: IF YOU HAVEN'T ALREADY DONE IT. YOU
9 DON'T HAVE TO DO IT AGAIN THOUGH.

10 THE CLERK: NO, SIR. THIS IS -- THAT'S A DOCTOR'S
11 OFFICE IN GREENVILLE THAT THAT'S FROM ALSO.

12 THE COURT: OKAY.

13 THE CLERK: I'M NOT SURE, YOUR HONOR, BUT I'LL
14 DOUBLE-CHECK ON THAT TO SEE IF WE'VE REQUESTED...

15 THE COURT: SOMEBODY WROTE, "NOT IN LEXINGTON
16 COUNTY, S.H.," FOR MRS. -- FOR 320, JOE TURBEVILLE.

17 THE CLERK: 320.

18 THE COURT: OH, YOU'RE JUST SAYING THE ADDRESS IS
19 NOT IN LEXINGTON COUNTY.

20 THE CLERK: CORRECT. THE ADDRESS IS NOT IN
21 LEXINGTON COUNTY.

22 THE COURT: RIGHT. WE'LL TAKE THAT UP.

23 THE CLERK: S.H. IS SONJA HESTER, MY JURY CLERK.

24 THE COURT: WE'LL TAKE THAT UP NEXT WEEK OR WHEN HE
25 SHOWS UP. NUMBER 324 IS A LETTER SAYING HE WORKS FOR THE

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5

1 UNIVERSITY AND HIS -- AS A TEACHER AND HE HAS SPECIFIC JOB
2 RESPONSIBILITIES DURING THE WEEK OF THE 10TH AND 17TH, AND
3 HE'S FREE AFTER THE 24TH. YOU KNOW, IF ALL THAT'S TRUE, THEN
4 HE'S ENTITLED TO BE TRANSFERRED.

5 MR. LITTLEJOHN: YES, SIR.

6 THE COURT: DO YOU...

7 MR. LITTLEJOHN: WE AGREE.

8 THE COURT: ALL RIGHT. TRANSFER NUMBER 324. NUMBER
9 333, THAT IS AN INADEQUATE EXCUSE, AND I WOULD NOT EXCUSE
10 HIM. AS TO NUMBER 335, THAT'S AN INADEQUATE EXPLANATION OF
11 HER STATUS AS A BUSINESS OWNER WHOSE BUSINESS WOULD HAVE TO
12 CLOSE, AND I'M NOT GOING TO EXCUSE HER BASED ON WHAT'S
13 WRITTEN HERE. 340, WE HAVE AN AFFIDAVIT FROM THE SHERIFF'S
14 DEPUTIES SAYING THAT SOUTH CAROLINA DRIVER'S LICENSE RECORDS
15 INDICATE THAT SHE -- THIS PERSON NOW LIVES IN KERSHAW COUNTY.

16 MR. LITTLEJOHN: WE'RE FINE WITH THAT, YOUR HONOR.

17 THE COURT: ALL RIGHT. NONRESIDENT, NOT IN THE
18 PANEL. OKAY. NUMBER 346, WHAT'S THE PROBLEM WITH HER? SHE
19 SAYS THAT SHE'S A CAFETERIA WORKER AT CHAPIN HIGH SCHOOL, HAS
20 SUBMITTED PAY STUBS, AND HAS WRITTEN A LETTER EXPLAINING THAT
21 SHE WORKS THERE. I MEAN, I'M NOT SURE THAT A CAFETERIA
22 WORKER REALLY QUALIFIES BECAUSE -- I DON'T KNOW. I'D HAVE TO
23 LOOK AT THE STATUTE, BUT I'M NOT SURE THAT A CAFETERIA WORKER
24 DOES QUALIFY UNDER THE STATUTE. WELL, WITHOUT CONSENT,
25 SHE'LL HAVE TO COME IN AND I'LL SPEAK TO HER ON THE 10TH.

1 ALL RIGHT. THAT'S IT. NOW, HAVE Y'ALL GOT YOUR RECORDS?
2 MA'AM?

3 THE CLERK: JUST...

4 THE COURT: HAVE Y'ALL GOT YOUR RECORDS IN FRONT OF
5 YOU ABOUT THOSE THAT YOU CONSENTED TO EARLIER TODAY?

6 MR. HUBBARD: WE DON'T HAVE WHAT MR. LITTLEJOHN---

7 THE COURT: WELL, YOU'VE GOT WHAT YOU CONSENTED TO.

8 MR. HUBBARD: YES, SIR.

9 THE COURT: ALL RIGHT. I'M GOING TO GO -- I'M GOING
10 TO LIST THE JUROR NUMBERS IN THIS ORDER THAT THE CLERK
11 PREPARED FOR ME TO SIGN, AND Y'ALL MAKE SURE THAT YOU ALL
12 DID, IN FACT, CONSENT TO THE EXCUSAL OF THESE JURORS. NUMBER
13 4. THESE ARE NOT THE ONES WE JUST WENT OVER. THESE ARE THE
14 ONES THAT Y'ALL AGREED TO EARLIER TODAY OR ACTUALLY I THINK,
15 MR. LITTLEJOHN, YOU MAY HAVE DONE THIS BEFORE TODAY.

16 MR. LITTLEJOHN: JUDGE, I'VE GOT -- DONE IT FOUR
17 TIMES, AND I'VE GOT FOUR DIFFERENT LISTS IS THE PROBLEM.

18 THE COURT: AND WILL YOU BE ABLE TO TELL -- HOW
19 WOULD YOU LIKE TO VERIFY THAT THIS IS AN ACCURATE LIST OF
20 JURORS?

21 THE CLERK: DO YOU WANT ME TO GO DOWN AND GET YOU A
22 COPY OFF MY DESK?

23 MR. LITTLEJOHN: NO, I'VE GOT COPIES OF WHERE I
24 DID... I'VE JUST GOT FOUR LISTS OF...

25 THE COURT: OKAY.

1 MR. LITTLEJOHN: YOU WANTED TO SIGN THAT ORDER TODAY
2 OBVIOUSLY?

3 THE COURT: YES, SIR.

4 THE CLERK: THIS IS EVERYONE ON THAT LIST THAT I
5 GAVE YOU WHEN WE WENT IN THERE THIS MORNING.

6 MR. LITTLEJOHN: OKAY.

7 THE COURT: WELL, I -- WE JUST NEED TO MAKE SURE
8 THERE'S NOT A MISTAKE.

9 MR. LITTLEJOHN: ALL RIGHT. THE PROBLEM IS THE LIST
10 SHE GAVE ME I CONSENTED TO, AND I GAVE IT BACK TO YOU AND I
11 DON'T HAVE A COPY OF IT.

12 THE CLERK: I JUST TOLD YOU DO YOU WANT ME TO GO GET
13 IT.

14 MR. LITTLEJOHN: YES.

15 THE COURT: ALL RIGHT.

16 MR. LITTLEJOHN: JUDGE, IF I JUST COULD JUST SEE THE
17 ORDER AND MAYBE I CAN JUST CHECK THEM OFF BASED ON MY LIST
18 RATHER THAN YOU HAVING TO STAND UP HERE AND SPOON-FEED ME.

19 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

20 THE COURT: ALL RIGHT. SO I HAD YOUR LIST. DO YOU
21 WANT TO SEE IT?

22 MR. LITTLEJOHN: NO, JUDGE.

23 THE COURT: I WAS USING YOUR LIST.

24 MR. LITTLEJOHN: THAT'S FINE. I'VE REVIEWED THE
25 ORDER. WE'RE IN COMPLETE AGREEMENT.

1 THE COURT: OKAY. AND MR. HUBBARD?

2 MR. HUBBARD: YES, SIR.

3 THE COURT: ALL RIGHT. AFTER I SIGN THIS ORDER, NOW
4 THE CLERK IS GOING TO TAKE THE INFORMATION THAT -- THE
5 RULINGS THAT I JUST MADE AND PUT IT INTO ANOTHER ORDER.
6 RIGHT, HOPE?

7 THE CLERK: YES, SIR.

8 THE COURT: DO YOU WANT -- AND IF YOU WANT -- IF YOU
9 WANT TO -- I'M LEAVING. I'M ON MY WAY OUT OF HERE RIGHT NOW.
10 IF YOU WANT TO CALL ME IN THE MORNING ON MY CELL PHONE---

11 THE CLERK: YES, SIR.

12 THE COURT: ---IF YOU WANT TO GET IT DONE IN THE
13 MORNING, I'LL FIND A FAX NUMBER FOR YOU TO USE. YOU CAN FAX
14 IT TO ME AND I'LL SIGN IT AND FAX IT RIGHT BACK.

15 THE CLERK: THOSE ARE THE ONES THAT YOU SAID YOU
16 WERE GOING TO EXCUSE?

17 THE COURT: THE ONE THAT -- THE ONES THAT I AM GOING
18 TO EXCUSE---

19 THE CLERK: OKAY. OR THE ONES YOU TRANSFERRED.

20 THE COURT: OR TRANSFERRED. RIGHT.

21 THE CLERK: YES, SIR.

22 MR. LITTLEJOHN: JUDGE, IF I COULD INQUIRE OF THE
23 CLERK IF WE'LL END UP WITH A LIST OF THE JURORS THAT ARE
24 SUPPOSED TO BE HERE ON APRIL 10TH.

25 THE CLERK: YOU ALREADY GOT THAT.

1 MR. LITTLEJOHN: I MEAN A CLEAN LIST WITHOUT -- JUST
2 A GOOD LIST.

3 THE COURT: YES. YES.

4 MR. LITTLEJOHN: OKAY.

5 THE COURT: HOW CAN WE BEST ACCOMPLISH THAT?

6 THE CLERK: YOUR HONOR, WHAT I'LL DO IS I WILL MAKE
7 -- I'LL USE THIS TEMPLATE AND I'LL PUT IN HERE JURORS THAT
8 ARE SUPPOSED TO BE REPORTING AND I'LL HAVE THEM LISTED FROM
9 THE MASTER LIST.

10 THE COURT: OKAY. ANYTHING FURTHER TODAY?

11 MR. HUBBARD: NO, SIR.

12 THE COURT: OKAY.

13 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED. THERE
14 WERE NO EXHIBITS INTRODUCED.)

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I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 30TH DAY OF MARCH, 2006.

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

OCTOBER 20, 2006



DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COURT OF GENERAL SESSIONS
2003-GS-32-0409

THE STATE OF SOUTH CAROLINA :

- VS - :

KEVIN J. MERCER :

TRANSCRIPT OF RECORD

AUGUST 9, 2006

LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE JOHN FEW, JUDGE.

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

DONALD V. MYERS, ESQUIRE
S. RICK HUBBARD, III, ESQUIRE
ATTORNEYS FOR THE STATE

CAMERON B. LITTLEJOHN, JR., ESQUIRE
MELISSA J. KIMBROUGH, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

ALSO PRESENT: DAVID J. MILLER, ESQUIRE
JAMES F. ROGERS, ESQUIRE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

I N D E X

WITNESS

MARCUS THOMPSON

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COLLOQUY

1 THE COURT: THANK YOU. BE SEATED, PLEASE. WE JUST
2 NEED MR. MERCER OUT HERE. I GUESS THEY'VE GONE TO GET HIM?

3 MS. KIMBROUGH: I CAN MAKE SURE.

4 (PAUSE IN PROCEEDINGS.)

5 MS. KIMBROUGH: HE'S ON HIS WAY.

6 (PAUSE IN PROCEEDINGS. MR. MERCER IS BROUGHT INTO
7 THE COURTROOM.)

8 THE COURT: LET'S GET SOMETHING STRAIGHT ABOUT THE
9 CAMERAS. WHAT STATION ARE YOU FROM?

10 CAMERAMAN: W.O.L.O., A.B.C. COLUMBIA.

11 THE COURT: AND WHAT STATION ARE YOU FROM?

12 CAMERAMAN: W.L.T.X.

13 THE COURT: THAT'S OKAY. OKAY. ALL RIGHT. WELL,
14 HERE, I'VE GOT FORMS SIGNED FOR BOTH OF THOSE. DID YOU -- IS
15 ANYBODY ELSE OUT THERE THAT NEEDS -- THAT HAS ASKED TO BE IN?
16 I DON'T THINK SO. ALL RIGHT. ALL RIGHT. I'M READY.

17 MS. KIMBROUGH: THANK YOU, YOUR HONOR. MAY IT
18 PLEASE THE COURT? WE'RE HERE TODAY ON A MOTION FOR A REMAND
19 WHICH WAS GRANTED AND A HEARING FOR A NEW TRIAL BASED ON
20 AFTER-DISCOVERED EVIDENCE, AND I BELIEVE THAT ALL PARTIES
21 HAVE BEEN SERVED WITH A COPY OF OUR MOTION. AND, YOUR HONOR,
22 JUST BY WAY OF BRIEF INTRODUCTION, MR. MERCER OBVIOUSLY BEARS
23 THE BURDEN IN THIS PROCEEDING, AND UNDER STATE LAW IT'S MY
24 UNDERSTANDING THAT THERE ARE ESSENTIALLY FIVE ELEMENTS THAT
25 HE HAS TO MEET IN ORDER TO BE GRANTED A NEW TRIAL BASED ON

1 THE AFTER-DISCOVERED EVIDENCE WHICH IN THIS CASE, OF COURSE,
2 AS WE ALL KNOW, CONSISTS OF A STATEMENT THAT WAS SIGNED BY
3 KEVIN FULLER INDICATING THAT MARCUS THOMPSON HAD ADMITTED HIS
4 GUILT TO BEING THE TRIGGER PERSON IN THE DEATH OF SERGEANT
5 DAVIS.

6 I THINK IT'S FAIR TO SAY THAT IN THIS PROCEEDING THE
7 REALLY -- THE ONLY ONE ELEMENT THAT'S IN DISPUTE WOULD BE THE
8 FIRST ONE AND THAT IS WHETHER OR NOT THE NEW EVIDENCE WOULD
9 PROBABLY CHANGE THE RESULT IF A NEW TRIAL IS GRANTED. THE
10 SECOND THROUGH FIFTH ELEMENTS SET FORTH IN HAYDEN THAT THE
11 EVIDENCE WAS DISCOVERED SINCE TRIAL, I DON'T THINK ANYBODY
12 WOULD DISPUTE THAT. THE SOLICITOR'S OFFICE DISCOVERED THIS
13 EVIDENCE AFTER TRIAL. THEY PROVIDED IT TO US ALMOST
14 IMMEDIATELY, AND THE ATTORNEY GENERAL, IN RESPONDING TO OUR
15 MOTION---

16 THE COURT: I WANT TO ASK YOU A QUESTION. WHEN YOU
17 SAY THIS EVIDENCE, I THINK YOU NEED TO BE CLEAR ABOUT WHAT
18 YOU'RE TALKING ABOUT.

19 MS. KIMBROUGH: YES, YOUR HONOR. THE EVIDENCE OF
20 MARCUS THOMPSON'S STATEMENT AGAINST INTEREST TO KEVIN FULLER
21 AND THE SWORN STATEMENT THAT KEVIN FULLER GAVE TO LAW
22 ENFORCEMENT CONCERNING THAT STATEMENT. AND OBVIOUSLY IF WE
23 WERE AT TRIAL WE WOULD HAVE TO, YOU KNOW, MEET CERTAIN
24 EVIDENTIARY THRESHOLDS TO GET THIS INFORMATION IN, AND WE
25 BELIEVE UNDER THE HEARSAY EXCEPTIONS FOR A STATEMENT AGAINST

COLLOQUY

1 PENAL INTEREST THIS WOULD BE CLEARLY HAVE FALLEN UNDER IT.
2 IT'S A STATEMENT AGAINST INTEREST NOT JUST IN THE SENSE OF
3 SUBMITTING TO MURDER BUT IT'S A -- WHICH IS A HIGHER CHARGE
4 THAN THAT THAT MR. THOMPSON FACED BECAUSE HE WAS CHARGED
5 OBVIOUSLY WITH CONSPIRACY BEFORE AND AFTER THE FACT TO THE
6 VARIOUS CRIMES, BUT IT'S ALSO AN ADMISSION TO SOMETHING THAT
7 COULD SUBJECT HIM TO CAPITAL MURDER CHARGES; I MEAN THE DEATH
8 PENALTY.

9 I CAN'T IMAGINE A STATEMENT THAT WOULD BE AGAINST
10 ONE'S PENAL INTEREST ANY MORE THAN THAT, THAT THERE SIMPLY
11 ISN'T A PUNISHMENT WORSE THAN DEATH. SO, YOUR HONOR, THAT'S
12 -- THAT'S THE EVIDENCE THAT WE'RE TALKING ABOUT HERE TODAY.

13 THE COURT: THE EVIDENCE THAT YOU OFFER AS AFTER-
14 DISCOVERED EVIDENCE IS THE STATEMENT AND I SUPPOSE TESTIMONY
15 OF FULLER.

16 MS. KIMBROUGH: YES, YOUR HONOR. AND, YOUR HONOR,
17 SINCE -- IF I MAY DIGRESS JUST FOR A MOMENT. AFTER MR.
18 MERCER WAS CONVICTED AND SENTENCED TO DEATH WHICH WAS ON
19 APRIL 22ND, THE UNITED STATES SUPREME COURT ISSUED A RULING
20 IN HOLMES VERSUS SOUTH CAROLINA. IT WAS ISSUED - EXCUSE ME -
21 IT WAS DECIDED MAY 1ST OF 2006. WHILE THIS LAW CAME DOWN
22 AFTER MR. MERCER'S TRIAL, IT CAME DOWN IN TIME FOR IT TO BE
23 APPLICABLE TO HIM BECAUSE HIS CONVICTION HAS NOT BEEN
24 FINALIZED ON APPEAL. AND THIS CASE IS A LITTLE DIFFERENT
25 THAN WHAT WE HAVE HERE TODAY; WE'LL CONCEDE THAT. THIS CASE

1 INVOLVED THIRD-PARTY GUILT, BUT I THINK THE UNITED STATES
2 SUPREME COURT MADE IT FAIRLY CLEAR THAT WHEN YOU HAVE ISSUES
3 OF THIRD-PARTY GUILT OR ADMISSIONS TO CRIMES MADE BY THOSE
4 OTHER THAN THE DEFENDANT THAT THESE ARE REALLY QUESTIONS FOR
5 THE TRIER OF FACT AND THAT THE DEFENDANT UNDER DUE PROCESS
6 AND, YOU KNOW, THE RIGHT TO A FAIR TRIAL SHOULD HAVE - AND I
7 QUOTE - A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE
8 DEFENSE.

9 AND, YOUR HONOR, WE BELIEVE THAT THIS EVIDENCE, THE
10 EVIDENCE OF THE ADMISSION AGAINST INTEREST, WOULD HAVE
11 ENABLED AND WOULD ENABLE, IF WE WERE GRANTED A NEW TRIAL, MR.
12 MERCER THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE. WE
13 FURTHER BELIEVE THAT, YOU KNOW, THE JURY TRIAL HAD THE RIGHT
14 TO HEAR THIS EVIDENCE AND SHOULD HAVE THE RIGHT TO HEAR IT IN
15 A -- IN A NEW TRIAL. IT'S MY UNDERSTANDING THAT MR. FULLER
16 IS NOT HERE YET. HOWEVER, WE WILL CALL HIM AS OUR FIRST
17 WITNESS.

18 THE COURT: WELL, WHEN -- OBVIOUSLY IN THIS HEARING
19 THE -- PRETTY MUCH ANYTHING YOU WANT TO PUT IN, OF COURSE,
20 YOU CAN PUT IN, WHETHER IT'S ACTUALLY OFFERED AS A PROFFER OR
21 IF IT'S ACTUALLY SOMETHING THAT WOULD GO AS IF IT WERE BEFORE
22 THE JURY. BUT WHAT I HAVE TO DO ULTIMATELY IS TO DECIDE, AS
23 YOU POINTED OUT, WHETHER OR NOT THE EVIDENCE THAT YOU OFFER
24 AS THE AFTER-DISCOVERED EVIDENCE WOULD -- WOULD PROBABLY
25 CHANGE THE RESULT IF A NEW TRIAL WAS HAD. AND IN ORDER FOR

COLLOQUY

1 IT TO CHANGE THE RESULT IF A NEW TRIAL WAS HAD, THE EVIDENCE
2 HAS TO BE ADMISSIBLE; RIGHT?

3 MS. KIMBROUGH: YES, YOUR HONOR.

4 THE COURT: AND IF YOU PUT PHILLIP (SIC) FULLER UP
5 FIRST, I DON'T UNDERSTAND HOW IT'S ADMISSIBLE.

6 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN
7 MS. KIMBROUGH AND MR. LITTLEJOHN.)

8 MS. KIMBROUGH: WELL, THEN, WE WOULD PROPOSE TO PUT
9 MARCUS THOMPSON ON THE STAND FIRST.

10 THE COURT: THE FLOOR IS YOURS. YOU DO WHATEVER YOU
11 WANT TO DO. I'M JUST SITTING HERE LISTENING.

12 MS. KIMBROUGH: THANK YOU, YOUR HONOR.

13 MR. MILLER: YOUR HONOR?

14 THE COURT: YES, SIR.

15 MR. MILLER: I'M DAVID MILLER. I'M FROM RICHARD
16 BREIBART'S OFFICE. WE REPRESENT MR. THOMPSON---

17 THE COURT: YES, SIR.

18 MR. MILLER: ---FOR PURPOSES OF THIS HEARING. IF
19 THEY PROPOSE TO PUT HIM UP FIRST, I'D LIKE AN OPPORTUNITY TO
20 BE HEARD ON A COUPLE OF STATEMENTS FOR THE RECORD.

21 THE COURT: SURE.

22 MR. MILLER: OKAY. THANK YOU. FIRST, YOUR HONOR,
23 WE HAVE NO PROBLEM WITH THEM DOING THAT, BUT WE WOULD REQUEST
24 THAT -- ACTUALLY FOR PURPOSES OF THIS HEARING, MR. THOMPSON'S
25 BEEN BROUGHT HERE BY COURT ORDER. IN REPRESENTING HIM AND

1 TALKING TO HIM, HE HAS NO DESIRE TO BE HERE TODAY, AND WE
2 WOULD ADVISE HIM NOT TO BE HERE TODAY EXCEPT FOR THE COURT
3 ORDER. WE'D ASK THAT THE COURT CALL MR. THOMPSON AS A
4 COURT'S WITNESS RATHER THAN ALLOW THE DEFENSE OR THE
5 SOLICITOR'S OFFICE TO CALL HIM AS A WITNESS.

6 NUMBER ONE, HE IS HERE UNDER COURT ORDER AND NOT
7 HERE BY EITHER SIDE'S WISH NOR BY HIS OWN. NUMBER TWO, HE'S
8 AN INMATE FOR A CONSIDERABLE PERIOD OF TIME IN THE FUTURE IN
9 THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS RIGHT HERE IN
10 COLUMBIA, AND I THINK IT MIGHT BE JUST MORE ADVANTAGEOUS TO
11 HIS INTEREST THAT HE BE CALLED AS A COURT'S WITNESS.
12 ADDITIONALLY AND I---

13 THE COURT: WHAT DIFFERENCE WOULD IT MAKE?

14 MR. MILLER: YOUR HONOR, WE WOULD PREFER THAT HE NOT
15 -- HE DOESN'T -- WE DON'T FEEL THAT HE HAS ANYTHING TO ADD TO
16 THIS HEARING WHATSOEVER TODAY. THAT'S HIS POSITION AND OUR
17 POSITION. HE REALLY WOULD PREFER NOT TO BE CALLED AS EITHER
18 SIDE'S WITNESS BECAUSE HE DOESN'T BELIEVE HE CAN BE A WITNESS
19 FOR EITHER SIDE. CERTAINLY I THINK HE CAN---

20 THE COURT: WELL, LET ME ASK YOU A QUESTION. IF
21 HE'S ASKED -- IF HE IS ASKED QUESTIONS ABOUT STATEMENTS THAT
22 HE MAY HAVE MADE IN THE DETENTION CENTER TO FULLER, IS HE
23 GOING TO ANSWER THOSE QUESTIONS?

24 MR. MILLER: TO ANSWER YOUR QUESTION, JUDGE, HE IS
25 TODAY HERE UNDER OUR UNDERSTANDING THAT AT -- HE WILL ANSWER

COLLOQUY

1 ANYTHING WITH REGARD TO TWO LIMITED SITUATIONS: ONE, ANY
2 ALLEGED STATEMENT THAT MAY OR MAY NOT HAVE BEEN MADE AND,
3 NUMBER TWO, IF IT'S DESIRED, ANYTHING WITH REGARD TO THE
4 NIGHT IN QUESTION PROVIDED THAT - AND WE UNDERSTAND THAT -
5 THE SOLICITOR'S OFFICE WOULD OFFER A STIPULATION THAT
6 JEOPARDY IS ALREADY ATTACHED TO HIM BECAUSE HE'S ALREADY BEEN
7 TRIED FOR THE EVENTS OF THAT NIGHT AND THAT NOTHING HE SAYS
8 HERE REGARDING THE EVENTS OF THAT NIGHT WITH REGARD TO KEVIN
9 MERCER AND THE EVENT -- THE MURDER THAT OCCURRED IN LEXINGTON
10 COUNTY THAT NONE OF THAT WOULD BE USED TO PROSECUTE HIM IN
11 ANY WAY IN THE FUTURE. IF HE IS NOT -- IF THAT STIPULATION
12 IS NOT MADE, THEN WE'LL ADVISE HIM TO TAKE THE FIFTH AS TO
13 ANYTHING WITH REGARD TO ANYTHING EXCEPT ANY ALLEGED
14 STATEMENTS.

15 THE COURT: ALL RIGHT. WELL, LET'S -- LET'S TAKE IT
16 ONE -- LET'S TAKE IT ONE STEP AT A TIME THEN. REGARDING ANY
17 CONVERSATIONS THAT HE MAY HAVE HAD WITH MR. FULLER IN THE
18 DETENTION CENTER, IS THERE ANY PRIVILEGE OR ANY RIGHT THAT HE
19 HAS NOT TO ANSWER QUESTIONS REGARDING THOSE STATEMENTS?

20 MR. MILLER: PROVIDED THAT THERE'S A STIPULATION IN
21 PLACE EVEN WITH REGARD TO THOSE CONVERSATIONS THAT NO
22 PROSECUTION WILL TAKE PLACE FROM ANYTHING THAT HE SAYS.

23 THE COURT: NO PROSECUTION FOR THE EVENTS THAT
24 OCCURRED ON THE NIGHT THAT SERGEANT DAVIS WAS KILLED.

25 MR. MILLER: YES, YOUR HONOR.

1 THE COURT: ALL RIGHT. WELL, SOLICITOR, WHAT'S THE
2 STATE'S POSITION ON WHETHER OR NOT MR. THOMPSON IS STILL
3 SUBJECT TO PROSECUTION FOR ANY OF THE CRIMES THAT OCCURRED IN
4 CONNECTION WITH THE DEATH OF SERGEANT DAVIS?

5 MR. MYERS: OUR POSITION IS THAT HE'S PLED GUILTY
6 AND BEEN SENTENCED AND WE'RE THROUGH WITH THAT CASE.

7 THE COURT: ALL RIGHT. SO THEN AS MR. MILLER SAID
8 WHEN HE -- WHEN HE WAS CHARGED WITH ACCESSORY BEFORE THE FACT
9 OF THE CRIME OF ARMED ROBBERY AND ACCESSORY AFTER THE FACT OF
10 MURDER, JEOPARDY ATTACHED TO BOTH -- TO THAT -- TO BOTH OF
11 THOSE EVENTS AND HE IS NO LONGER SUBJECT TO PROSECUTION FOR
12 ANY FURTHER CRIMES REGARDING THE ROBBERY OF THE VEHICLE OR
13 THE DEATH OF SERGEANT DAVIS.

14 MR. MYERS: NO, SIR. HE'S PLED GUILTY TO WHAT HE'S
15 BEEN INDICTED FOR AND WHAT WENT BEFORE THE JUDGE, AND HE'S
16 BEEN SENTENCED AND JEOPARDY IS ATTACHED.

17 THE COURT: ALL RIGHT. WELL, DOES THAT ANSWER YOUR
18 QUESTION?

19 MR. MILLER: THAT DOES.

20 THE COURT: ALL RIGHT. SO NOW WITH THAT -- WITH
21 THAT STIPULATION, IF HE'S ASKED QUESTIONS ABOUT WHAT HE MIGHT
22 OR MIGHT NOT HAVE SAID TO MR. FULLER, IS HE GOING TO ANSWER
23 THOSE QUESTIONS?

24 MR. MILLER: HE'LL ANSWER THEM ABSOLUTELY TRUTHFULLY
25 IF HE HAS ANYTHING TO ADD.

COLLOQUY

1 THE COURT: ALL RIGHT. NOW, WITH REGARD TO -- IF
2 HE'S ASKED ANY QUESTIONS ABOUT WHAT HAPPENED ON THE NIGHT
3 THAT SERGEANT DAVIS WAS KILLED WITH THE POSITION THAT THE
4 STATE HAS JUST ANNOUNCED ON THE RECORD, WILL HE ANSWER THOSE
5 QUESTIONS?

6 MR. MILLER: HE WILL, AND I WILL PUT ON THE RECORD
7 NOW THAT ANYTHING OUTSIDE OF THAT LIMITED SCOPE I WOULD
8 OBJECT TO NOW AND I WILL CONTINUE TO OBJECT TO WITHOUT TRYING
9 TO INTERRUPT THE PROCEEDINGS BUT---

10 THE COURT: ALL RIGHT.

11 MR. MILLER: ---THE EVENTS OF THAT NIGHT AND ANY
12 ALLEGED STATEMENTS THAT WERE MADE.

13 THE COURT: OKAY. WELL, Y'ALL ALL KNOW OR SOME OF
14 YOU I THINK KNOW A LITTLE BIT MORE ABOUT ALL THIS THAN I DO.
15 THERE'S SOMETHING ELSE GOING ON - I FIGURED THAT OUT - BUT I
16 DON'T KNOW WHAT IT IS. DOES ANYBODY INTEND TO ASK MR.
17 THOMPSON ANY QUESTIONS THAT DON'T RELATE DIRECTLY TO WHAT
18 HAPPENED THE NIGHT SERGEANT DAVIS WAS KILLED?

19 MS. KIMBROUGH: NOT FROM MR. MERCER, NO.

20 MR. MYERS: NOT FROM THE STATE.

21 THE COURT: ALL RIGHT. THEN WE SHOULD HAVE NO
22 PROBLEM.

23 MR. MILLER: NO PROBLEM. THANK YOU, YOUR HONOR.

24 THE COURT: ALL RIGHT. SO THE -- MR. MERCER HAS
25 CALLED MR. THOMPSON AS A WITNESS. ARE WE READY TO GO?

1 MR. MILLER: WE ARE.

2 THE COURT: ALL RIGHT. BRING HIM OUT.

3 MR. LITTLEJOHN: YOUR HONOR, JUST -- IF I COULD HAVE
4 JUST A MOMENT... PERHAPS WE DIDN'T PUT WHAT WE WERE TRYING
5 TO DO HERE IN CONTEXT OF THE ORIGINAL TRIAL FOR PURPOSES OF
6 THIS RECORD. WE DID NOT INTEND ON CALLING MR. THOMPSON, BUT
7 I THINK WHEN YOU LOOK AT THE WAY THE CASE WAS PRESENTED BY
8 THE STATE IN THIS MATTER THAT THE STATEMENT MADE BY MARCUS
9 THOMPSON TO KEVIN FULLER BECOMES VERY RELEVANT TO A NEW TRIAL
10 MOTION. AND, YOUR HONOR, BY WAY OF BACKGROUND, IF YOU RECALL
11 THE STATE BEGAN THEIR PRESENTATION, THEIR PROSECUTION OF
12 KEVIN MERCER, BY SAYING KEVIN MERCER WAS THE SHOOTER. THAT
13 WAS IN THEIR OPENING STATEMENT. THAT WAS THE THEME
14 THROUGHOUT THE PRESENTATION OF THE STATE'S CASE THAT KEVIN
15 MERCER WAS THE SHOOTER AND MARCUS THOMPSON, THEREFORE, WAS
16 NOT.

17 YOUR HONOR, THEY PRESENTED EVIDENCE THAT
18 CIRCUMSTANTIALLY TIED MR. MERCER TO THE SHOOTING. WE TRIED
19 TO PRESENT EVIDENCE THAT SHOWED THAT MARCUS THOMPSON WAS, IN
20 FACT, THE SHOOTER. YOUR HONOR, IN THAT CONTEXT OF HOW THE
21 STATE PRESENTED THAT CASE, OR THEIR CASE, WE WOULD SUBMIT
22 THAT HAD WE HAD THE TESTIMONY OF KEVIN FULLER AS TO MARCUS
23 THOMPSON'S STATEMENTS THAT THOSE WOULD HAVE BEEN ADMISSIBLE
24 UNDER RULE 804(B) (3) AS A STATEMENT AGAINST PENAL INTEREST.
25 YOUR HONOR -- AND THAT'S THE BASIS FOR OUR MOTION. WE THINK

1 THAT---

2 THE COURT: BUT 804(B)(3) ONLY COMES INTO PLAY IF
3 MARCUS THOMPSON IS UNAVAILABLE, AND HE'S SITTING RIGHT BACK
4 THERE READY TO COME OUT AND TESTIFY.

5 MR. LITTLEJOHN: YOUR HONOR, AT THE TIME OF THE
6 TRIAL HE WAS UNAVAILABLE. OBVIOUSLY HE IS AVAILABLE UNDER
7 THE STIPULATIONS THAT HAVE BEEN ENTERED INTO HERE. AND I
8 GUESS WHAT THE COURT IS SAYING IS IF THERE WAS A FUTURE
9 TRIAL, YOU'RE SAYING THE COURT -- THAT MARCUS THOMPSON WOULD
10 BE AVAILABLE.

11 THE COURT: WELL, I'M ASKING QUESTIONS. I'M NOT
12 PROVIDING ANY ANSWERS AT THIS POINT. MY ANSWERS COME LATER.
13 BUT I SIMPLY ASK -- I MEAN, ONE OF THE THINGS I'VE GOT TO
14 DECIDE, OF COURSE, IS WHETHER I THINK -- IT'S NOT WHETHER OR
15 NOT IT WOULD HAVE MADE A DIFFERENCE IN THE FIRST TRIAL BUT
16 WHETHER OR NOT IT WOULD MAKE A DIFFERENCE IN THE SECOND
17 TRIAL. AM I RIGHT ABOUT THAT?

18 MR. LITTLEJOHN: I UNDERSTAND YOUR RULING NOW, YOUR
19 HONOR.

20 THE COURT: I'M ASKING. I'M NOT RULING; I'M ASKING.
21 WHEN LISA WAS TALKING ABOUT THE FIRST ELEMENT THAT YOU MUST
22 PROVE THAT THE EVIDENCE IS SUCH AS WOULD PROBABLY CHANGE THE
23 RESULT IF A NEW TRIAL IS HAD, AM I NOT TO LOOK AT THIS IN THE
24 CONTEXT OF A NEW TRIAL RATHER THAN LOOK AT THIS EVIDENCE IN
25 THE CONTEXT OF THE TRIAL WE ALREADY HAD?

1 MR. LITTLEJOHN: TO THE EXTENT THAT MARCUS THOMPSON
2 WOULD BE AVAILABLE NOW THAT WE HAD THIS STIPULATION IN A
3 FUTURE TRIAL, YES.

4 THE COURT: OKAY. SO IF I'M LOOKING AT IT FROM THE
5 STANDPOINT OF A -- OF A TRIAL THAT MIGHT OCCUR AT SOME POINT
6 IN THE FUTURE, I DON'T THINK THAT THE STATEMENT OF -- OF
7 KEVIN FULLER -- IS IT KEVIN FULLER?

8 MR. LITTLEJOHN: YES, SIR.

9 MS. KIMBROUGH: YES, YOUR HONOR.

10 THE COURT: OR HIS TESTIMONY REGARDING THAT
11 STATEMENT IS ADMISSIBLE UNLESS EITHER MARCUS THOMPSON IS
12 UNAVAILABLE, WHICH HE APPARENTLY IS NOT, OR HE IS GIVEN AN
13 OPPORTUNITY TO ADMIT OR DENY THE STATEMENT AND THEN IT IS
14 OFFERED AS A PRIOR INCONSISTENT STATEMENT UNDER 613 OR
15 801(3).

16 MR. LITTLEJOHN: RIGHT.

17 THE COURT: IT'S GOT TO BE ONE OR THE OTHER. SO IF
18 HE'S UNAVAILABLE, THAT'S FINE, BUT IF HE'S NOT UNAVAILABLE,
19 HE'S GOT TO TESTIFY FIRST.

20 MR. LITTLEJOHN: ALL RIGHT. YOUR HONOR, TO THAT
21 EXTENT THEN, I THINK WE WOULD HAVE TO ASK HIM QUESTIONS TODAY
22 ABOUT HIS INVOLVEMENT WITH SERGEANT DAVIS'S DEATH ON THE DAY
23 HE WAS KILLED.

24 THE COURT: I THINK WE JUST HEARD THAT HE'S PREPARED
25 TO ANSWER THOSE QUESTIONS.

1 MR. MILLER: YES, SIR, YOUR HONOR.

2 MR. LITTLEJOHN: ALL RIGHT, SIR.

3 MR. MILLER: JUST FOR THE RECORD, WILL HE BE CALLED
4 AS A COURT'S WITNESS?

5 MR. MYERS: WE HAVE NO OBJECTION. IT DOESN'T MAKE
6 ANY DIFFERENCE ONE WAY OR THE OTHER.

7 THE COURT: DO YOU MEAN WITH ME ASKING HIM QUESTIONS
8 BECAUSE---

9 MR. MILLER: IF HE WAS A COURT WITNESS, MY
10 UNDERSTANDING, BASED ON CASE LAW, IS THAT THEY CAN -- BOTH
11 SIDES CAN ASK HIM QUESTIONS, I THINK, AS WELL AS, OF COURSE,
12 YOURSELF, YOUR HONOR.

13 THE COURT: WELL, I DON'T SEE ANY DIFFERENCE, BUT
14 BECAUSE EVEN IF I -- EVEN IF I CALLED HIM AS A WITNESS, BOTH
15 SIDES HAVE AN OPPORTUNITY TO ASK HIM WHATEVER QUESTIONS THEY
16 WANT, AND I'M RELUCTANT TO PUT MYSELF INTO THE -- INTO THE
17 ADVOCATE ROLE BY ASKING HIM QUESTIONS MYSELF BECAUSE I THINK
18 THAT WOULD BE -- I JUST DON'T THINK THAT WOULD BE PROPER
19 HERE. WE'VE GOT EXTREMELY COMPETENT LAWYERS ON BOTH SIDES
20 WHO ARE PERFECTLY CAPABLE OF ELICITING ALL OF THE RELEVANT
21 INFORMATION THAT NEEDS TO BE ELICITED, AND IT'S BETTER, I
22 BELIEVE, FOR ME TO JUST REMAIN - ESPECIALLY IN THE CONTEXT OF
23 THIS HEARING BECAUSE I HAVE TO BE THE FACT FINDER - TO REMAIN
24 IN A NEUTRAL ROLE. SO I DON'T SEE ANY DIFFERENCE WHATSOEVER
25 IN WHO CALLS HIM AS A WITNESS.

1 MR. MILLER: ALL RIGHT. I UNDERSTAND.

2 THE COURT: HE'S NOT GOING TO KNOW BECAUSE THE
3 OFFICERS ARE GOING TO BRING HIM OUT AND PUT HIM ON THE STAND
4 AND SOMEBODY IS GOING TO START ASKING HIM QUESTIONS, BUT I'M
5 NOT GOING TO START OFF -- I'M NOT GOING TO START OFF ASKING
6 HIM QUESTIONS.

7 MR. MILLER: I UNDERSTAND YOUR RULING, YOUR HONOR.
8 JUST FOR THE RECORD, OUR POINT WAS THAT HE IS HERE REALLY BY
9 THE COURT'S ORDER AND NOT FROM EITHER PARTY AND,
10 ADDITIONALLY, JUST BEING AN INMATE IN THE DEPARTMENT OF
11 CORRECTIONS, HE DOESN'T WANT TO, AS A PRACTICAL MATTER, BE
12 ALIGNED WITH EITHER SIDE WHEN HE FEELS THAT HE HAS NOTHING
13 RELEVANT TO ADD. FOR THE RECORD, I DO UNDERSTAND YOUR
14 RULING, AND THANK YOU, SIR.

15 THE COURT: ALL RIGHT. ANYTHING FURTHER BEFORE WE
16 BRING OUT MARCUS THOMPSON?

17 MR. MYERS: NOTHING FROM THE STATE.

18 MS. KIMBROUGH: NO, YOUR HONOR.

19 THE COURT: BRING HIM OUT.

20 OFFICER: OKAY. HE'S COMING FROM THAT WAY, YOUR
21 HONOR.

22 (MARCUS THOMPSON IS BROUGHT INTO THE COURTROOM.)

23 MARCUS THOMPSON, AFTER BEING DULY SWORN,
24 TESTIFIED AS FOLLOWS:
25

DIRECT EXAMINATION

BY MR. LITTLEJOHN:

Q. YOU'RE MARCUS THOMPSON?

A. YES, SIR.

Q. OKAY. MR. THOMPSON, YOU WERE CHARGED ON MAY 17TH, 2002, WITH MURDER AND ARMED ROBBERY AND SOME OTHER CHARGES INVOLVING THE DEATH OF SERGEANT TRACY DAVIS?

A. YES, SIR.

Q. OKAY. AND I BELIEVE SINCE THAT TIME YOU HAVE ENTERED A GUILTY PLEA?

A. YES, SIR.

Q. WHAT DID YOU PLEAD GUILTY TO?

A. ACCESSORY BEFORE THE FACT OF ARMED ROBBERY AND ACCESSORY AFTER THE FACT OF MURDER AND ARMED ROBBERY.

Q. OKAY. AND YOU RECEIVED A 28-YEAR SENTENCE?

A. YES, SIR.

Q. OKAY. NOW, MR. THOMPSON, DO YOU RECALL THE EVENTS OF MAY 16, 2002?

A. MAY 16TH, 2002?

Q. YES, SIR.

A. NO, SIR.

Q. YOU DON'T -- DO YOU RECALL THE NIGHT THAT TRACY DAVIS WAS KILLED?

A. YES, SIR. OH, OKAY. YES, SIR.

Q. MAY 16TH, 2002?

1 A. THAT WAS THE 16TH; I THOUGHT IT WAS THE 17TH. I'M
2 SORRY.

3 Q. OKAY. MR. THOMPSON, WERE YOU WITH KEVIN MERCER THAT
4 NIGHT?

5 A. YES, SIR.

6 Q. OKAY.

7 A. YES, SIR, BEFORE EVERYTHING HAPPENED.

8 Q. ALL RIGHT.

9 COURT REPORTER: I'M SORRY. I DIDN'T UNDERSTAND.

10 BY MR. LITTLEJOHN:

11 Q. REPEAT YOUR ANSWER.

12 A. YES, SIR, BEFORE EVERYTHING HAPPENED.

13 Q. OKAY. BEFORE EVERYTHING HAPPENED.

14 A. YES, SIR.

15 Q. AND I BELIEVE YOU HAVE GIVEN TWO STATEMENTS TO THE
16 SHERIFF'S DEPARTMENT OR TO THE SOLICITOR'S OFFICE INVOLVING
17 YOUR PARTICIPATION IN THIS MATTER?

18 A. SO FAR FROM MY UNDERSTANDING IT WAS JUST ONE
19 STATEMENT THAT I GAVE.

20 Q. OKAY. DO YOU RECALL GIVING A STATEMENT ON MAY 17TH,
21 THE EARLY MORNING HOURS?

22 A. YES, SIR.

23 Q. OKAY. THEN DO YOU RECALL BEING INTERVIEWED FOR
24 KEVIN MERCER'S TRIAL BACK IN APRIL OF THIS YEAR?

25 A. YES, SIR.

1 Q. AND SITTING DOWN WITH SOLICITOR MYERS?

2 A. YES, SIR.

3 Q. AND MEMBERS OF HIS STAFF AND THE SHERIFF'S
4 DEPARTMENT?

5 A. (WITNESS NODDED HEAD UP AND DOWN.)

6 Q. OKAY. DO YOU REMEMBER THAT THOSE TWO STATEMENTS
7 WERE NOT CONSISTENT?

8 A. YES, SIR.

9 Q. OKAY. AND LET ME BACK UP. MR. THOMPSON, ON THE
10 NIGHT THAT SERGEANT DAVIS WAS KILLED, DID YOU PARTICIPATE IN
11 HIS MURDER?

12 A. NO, SIR.

13 Q. YOU DIDN'T HAVE ANYTHING TO DO WITH IT.

14 A. I DIDN'T PARTICIPATE IN THE MURDER. I WAS JUST
15 THERE BEFORE THE FACT AND AFTER THE FACT.

16 Q. YOU WERE JUST THERE IN THE BEFORE AND THE AFTER.

17 A. YES, SIR.

18 Q. DID YOU PULL THE TRIGGER?

19 A. NO, SIR.

20 Q. DID YOU KILL SERGEANT DAVIS?

21 A. NO, SIR, I DID NOT.

22 Q. DID YOU PARTICIPATE IN THE ARMED ROBBERY OF SERGEANT
23 DAVIS?

24 A. NO, SIR, I DID NOT ROB HIM.

25 Q. YOU DIDN'T. AND IF YOU WERE CALLED TO TESTIFY,

1 THAT'S WHAT YOU'D SAY?

2 A. YES, SIR.

3 Q. OKAY. MR. THOMPSON, DO YOU KNOW KEVIN FULLER?

4 A. YES, SIR.

5 Q. HOW DO YOU KNOW MR. FULLER?

6 A. HE WAS MY ROOMMATE WHEN I CAME TO LEXINGTON COUNTY

7 THIS YEAR.

8 Q. OKAY. AND THAT WAS AT THE LEXINGTON COUNTY

9 DETENTION CENTER?

10 A. YES, SIR.

11 Q. AND HOW LONG WERE Y'ALL ROOMMATES?

12 A. PROBABLY THREE TO FOUR DAYS AT THE MOST.

13 Q. THREE TO FOUR DAYS?

14 A. YES, SIR.

15 Q. OKAY. NOW, DO YOU RECALL BEING TREATED FOR KIDNEY

16 STONES?

17 A. YES, SIR.

18 Q. AND THAT WAS WHEN KEVIN FULLER WAS YOUR ROOMMATE?

19 A. YES, SIR.

20 Q. OKAY. DO YOU RECALL COMING BACK AFTER YOUR

21 TREATMENT FOR THE KIDNEY STONES AND TELLING KEVIN FULLER

22 ABOUT YOUR PARTICIPATION IN SERGEANT DAVIS'S DEATH?

23 A. I NEVER TOLD KEVIN FULLER ANYTHING ABOUT THAT

24 PARTICULAR -- MY SITUATION IN LEXINGTON COUNTY.

25 Q. OKAY. I'LL ASK YOU SPECIFICALLY: MR. THOMPSON, DID

1 YOU TELL KEVIN FULLER THAT YOU SHOT SERGEANT TRACY LAMAR
2 DAVIS?

3 A. NO, SIR.

4 Q. DID YOU TELL HIM THAT YOU WERE WEARING KNIT GLOVES
5 TURNED INSIDE OUT WHEN YOU KILLED SERGEANT DAVIS?

6 A. NO, SIR.

7 Q. DID YOU TALK ABOUT THE MURDER AND BRAG TO KEVIN
8 FULLER THAT YOU HAD GOTTEN AWAY WITH MURDER?

9 A. NO, SIR.

10 Q. DID YOU TELL KEVIN FULLER THAT YOU HAD GOTTEN OUT ON
11 BOND BY BLAMING KEVIN MERCER FOR THIS MURDER?

12 A. NO, SIR.

13 Q. DID YOU TELL KEVIN FULLER THAT YOU HAD FIRED THE
14 MURDER WEAPON EARLIER IN THE DAY?

15 A. NO, SIR.

16 Q. AND THAT YOU WERE WEARING YOUR GLOVES WHEN YOU FIRED
17 THE WEAPON---

18 A. NO, SIR, I DIDN'T.

19 Q. ---ON THAT DAY AND WHEN YOU KILLED SERGEANT DAVIS?

20 A. NO, SIR.

21 Q. AND YOUR TESTIMONY IS THAT YOU DIDN'T TELL KEVIN
22 FULLER ANYTHING ABOUT THE EVENTS OF MAY 16TH, 2002, IN THE
23 MURDER OF SERGEANT TRACY DAVIS.

24 A. YES, SIR.

25 MR. LITTLEJOHN: THOSE ARE ALL THE QUESTIONS WE HAVE

1 FOR MR. THOMPSON, YOUR HONOR.

2 CROSS-EXAMINATION

3 BY MR. MYERS:

4 Q. MR. THOMPSON, THE NIGHT THAT YOU AND KEVIN MERCER
5 WERE STOPPED ON I-20, WHO WAS DRIVING?

6 A. MR. KEVIN MERCER.

7 Q. NOW, WHO DID THE OFFICER GET OUT OF THE CAR FIRST?
8 YOU OR KEVIN MERCER?

9 A. GOT KEVIN MERCER OUT OF THE CAR, SIR.

10 Q. THEN YOU WERE GOTTEN OUT OF THE CAR SECOND.

11 A. YES, SIR.

12 Q. OKAY. WHEN Y'ALL WERE GOTTEN OUT OF THE VEHICLE YOU
13 WERE RIDING IN, WERE YOU PUT INTO THE SAME POLICE CAR OR
14 DIFFERENT POLICE CARS?

15 A. IT WAS DIFFERENT POLICE CARS.

16 Q. AND ON THE SCENE OUT THERE -- STAND UP, SCOTTIE.

17 MR. FRIER: YES, SIR.

18 BY MR. MYERS:

19 Q. DID THIS OFFICER TALK WITH YOU?

20 A. YES, SIR.

21 Q. AND YOU TALKED WITH HIM THERE AT THE SCENE OUT ON
22 THE HIGHWAY.

23 A. YES, SIR.

24 Q. AND THEN LATER ON YOU WERE BROUGHT BACK TO THE
25 SHERIFF'S DEPARTMENT. YOU TALKED WITH THAT OFFICER AGAIN.

1 A. YES, SIR.

2 Q. YOU GAVE HIM A WRITTEN STATEMENT.

3 A. YES, SIR.

4 Q. LOOK THIS OVER, PLEASE, AND SEE IF YOUR SIGNATURE IS
5 ON THAT SHEET.

6 A. (THE WITNESS COMPLIES.) YES, SIR, IT IS.

7 MR. MYERS: WE OFFER THIS IN EVIDENCE, AND A COPY
8 HAS BEEN PROVIDED TO THE DEFENSE.

9 MR. LITTLEJOHN: WE'VE SEEN IT. NO OBJECTION, YOUR
10 HONOR---

11 THE COURT: IT'S ADMITTED.

12 MR. LITTLEJOHN: ---FOR PURPOSES OF THIS HEARING.

13 (STATE'S EXHIBIT 1 WAS RECEIVED IN EVIDENCE.)

14 BY MR. MYERS:

15 Q. IT'S A FOUR-PAGE STATEMENT, EXHIBIT 1. STATE'S
16 EXHIBIT NUMBER 1 SAYS MAY 17, 2002, UP AT THE TOP. IS THAT
17 RIGHT?

18 A. YES, SIR.

19 Q. AND YOUR SIGNATURE IS ON THIS STATEMENT?

20 A. YES, SIR.

21 MR. MYERS: MAY I PUBLISH IT, YOUR HONOR?

22 THE COURT: IF YOU FEEL IT'S NECESSARY. I CAN READ
23 IT LATER. YOU CAN DO IT HOW EVER YOU WANT TO.

24 BY MR. MYERS:

25 Q. I'LL LET YOU READ IT LATER. IN THIS STATEMENT THAT

1 YOU GAVE TO THAT OFFICER BACK THERE, SCOTTIE FRIER WITH THE
2 LEXINGTON COUNTY SHERIFF'S DEPARTMENT, DID YOU TELL HIM YOU
3 SHOT MR. DAVIS?

4 A. NO, SIR.

5 Q. DID YOU TELL HIM YOU WERE THERE WHEN THE SHOOTING
6 TOOK PLACE?

7 A. NO, SIR. I TOLD HIM I WAS THERE BEFORE AND AFTER.

8 Q. HOW WERE YOU THERE BEFORE?

9 A. ME AND MR. KEVIN MERCER WERE RIDING TOGETHER.

10 Q. YES, SIR.

11 A. AND BEFORE THE MURDER WAS TAKING PLACE, MR. KEVIN
12 MERCER GOT OUT OF THE CAR FROM WHERE WE WAS AT, AND HE WENT
13 AND DID WHATEVER, HOW EVER IT WENT DOWN, AND AFTERWARDS WE
14 MET UP AT A HOTEL.

15 Q. NOW, WHAT CAR WERE YOU IN WHEN YOU AND MR. MERCER
16 WENT OVER TO THIS APARTMENT COMPLEX AREA?

17 A. A GRAY OLDSMOBILE.

18 Q. WHOSE CAR WAS THAT?

19 A. MR. KEVIN MERCER'S.

20 Q. WAS THERE A PISTOL INSIDE THAT CAR?

21 A. YES, SIR.

22 Q. WHOSE PISTOL WAS THAT?

23 A. MR. KEVIN MERCER'S.

24 Q. WHEN KEVIN MERCER GOT OUT OF HIS CAR, WHERE WAS THE
25 PISTOL?

1 A. IN HIS HAND.

2 Q. IN WHOSE HAND?

3 A. KEVIN MERCER.

4 Q. AND DID YOU KNOW WHAT HE WAS GOING TO DO WHEN HE GOT
5 OUT OF THAT CAR?

6 A. NO, SIR, I HAD NO INTENTIONS. I DIDN'T KNOW
7 ANYTHING.

8 Q. YOU'RE THEN DRIVING HIS CAR. WHERE DID YOU GO?

9 A. TO THE ECONOMY INN ON BROAD RIVER ROAD ACROSS FROM
10 APPLEBEE'S.

11 Q. AND WHY DID YOU GO TO THE ECONOMY INN?

12 A. BECAUSE THAT'S WHERE I WAS TOLD TO GO.

13 Q. BY WHOM?

14 A. KEVIN MERCER.

15 Q. THE NEXT TIME YOU SAW KEVIN MERCER, WAS HE WALKING
16 OR DRIVING?

17 A. HE WAS DRIVING.

18 Q. WHAT WAS HE DRIVING?

19 A. A LINCOLN NAVIGATOR.

20 Q. DID YOU ASK HIM ANYTHING ABOUT THAT LINCOLN
21 NAVIGATOR?

22 A. I ASKED HIM AFTER THE FACT -- I ASKED HIM HOW DID HE
23 GET IT OR WHAT HAPPENED.

24 Q. AND WHAT DID KEVIN MERCER SAY?

25 A. HE SAID HE SHOT THIS NIGGER IN THE HEAD AND TOOK HIS

1 VEHICLE.

2 Q. WHERE WAS THE GUN?

3 A. THE GUN WAS ON THE SEAT IN THE CAR.

4 Q. WHICH SEAT?

5 A. THE PASSENGER SEAT.

6 Q. WHEN YOU GOT IN, WHAT HAPPENED TO THE GUN?

7 A. I GAVE IT TO KEVIN MERCER.

8 Q. WHAT DID YOU HAVE ON YOUR HANDS?

9 A. GLOVES.

10 Q. WHY DID YOU HAVE GLOVES ON YOUR HANDS?

11 A. BECAUSE I DIDN'T WANT MY FINGERPRINTS ON THE GLOVES

12 -- I MEAN ON THE GUN.

13 Q. WERE YOU THERE WHEN TRACY DAVIS WAS MURDERED?

14 A. NO, SIR.

15 Q. NOW, DID Y'ALL LEAVE THE ECONOMY INN? YOU AND KEVIN

16 MERCER, DID Y'ALL LEAVE THE ECONOMY INN?

17 A. TOGETHER?

18 Q. YEAH.

19 A. YES, SIR.

20 Q. AND IN WHAT VEHICLE WERE YOU RIDING WHEN Y'ALL LEFT?

21 A. THE NAVIGATOR.

22 Q. THE NAVIGATOR.

23 A. YES, SIR.

24 Q. WHERE WAS KEVIN MERCER'S CAR THAT YOU HAD BEEN

25 DRIVING?

1 A. AT THE MOTEL.

2 Q. YOU LEFT IT THERE?

3 A. YES, SIR.

4 Q. WHERE WERE Y'ALL HEADED WHEN YOU GOT IN THE
5 NAVIGATOR?

6 A. TO ATLANTA.

7 Q. TO ATLANTA.

8 A. YES, SIR.

9 Q. YOU GOT ON I-20.

10 A. YES, SIR.

11 Q. HEADING TO ATLANTA.

12 A. YES, SIR.

13 Q. AND THAT'S WHEN THE OFFICERS STOPPED YOU.

14 A. YES, SIR.

15 Q. HOW DID THAT GUN GET UNDER THE SEAT WHEN THE
16 OFFICERS STOPPED Y'ALL?

17 A. HE PUT IT UNDER THE SEAT.

18 Q. NOW, LET ME ASK YOU THIS: WHOSE GUN WAS THAT?

19 A. KEVIN MERCER'S GUN.

20 Q. WHEN YOU WERE ARRESTED, YOU HAD A BAG OF BULLETS IN
21 YOUR POCKET.

22 A. YES, SIR.

23 Q. WHO GAVE YOU THOSE BAG OF BULLETS?

24 A. KEVIN MERCER.

25 Q. WHEN DID HE GIVE YOU THOSE BAG OF BULLETS?

1 A. WHILE WE WERE AT MY HOUSE.

2 Q. WHAT DID HE SAY WHEN HE GAVE THEM TO YOU?

3 A. HE JUST TOLD ME TO HOLD ON TO THEM.

4 Q. JUST TOLD YOU TO HOLD THEM?

5 A. YES, SIR.

6 Q. DID HE TELL YOU WHY?

7 A. NO, SIR.

8 Q. YOU TALKED WITH OFFICER FRIER OUT THERE WHEN THE
9 POLICEMAN STOPPED YOU ON I-20.

10 A. YES, SIR.

11 Q. DID YOU TELL HIM YOU HAD KILLED THIS FELLOW?

12 A. NO, SIR.

13 Q. WHO DID YOU TELL HIM HAD KILLED HIM?

14 A. I TOLD HIM KEVIN MERCER DID.

15 Q. AND THEN WHEN YOU GAVE THIS WRITTEN STATEMENT BACK
16 AT THE SHERIFF'S DEPARTMENT, WHO DID YOU SAY HAD MURDERED
17 TRACY DAVIS?

18 A. KEVIN MERCER.

19 Q. ALSO ON THE BACK BACK HERE THERE'S A CIRCLE OF TWO
20 -- THERE'S A WHOLE BUNCH OF PISTOLS AND GUNS ON THIS SHEET.
21 THERE'S A CIRCLE OF TWO OF THEM. WHO MADE THAT CIRCLE?

22 A. I DID.

23 Q. DOES THAT CIRCLE INDICATE THE TYPE OF GUN THAT KEVIN
24 MERCER HAD?

25 A. YES, SIR.

1 Q. AND THE GUN THAT WAS UNDER THE SEAT?

2 A. YES, SIR.

3 Q. THAT'S PRETTY MUCH WHAT'S IN THIS STATEMENT THAT YOU
4 TOLD OFFICER FRIER THAT NIGHT?

5 A. YES, SIR.

6 Q. NOW, YOU WERE PUT IN JAIL. THEN YOU LATER GOT OUT
7 ON BOND. IS THAT RIGHT?

8 A. YES, SIR.

9 Q. AND THEN THIS YEAR YOU WERE PUT BACK IN JAIL.

10 A. YES, SIR.

11 Q. BECAUSE YOU HAD VIOLATED THE BOND CONDITIONS?

12 A. YES, SIR.

13 Q. AND IS THAT WHEN YOU WERE PUT IN THE CELL WITH KEVIN
14 FULLER?

15 A. YES, SIR.

16 Q. DID YOU TELL KEVIN FULLER THAT YOU WERE THE ONE THAT
17 MURDERED TRACY DAVIS?

18 A. NO, SIR.

19 Q. DO YOU KNOW WHY KEVIN FULLER WAS IN THERE?

20 A. YES, SIR.

21 Q. WHY WAS HE IN JAIL?

22 A. TWO CRIMINAL DOMESTIC VIOLENCE CHARGES..

23 Q. DID HE EVER TALK ABOUT HIM - KEVIN FULLER - WANTING
24 TO GET OUT OF JAIL?

25 A. YES, SIR, HE TALKED ABOUT WANTING TO GET OUT.

1 Q. DID HE SAY HOW HE WAS GOING TO GET OUT OF JAIL?

2 A. NO, SIR, HE DIDN'T SAY HOW.

3 Q. OKAY. NOW, WHILE YOU WERE IN THE SAME CELL WITH
4 KEVIN FULLER, THEY ASKED YOU A LITTLE WHILE AGO ABOUT HAVING
5 SOME KIDNEY STONES; IS THAT RIGHT?

6 A. YES, SIR.

7 Q. DID YOU HAVE SOME KIDNEY STONE PROBLEMS?

8 A. YES, SIR, I DID.

9 Q. AND DID THEY TAKE YOU TO A DOCTOR OR A HOSPITAL?

10 A. YES, SIR, THEY DID.

11 Q. NOW, I WANT TO TALK WITH YOU ABOUT THAT A LITTLE
12 BIT. THE DAY THAT YOU WENT TO THE HOSPITAL, WAS THAT IN THE
13 MORNING THEY TOOK YOU OR IN THE AFTERNOON?

14 A. IT WAS IN THE AFTERNOON, BETWEEN THE MORNING AND THE
15 AFTERNOON, LIKE RIGHT AROUND ABOUT -- I'D SAY ABOUT 11 OR 12
16 O'CLOCK OR SOMETHING LIKE THAT.

17 Q. 11 OR 12 O'CLOCK THEY TOOK YOU TO THE HOSPITAL.

18 A. YES, SIR.

19 Q. DID YOU STAY OVERNIGHT IN THE HOSPITAL?

20 A. NO, SIR.

21 Q. ABOUT WHAT TIME DID YOU GET BACK TO THE JAIL FROM
22 THE HOSPITAL? WAS IT DAYLIGHT OR DARK?

23 A. IT WAS ALMOST DARK TIME. IT WAS LIKE RIGHT BETWEEN
24 THE HOURS OF GOING INTO THE EVENING HOURS.

25 Q. OKAY. DID THEY OPERATE ON YOU AT THE HOSPITAL OR DO

1 ANYTHING TO YOU OR WHAT?

2 A. THEY GAVE ME TWO SHOTS IN THE REAR.

3 Q. GAVE YOU SOME SHOTS.

4 A. YES, SIR.

5 Q. DIDN'T OPERATE ON YOU OR ANYTHING.

6 A. NO, THEY DIDN'T OPERATE.

7 Q. DID THEY GIVE YOU ANY MEDICINE?

8 A. YES, SIR, THEY GAVE ME VICODIN.

9 Q. GAVE YOU VICODIN?

10 A. YES, SIR.

11 Q. DID YOU TAKE THAT VICODIN BACK WITH YOU?

12 A. YES, SIR.

13 Q. NOW, I WANT TO ASK YOU THIS: THE NIGHT BEFORE THEY

14 TOOK YOU TO THE HOSPITAL, HAD YOU BEEN COMPLAINING ABOUT

15 KIDNEY STONES AT THE JAIL?

16 A. YES, SIR.

17 Q. WHAT DID THE JAIL DO WITH YOU THE NIGHT BEFORE THEY

18 TOOK YOU TO THE HOSPITAL?

19 A. THEY PUT ME IN THE BOOKINGS FOR OBSERVATION.

20 Q. PUT YOU IN WHAT NOW?

21 A. IN THE BOOKINGS AREA FOR OBSERVATION.

22 Q. IN THE BOOKING AREA FOR OBSERVATION.

23 A. YES, SIR.

24 Q. THAT'S WHERE PEOPLE WHO HAVE SOME MEDICAL PROBLEMS.

25 OR SOME KIND OF PROBLEMS THEY PUT THEM DOWN ON THE FIRST

1 FLOOR IN THE BOOKING AREA.

2 A. YES, SIR.

3 Q. SO THEY CAN KEEP A CLOSE EYE ON THEM.

4 A. YES, SIR.

5 Q. AND DID YOU SEE A DOCTOR THERE AT THE JAIL THE NIGHT
6 BEFORE WHEN THEY PUT YOU IN THE BOOKING PLACE?

7 A. NO, SIR, I SAW A NURSE.

8 Q. SAW A NURSE.

9 A. YES, SIR.

10 Q. DID THE NURSE HELP YOU IN ANY WAY THAT NIGHT?

11 A. SHE GAVE ME A SLEEPING PILL, JUST PUT ME TO SLEEP.

12 Q. SO SHE GAVE YOU A SLEEPING PILL. NOW, WHEN YOU WENT
13 DOWN TO THAT BOOKING AREA, DID YOU GO DOWN THERE BEFORE DARK
14 OR AFTER DARK THAT NIGHT BEFORE?

15 A. IT WAS BEFORE DARK.

16 Q. BEFORE DARK.

17 A. YES, SIR.

18 Q. SO THE AFTERNOON BEFORE YOU WENT TO THE HOSPITAL YOU
19 COMPLAINED ABOUT THE KIDNEY STONES.

20 A. YES, SIR.

21 Q. THEY TOOK YOU DOWN IN THE BOOKING AREA. YOU SAW A
22 NURSE. SHE GAVE YOU SOMETHING TO GO TO SLEEP, AND YOU WENT
23 TO SLEEP.

24 A. (WITNESS NODDED HEAD UP AND DOWN.)

25 Q. THEN THE NEXT MORNING YOU GET UP AND GO TO THE

1 HOSPITAL.

2 A. THE NEXT MORNING I GOT UP. I GOT UP LIKE SIX IN THE
3 MORNING BECAUSE THE PAINS HAD CAME BACK.

4 Q. RIGHT.

5 A. ONCE THE PAINS CAME BACK, I STARTED COMPLAINING, AND
6 ROUGHLY BETWEEN RIGHT BEFORE THE AFTERNOON, I WOULD SAY
7 BETWEEN 11 AND 12, AS I SAID, THEY TOOK ME TO THE HOSPITAL.

8 Q. OKAY. AND THEY TOOK YOU TO THE HOSPITAL AND GAVE
9 YOU SOME SHOTS, GAVE YOU SOME VICODIN, BROUGHT YOU BACK TO
10 THE JAIL AFTER DARK.

11 A. YES, SIR.

12 Q. WHEN YOU GOT BACK TO THE JAIL FROM THE HOSPITAL, DID
13 YOU TELL KEVIN FULLER THAT NIGHT THAT YOU HAD SHOT TRACY
14 DAVIS?

15 A. NO, SIR. I WENT TO SLEEP.

16 Q. YOU WENT TO SLEEP.

17 A. YES, SIR.

18 Q. THERE WAS A THIRD PERSON IN THAT CELL. IT WAS YOU,
19 KEVIN FULLER, AND A THIRD PERSON.

20 A. YES, SIR.

21 Q. WHO WAS THAT THIRD PERSON?

22 A. TIMOTHY JOHNSTON.

23 Q. HAS HE GOT A NICKNAME?

24 A. ROCKY.

25 Q. ROCKY.

1 A. YES, SIR.

2 Q. ROCKY WAS IN THERE, TOO.

3 A. YES, SIR.

4 Q. THREE OF YOU TO THE CELL.

5 A. YES, SIR.

6 Q. OF KEVIN FULLER AND ROCKY, WHICH ONE DID YOU TALK TO
7 THE MOST?

8 A. ROCKY.

9 Q. YOU TALKED WITH ROCKY THE MOST.

10 A. YES, SIR.

11 Q. OKAY. YOU TALKED WITH KEVIN LESSER THAN YOU TALKED
12 WITH ROCKY.

13 A. YES, SIR.

14 Q. DID YOU EVER TELL ROCKY THAT YOU ARE THE ONE THAT
15 KILLED TRACY DAVIS?

16 A. NO, SIR.

17 MR. MYERS: THAT'S ALL WE HAVE AT THIS TIME.

18 REDIRECT EXAMINATION

19 BY MR. LITTLEJOHN:

20 Q. MR. THOMPSON, SOLICITOR MYERS ASKED YOU SEVERAL
21 QUESTIONS ABOUT YOUR STATEMENT WHICH HAS BEEN INTRODUCED AS
22 STATE'S EXHIBIT NUMBER 1 FOR PURPOSES OF THIS HEARING.

23 A. YES, SIR.

24 Q. AND HE ASKED YOU IN THERE ABOUT THE -- ABOUT THE
25 BULLETS THAT YOU -- THE SEVENTEEN 357 BULLETS THAT YOU HAD IN

1 YOUR POCKET WHEN YOU WERE ARRESTED ON MAY 17TH, 2002?

2 A. YES, SIR.

3 Q. YOU HAD THOSE BULLETS IN YOUR POCKET.

4 A. YES, SIR.

5 Q. OKAY. DO YOU RECALL IN YOUR STATEMENT TELLING THE
6 DETECTIVES THAT, "KEVIN HAD GIVEN ME A WHITE PLASTIC BAG WITH
7 BULLETS IN IT AT MY HOUSE"?

8 A. YES, SIR.

9 Q. DO YOU REMEMBER THAT?

10 A. YES, SIR.

11 Q. OKAY. NOW, MR. THOMPSON, ON MARCH 15TH, 2006, YOU
12 WERE INTERVIEWED BY SOLICITOR MYERS.

13 A. (WITNESS NODDED HEAD UP AND DOWN.)

14 Q. AND DETECTIVES WITH THE SHERIFF'S DEPARTMENT; RIGHT?

15 A. YES, SIR.

16 Q. WHAT DID YOU TELL THEM ABOUT THE BULLETS THEN?

17 A. WHAT I TOLD THEM ABOUT THE BULLETS THEN?

18 Q. YES, SIR. DO YOU REMEMBER?

19 A. YES, SIR, I REMEMBER. I TOLD THEM THAT THEY WERE IN
20 THE TRUCK.

21 Q. OKAY. THAT WASN'T THE SAME THING YOU TOLD THEM
22 ON---

23 A. NO, THAT WASN'T THE SAME THING.

24 Q. ---THE DAY AFTER THE MURDER.

25 A. NO, SIR.

1 Q. OKAY. AND ON THE DAY AFTER THE MURDER, YOU SAID TO
2 THE OFFICERS, WHICH IS IN YOUR STATEMENT, THAT KEVIN TOLD YOU
3 TO DRIVE HIS CAR TO THE ECONOMY INN.

4 A. YES, SIR.

5 Q. ISN'T THAT RIGHT?

6 A. YES, SIR.

7 Q. AND ON MARCH 16TH - EXCUSE ME - MARCH 15TH, 2006,
8 WHEN YOU WERE BEING TALKED TO BY SOLICITOR MYERS, YOU TOLD
9 HIM THAT YOU JUST DROVE THE CAR TO THE ECONOMY INN BECAUSE
10 YOU KNEW KEVIN HAD STAYED THERE SOMETIME.

11 A. YES, SIR.

12 Q. AND THAT KEVIN DIDN'T TELL YOU TO GO THERE. YOU
13 JUST WENT THERE.

14 A. YES, SIR.

15 Q. ISN'T THAT RIGHT?

16 A. YES, SIR.

17 Q. THAT WAS INCONSISTENT.

18 A. YES, SIR.

19 Q. ONE OF THOSE IS A LIE.

20 A. YES, SIR.

21 Q. ISN'T THAT RIGHT?

22 A. YES, SIR.

23 Q. AND THE THING ABOUT THE BULLETS - ONE OF THOSE
24 STATEMENTS IS A LIE.

25 A. YES, SIR.

1 Q. AND THE DAY AFTER YOU WERE ARRESTED YOU TOLD THE
2 OFFICERS THAT THE PISTOL WAS ON THE SEAT.

3 A. YES, SIR.

4 Q. / ISN'T THAT RIGHT?

5 A. YES, SIR.

6 Q. THEN ON MARCH 15, 2006, YOU TOLD SOLICITOR MYERS THE
7 PISTOL WAS ON THE FLOORBOARD OF THE CAR.

8 A. YES, SIR.

9 Q. ISN'T THAT RIGHT?

10 A. YES, SIR.

11 Q. OKAY. AND ON ONE OF THOSE OCCASIONS - AND I GET
12 THEM MIXED UP - YOU TOLD THEM THAT KEVIN SAID HE WANTED TO GO
13 SEE A FRIEND AT THE APARTMENT COMPLEX. THAT WAS ON MARCH 15,
14 2006. THAT'S WHAT YOU TOLD SOLICITOR MYERS THAT DAY, WASN'T
15 IT?

16 A. I CAN'T RECALL.

17 Q. OKAY. ONE TIME YOU TOLD HIM THAT KEVIN SAID HE
18 WANTED TO GO TO A -- TO SEE A FRIEND. ANOTHER TIME YOU TOLD
19 THEM KEVIN SAID HE WANTED TO GO STEAL A CAR. WEREN'T THOSE
20 YOUR TWO STATEMENTS?

21 A. I CAN'T RECALL.

22 Q. YOU CAN'T RECALL.

23 A. YES, SIR.

24 Q. OKAY. WOULD YOU AGREE WITH ME ONE OF THOSE IS NOT
25 TRUE?

1 A. YES, SIR.

2 Q. AND, MR. THOMPSON, IN REGARD TO YOUR SIGNED SWORN
3 STATEMENT THAT YOU GAVE ON MAY 17, 2002, WHEN YOU WERE
4 INTERVIEWED BY SOLICITOR MYERS, YOU, IN FACT, TOLD HIM THAT
5 MANY OF THE THINGS IN THAT OTHER STATEMENT WERE NOT TRUE.

6 A. YES.

7 Q. ISN'T THAT RIGHT?

8 A. YES, SIR.

9 MR. LITTLEJOHN: THAT'S ALL I HAVE, YOUR HONOR.

10 MR. MYERS: NOTHING FURTHER.

11 THE COURT: ALL RIGHT. YOU CAN TAKE HIM ON.

12 (MR. THOMPSON LEAVES THE COURTROOM.)

13 THE COURT: JUST AS I RAISED THE QUESTION OF --

14 BECAUSE ULTIMATELY I'VE GOT TO MAKE MY DECISION BASED ON
15 WHAT'S ADMISSIBLE IN A RETRIAL AND WHAT'S NOT ADMISSIBLE IN A
16 RETRIAL, AND JUST AS I ASKED THE QUESTION ABOUT THE
17 ADMISSIBILITY OF KEVIN FULLER'S STATEMENT WITHOUT MARCUS
18 THOMPSON HAVING FIRST TESTIFIED, I RAISED THE QUESTION OF THE
19 ADMISSIBILITY OF THIS WRITTEN STATEMENT THAT WAS GIVEN BY
20 MARCUS THOMPSON. AND IT'S KIND OF BACKWARDS, BUT I THINK
21 THAT WHAT JUST HAPPENED ON RECROSS -- ON REDIRECT IS
22 ESSENTIALLY A CHARGE THAT WHAT HE SAID JUST NOW LIVE HERE IN
23 THE COURTROOM WAS RECENTLY FABRICATED WHICH WOULD THEN RENDER
24 THE STATEMENT, IF THAT WERE -- IF THAT WERE BROUGHT OUT ON --
25 IF THE STATE HAD -- IF THE STATE CALLED MARCUS THOMPSON AS A

1 WITNESS AND HE TESTIFIED AT TRIAL AS HE JUST TESTIFIED AND
2 THEN IF YOU CROSS-EXAMINED HIM BASED ON THE STATEMENTS THAT
3 HE MADE TO SOLICITOR MYERS AND LAW ENFORCEMENT ON MARCH THE
4 15TH AS BEING DIFFERENT FROM WHAT HE JUST TESTIFIED TO, THEN
5 THAT WOULD RENDER THIS STATEMENT THAT HAS BEEN MARKED AS
6 STATE'S EXHIBIT 1 ADMISSIBLE AS UNDER 801(D) (1) (B) TO REBUT A
7 CHARGE OF RECENT FABRICATION. IS THAT CORRECT?

8 MR. MYERS: YES, SIR.

9 MR. LITTLEJOHN: IF YOU WOULD GIVE ME JUST A MOMENT,
10 YOUR HONOR.

11 THE COURT: ALL RIGHT. LET'S TAKE A SHORT BREAK.
12 I'LL LET YOU LOOK AT THAT, AND YOU DON'T HAVE TO -- WE DON'T
13 ACTUALLY HAVE TO ANSWER THAT QUESTION RIGHT NOW.

14 MR. LITTLEJOHN: ALL RIGHT, SIR.

15 THE COURT: BUT AT SOME POINT I'VE GOT TO MAKE, I
16 THINK, A DECISION ABOUT WHETHER OR NOT THE CONTENTS OF THAT
17 STATEMENT AS THIS TESTIMONY WAS JUST PRESENTED WOULD BE
18 ADMISSIBLE ON A RETRIAL. ABOUT FIVE MINUTES.

19 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

20 THE COURT: BE SEATED, PLEASE. DO WE NEED TO WAIT
21 FOR MR. LITTLEJOHN?

22 MS. KIMBROUGH: YES, YOUR HONOR.

23 OFFICER: YES, SIR. HE'S BACK THERE TALKING.

24 THE COURT: ALL RIGHT. WHILE WE'RE WAITING ON HIM,
25 THERE WAS -- THERE WAS ONE OTHER EVIDENTIARY QUESTION THAT I

1 THOUGHT WAS RAISED BY MR. THOMPSON'S TESTIMONY AND THAT IS
2 THE -- ON CROSS-EXAMINATION YOU ASKED HIM WHETHER OR NOT HE
3 HEARD MR. FULLER MAKE STATEMENTS ABOUT WANTING TO GET OUT OF
4 JAIL, AND AT THIS POINT I DON'T THINK THOSE WOULD BE
5 ADMISSIBLE IF THIS CASE WERE RETRIED. THAT SITUATION COULD
6 CHANGE AFTER FULLER TESTIFIES, BUT I'M JUST TRYING TO MAKE
7 SURE I -- BECAUSE I THINK I'VE GOT TO MAKE MY DECISION BASED
8 ON WHAT TESTIMONY WOULD ACTUALLY BE ADMISSIBLE IN A RETRIAL.
9 DOES ANYBODY DISAGREE WITH THAT?

10 MR. MYERS: IF FULLER TESTIFIES, WE'LL CONNECT IT.

11 THE COURT: ALL RIGHT. I FIGURED YOU WOULD, BUT
12 DOES ANYBODY DISAGREE WITH WHAT I SAY THAT I HAVE TO MAKE MY
13 DECISION AS TO WHETHER OR NOT THERE IS A LIKELIHOOD THAT THE
14 RESULT WOULD BE DIFFERENT BASED ON EVIDENCE THAT WOULD BE
15 ADMISSIBLE AT A RETRIAL?

16 MR. MYERS: THE STATE AGREES.

17 MS. KIMBROUGH: CAN WE RESERVE OUR POSITION ON THAT?

18 (MR. LITTLEJOHN ENTERS THE COURTROOM. AN OFF-THE-
19 RECORD DISCUSSION TAKES PLACE BETWEEN MR. LITTLEJOHN AND MS.
20 KIMBROUGH.)

21 MS. KIMBROUGH: YOUR HONOR, WE WOULD AGREE.

22 THE COURT: ALL RIGHT. CALL YOUR NEXT WITNESS.

23 MR. LITTLEJOHN: YOUR HONOR, WE CALL KEVIN FULLER.
24 DIDN'T MEAN TO BE LATE, YOUR HONOR. I GOT TRAPPED IN THE
25 MAZE BACK THERE.

KEVIN FULLER - DIRECT EXAM BY MR. LITTLEJOHN

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

2 (KEVIN FULLER IS BROUGHT INTO THE COURTROOM.)

3 KEVIN L. FULLER, AFTER BEING DULY SWORN,

4 TESTIFIED AS FOLLOWS:

5 THE COURT: YOU CAN BE SEATED, SIR.

6 DIRECT EXAMINATION

7 BY MR. LITTLEJOHN:

8 Q. MR. FULLER, WOULD YOU STATE YOUR FULL NAME FOR THE
9 RECORD, PLEASE?

10 A. MY NAME IS KEVIN LEE FULLER.

11 Q. HOW OLD ARE YOU, KEVIN?

12 A. I'M 28, SIR.

13 Q. WHERE DO YOU LIVE?

14 A. HOPKINS, SOUTH CAROLINA.

15 Q. HOW LONG HAVE YOU LIVED IN LEXINGTON COUNTY?

16 A. PROBABLY ABOUT SIX, SEVEN YEARS.

17 Q. OKAY. MR. FULLER, YOU'RE PRESENTLY INCARCERATED AT
18 THE LEXINGTON COUNTY DETENTION CENTER?

19 A. THAT IS CORRECT, SIR.

20 Q. AND FOR THE COURT'S INFORMATION, WHAT CHARGES ARE
21 YOU BEING HELD ON?

22 A. I'VE GOT TWO C.D.V.'S HIGH AND AGGRAVATED NATURE,
23 SIR, AND A C.D.V. THIRD, SIR.

24 Q. OKAY. AND YOU'RE REPRESENTED BY JIMMY ROGERS?

25 A. THAT IS CORRECT, SIR.

1 Q. AND I BELIEVE MR. ROGERS IS HERE IN THE COURTROOM?

2 A. YES, SIR.

3 Q. SOMEWHERE?

4 A. RIGHT THERE, SIR.

5 Q. OKAY.

6 THE COURT: RIGHT OVER HERE.

7 BY MR. LITTLEJOHN:

8 Q. AND YOU'VE DISCUSSED WITH HIM YOUR PRESENCE HERE
9 TODAY AND YOUR BEING A WITNESS?

10 A. THAT IS CORRECT, SIR.

11 Q. OKAY. NOW, MR. FULLER, DO YOU KNOW MARCUS THOMPSON?

12 A. MARCUS THOMPSON?

13 Q. YES, SIR.

14 A. YES, SIR.

15 Q. HOW DO YOU KNOW MARCUS THOMPSON?

16 A. AROUND ABOUT MAY MARCUS THOMPSON CAME TO MY ROOM. I
17 WAS IN F. POD IN LEXINGTON COUNTY.

18 Q. RIGHT.

19 A. IN ROOM 7, SIR.

20 Q. OKAY.

21 A. HE CAME INTO MY ROOM. HE -- WE GOT TO KNOWING EACH
22 OTHER OVER, YOU KNOW, SMOKING CIGARETTES, PLAYING CARDS,
23 STUFF LIKE THAT THERE, BECOMING BUDDIES. HE KEPT TALKING
24 ABOUT A MURDER THAT HIM AND KEVIN MERCER COMMITTED. AND HE
25 WENT AND HAD SOME GALLSTONES REMOVED, AND THEN ALL OF A

1 SUDDEN HE COME BACK. AND WHEN HE COME BACK, HE TURNED AROUND
2 AND WE GOT TO TALKING AGAIN AND WE KIND OF BONDED. YOU KNOW
3 WHAT I'M SAYING, SIR?

4 Q. OKAY. NOW, Y'ALL WERE IN THE SAME CELL---

5 A. YES, SIR.

6 Q. ASSIGNED TO THE SAME CELL.

7 A. WE'RE IN THE SAME CELL.

8 Q. OKAY. WAS ANYBODY ELSE---

9 A. I ALREADY HAD WROTE DONNIE MYERS A LETTER TELLING
10 HIM, YOU KNOW, THAT THIS GUY WAS MENTIONING ABOUT A MURDER TO
11 START WITH AND ALSO I SENT A GRIEVANCE IN FROM LEXINGTON
12 COUNTY TO SEE THE INVESTIGATOR. THIS GUY TOLD ME THAT
13 WHOEVER KEVIN MERCER IS -- IS KEVIN MERCER HERE?

14 Q. YES, SIR---

15 A. OKAY.

16 Q. ---TO ANSWER YOUR QUESTION, BUT JUST GO AHEAD WITH
17 IT.

18 A. ALL RIGHT. WELL, HE TOLD ME HIM AND KEVIN MERCER
19 WAS LOOKING FOR A RIDE SO THEY CAN GO TO ATLANTA AND PARTY
20 DOWN AND THAT THEY'D BEEN OUT ALL DAY SHOOTING SOME KIND OF
21 GUN AND THAT HE TURNED AROUND AND SAID THAT THEY FOUND A GUY
22 WITH SOME KIND OF ESCALADE OR NAVIGATOR AND THAT THEY PULLED
23 IN BEHIND HIM IN KEVIN MERCER'S CAR AND THAT KEVIN MERCER
24 JUMPED OUT AND OPENED THE DOOR AND THE GUY -- THEY THOUGHT HE
25 HAD A GUN ON HIM; BUT HE HAD A CELL PHONE IN HIS HAND AND

1 MARCUS THOMPSON SHOT THE GUY BEHIND HIS EAR. THEN HE KEPT
2 BRAGGING ABOUT, YOU KNOW, WELL, YOU -- HELL, YOU CAN KILL
3 ANYBODY AS LONG AS YOU WATCH C.S.I., AND HE SAID THAT I GUESS
4 WHOEVER DOES THE TESTS ON MURDERS OR WHATEVER DIDN'T CHECK
5 THE INSIDE OF THE GLOVES AND THAT HE WAS BRAGGING ABOUT HOW
6 LEXINGTON COUNTY HAD LET HIM GET BOND AND THAT HOW -- I AIN'T
7 GOING TO EXACTLY SAY IT BUT HOW A BLACK MAN WAS GOING TO PAY
8 FOR HIS CRIME BECAUSE OF HIS IGNORANCE.

9 THEN HE STATED THAT THEY PULLED -- I GUESS WHEN THEY
10 STOLE THE MAN'S STUFF THEY WENT AND PARKED KEVIN MERCER'S CAR
11 AT A HOTEL ROOM SOMEWHERE, SIR. AND THEN THEY TURNED AROUND
12 AND WAS DRIVING THAT BIG TRUCK, WHATEVER KIND OF TRUCK IT WAS
13 - I'M NOT SURE, SIR - BUT THEY WAS DRIVING A TRUCK AND THAT
14 KEVIN MERCER WAS DRIVING THE TRUCK AND THEY GOT PULLED OVER.
15 AND THE OFFICER TOLD KEVIN MERCER TO STEP OUT OF THE VEHICLE,
16 AND AS KEVIN MERCER STEPPED OUT OF THE VEHICLE, MARCUS
17 THOMPSON TOOK THE GUN AND PLACED IT OVER ON KEVIN MERCER'S
18 SIDE.

19 Q. OKAY.

20 A. AND THAT'S EXACTLY WHAT HE TOLD ME.

21 Q. ALL RIGHT. LET ME BACK UP A LITTLE BIT NOW. MR.
22 FULLER, YOU AND MARCUS THOMPSON WERE ASSIGNED TO THE SAME
23 CELL?

24 A. YES, SIR.

25 Q. WAS THERE ANYBODY ELSE ASSIGNED TO THAT CELL WHEN

1 MARCUS THOMPSON WAS MAKING THESE STATEMENTS?

2 A. A BOY NAMED TIMOTHY JOHNSTON.

3 Q. OKAY. DID HE HEAR SOME OF THIS?

4 A. I'M PRETTY SURE HE HEARD US TALKING ABOUT THE
5 MURDER. MARCUS THOMPSON WAS VERY OPEN ABOUT THE MURDER. I
6 MEAN, HE -- HE SHOWED NO CONCERN WHATSOEVER. I MEAN, HE
7 ACTUALLY THOUGHT, YOU KNOW, HE WAS GOING TO GET AWAY
8 SCOT-FREE. I'M A CONVICT, SIR, AND I DO NOT BELIEVE IN
9 TALKING TO THE POLICE AT ALL, AND IN -- AND IN RETURN IT MADE
10 ME SO SICK TO MY STOMACH THAT I BASICALLY SNITCHED ON THIS
11 GUY AND NOW, YOU KNOW, I'M IN JAIL ALSO.

12 Q. OKAY. NOW, YOU SAY MARCUS THOMPSON BRAGGED ABOUT
13 DOING THE MURDER?

14 A. YES, SIR. THAT'S CORRECT.

15 Q. OKAY. DID HE---

16 A. HE ALSO BRAGGED ABOUT HOW KEVIN MERCER WAS GOING TO
17 GET THE DEATH PENALTY.

18 Q. OKAY. AND HE WASN'T.

19 A. AND HE WASN'T.

20 Q. OKAY. DID HE---

21 A. THAT HE WAS GOING TO GET AWAY SCOT-FREE WAS HIS
22 EXACT WORDS.

23 Q. ALL RIGHT.

24 A. AND THAT ALL YOU HAD TO DO WAS WATCH C.S.I. AND YOU
25 CAN GO AROUND KILLING ANYBODY.

1 Q. OKAY. DID HE TALK ABOUT THIS A LOT?

2 A. HE TALKED ABOUT IT ALMOST EVERY DAY---

3 Q. OKAY.

4 A. ---UNTIL I FINALLY -- OFFICER PHANTOM (PHONETIC)
5 STEELE COME IN THERE ONE DAY AND JUST UP AND MOVED US.

6 Q. OKAY.

7 A. AND I DON'T EVEN KNOW IF IT WAS RELATING TO THAT
8 INCIDENT OR WHAT, BUT THAT'S -- THAT'S REALLY ALL I KNOW.
9 THAT'S REALLY ALL THE HELP I CAN GIVE YOU.

10 Q. OKAY. DID MARCUS THOMPSON HAVE A SONG OR SOMETHING
11 HE SANG ABOUT THIS?

12 A. HE WOULD RAP ABOUT SOMETHING ABOUT MO' MURDERS AND
13 HOW -- JUST STUPID STUFF. I DON'T GET -- I DON'T LISTEN TO
14 THAT KIND OF MUSIC. I'M MORE -- I'M FROM THE COUNTRY AND I
15 DON'T -- I DON'T EVEN PAY ATTENTION TO THAT KIND OF STUFF.

16 Q. OKAY. NOW, MR. FULLER, IS THERE ANY -- DID MR.
17 THOMPSON BEGIN TALKING ABOUT THIS ON ANY PARTICULAR OCCASION
18 OR WAS IT THE ENTIRE TIME OR JUST TELL US HOW THIS---

19 A. HE WAS---

20 Q. ---HOW THE CONVERSATIONS STARTED.

21 A. HE WAS VAGUELY -- AFTER ABOUT TWO OR THREE DAYS, I
22 HAD A COUPLE OF ROLL-UPS ON ME, AND YOU'RE NOT SUPPOSED TO
23 SMOKE IN LEXINGTON COUNTY JAIL.

24 Q. A ROLL-UP? WHAT'S A ROLL-UP?

25 A. A CIGARETTE ROLLED UP---

1 Q. OKAY.

2 A. ---IN NOTEBOOK PAPER.

3 Q. OKAY.

4 A. AND SO I ASKED HIM -- I SAID, "DO YOU WANT TO BURN
5 ONE?" SO WE GOT KIND OF CLOSE. WE WERE PLAYING SPADES, AND
6 HE WAS LIKE, "WHAT YOU IN HERE FOR?" AND I TOLD HIM I'M IN
7 HERE FOR SOME C.D.V.'S AND THAT I'M GOING TO PRISON, AND HE
8 WAS LIKE, "WELL, I'M IN HERE FOR ACCESSORY TO MURDER OR" -- I
9 CAN'T QUOTE EXACTLY WHAT HIS -- HE SHOWED ME ALL OF HIS
10 PAPERWORK WHERE -- VIOLENT COMMISSION OF A FIREARM, ALL KINDS
11 OF DIFFERENT THINGS Y'ALL CHARGED HIM WITH. BUT HE TURNED
12 AROUND AND, YOU KNOW, HE JUST TALKED ABOUT KILLING THIS GUY
13 AND, YOU KNOW, HOW, YOU KNOW, IT REALLY SHOULDN'T HAVE WENT
14 DOWN THAT WAY, BUT WHEN THE GUY -- I GUESS HE WAS ON HIS CELL
15 PHONE AND THEY THOUGHT THAT HE WAS TRYING TO HIT KEVIN MERCER
16 WITH A -- WITH A GUN OR I DON'T -- I DON'T KNOW. AND HE SHOT
17 THE GUY BEHIND THE EAR AND THAT THE IDIOT - AND THAT'S
18 EXACTLY HOW HE PUT IT - WAS WHOEVER KEVIN -- ARE YOU KEVIN
19 MERCER?

20 THE COURT: SIR, YOU ANSWER QUESTIONS. YOU DON'T
21 ASK QUESTIONS.

22 THE WITNESS: I'M SORRY, SIR. I APOLOGIZE. I AIN'T
23 NEVER BEEN THROUGH NOTHING LIKE THIS HERE.

24 THE COURT: THAT'S ALL RIGHT. HE'LL ASK YOU ANOTHER
25 QUESTION.

1 BY MR. LITTLEJOHN:

2 Q. OKAY. YOU SAID HE DESCRIBED SOMEBODY AS AN IDIOT.

3 A. YEAH, KEVIN MERCER.

4 Q. DID MARCUS THOMPSON TELL YOU THAT HE WAS THE ONE
5 THAT PULLED THE TRIGGER THAT FIRED THE SHOT THAT KILLED
6 SERGEANT DAVIS?

7 A. HE TOLD ME HE STUCK THE GUN IN THE BACK OF THAT
8 MAN'S -- WELL, IT WAS TO THE SIDE OF HIS HEAD AND SHOT THAT
9 MAN DEAD AND HE SLID OUT THE TRUCK. KEVIN MERCER JUMPED IN
10 THE TRUCK WITH THE GUN AND THEN DROVE OFF IN THE VEHICLE, AND
11 MARCUS THOMPSON GOT IN THE BACK OF THAT -- IN KEVIN'S CAR AND
12 FOLLOWED HIM DOWN THE ROAD. THEN THEY BOTH GOT OUT AND
13 JUMPED IN THAT ESCALADE AND WAS GOING TO ATLANTA.

14 Q. OKAY. NOW, YOU MENTIONED SOMETHING HE TOLD YOU
15 ABOUT SOME GLOVES? WHAT DID HE TELL YOU ABOUT GLOVES?

16 A. HE SAID THAT THEY HAD BEEN SHOOTING THE GUN ALL DAY
17 LONG, BUT THE GLOVES WAS TURNED INSIDE OUTWARDS.

18 Q. OKAY.

19 A. AND HE SAID THAT WHEN HE -- AFTER HE SHOT THE GUY HE
20 FLIPPED THE GLOVES INSIDE -- BACK INSIDE AND HE SAID HE HAD
21 THE GLOVES ON HIM WHEN HE GOT ARRESTED AND HE HAD SOME -- THE
22 BULLETS THAT WENT TO THE GUN THAT WAS FOUND IN THE TRUCK.

23 Q. OKAY. NOW, MR. FULLER, PRIOR TO MARCUS THOMPSON
24 MAKING THESE STATEMENTS TO YOU, HOW MUCH DID YOU KNOW ABOUT
25 THIS CASE?

1 A. I GLANCED THROUGH IT THROUGH THE NEWSPAPER. THAT'S
2 IT.

3 Q. OKAY.

4 A. I MEAN, THAT REALLY IS NOT MY CREED. I DON'T CARE
5 ABOUT REALLY NEITHER ONE OF THEM---

6 Q. OKAY.

7 A. ---YOU KNOW.

8 Q. I DON'T MEAN TO EMBARRASS YOU. DO YOU READ WELL?

9 A. NO, NOT REALLY.

10 Q. OKAY. YOU HAD SEEN SOMETHING IN THE NEWSPAPER?

11 A. YEAH. I MEAN, IF YOU'RE IN JAIL, I MEAN, THAT'S
12 REALLY THE ONLY THING THEY DO - THAT OR READ THE BIBLE.

13 Q. OKAY. DID YOU SEE ANYTHING ON T.V. ABOUT IT?

14 A. NO, WE DON'T GET TO WATCH THE NEWS, AND IF YOU LOOK
15 AT THE SCHEDULE THERE, EVERY TIME THE NEWS IS ON, MOST OF THE
16 TIME WE'RE LOCKED DOWN. WE ONLY GET OUT TWO AND A HALF HOURS
17 A DAY---

18 Q. OKAY.

19 A. ---FOR REC AND AIN'T NOBODY GOING TO PAY ATTENTION
20 TO NO T.V. WHEN YOU ONLY GOT TWO AND A HALF HOURS OF REC.
21 YOU NEED TO MAKE A PHONE CALL, TAKE A SHOWER, AND JUST MOVE
22 AROUND A LITTLE BIT.

23 Q. OKAY. ALL THE DETAILS YOU'VE TOLD US ABOUT MARCUS
24 THOMPSON, DID THOSE COME FROM MARCUS THOMPSON'S LIPS?

25 A. YES, SIR.

1 Q. OKAY.

2 A. EVERY SINGLE ONE OF THEM.

3 Q. NOW, MR. FULLER, YOU INDICATED THAT AFTER MR.
4 THOMPSON MADE ALL THESE STATEMENTS TO YOU THAT YOU CONTACTED
5 THE SOLICITOR'S OFFICE?

6 A. I WROTE DONNIE MYERS HIMSELF BECAUSE EVERYBODY KNOWS
7 IF YOU WRITE DONNIE MYERS HE TAKES CARE OF BUSINESS.

8 Q. OKAY. AND DID YOU DO THAT OF YOUR OWN VOLITION?

9 A. YES, SIR.

10 Q. OKAY.

11 A. WELL, MY GRANDMA TOLD ME IF I KNEW OF -- IF I KNEW
12 OF -- I TOLD MY GRANDMA FIRST, YOU KNOW, THAT I KNEW OF
13 SOMETHING THAT HAD HAPPENED REAL BAD AND, YOU KNOW, MY
14 GRANDMA -- SHE'S ALWAYS ON THAT TYPE, WELL, IF YOU KNOW
15 SOMETHING, YOU KNOW, THE TRUTH WILL SET YOU FREE.

16 Q. OKAY.

17 A. AND, YOU KNOW, AT FIRST I THOUGHT IT WAS A BIG
18 MISTAKE TO STICK MY NOSE IN SOMEBODY'S BUSINESS, BUT THEN I
19 THOUGHT, WELL, THAT FAMILY DESERVES TO KNOW WHAT REALLY
20 HAPPENED---

21 Q. OKAY.

22 A. ---YOU KNOW---

23 Q. IN TRYING TO---

24 A. ---OR AT LEAST THERE'S A GUY IN HERE CLAIMING THAT
25 HE DONE SOMETHING TO SOMEBODY'S FAMILY MEMBER.

1 Q. OKAY. DID YOU DO THIS IN ORDER TO GET SOME SORT OF
2 ADVANTAGE ON YOUR CHARGES OR SOME SORT OF HELP WITH YOUR
3 CHARGES?

4 A. NO. I WANT TO PLEAD GUILTY TO MINE AND GO TO
5 PRISON.

6 MR. LITTLEJOHN: OKAY. IF YOU WOULD INDULGE ME JUST
7 A MOMENT, YOUR HONOR.

8 (AN OFF-THE-RECORD DISCUSSION TAKES PLACE BETWEEN
9 MR. LITTLEJOHN AND MS. KIMBROUGH.)

10 THE COURT: IF YOU WANT TO SAY ANYTHING, YOU HAVE TO
11 SAY IT ON THE RECORD.

12 THE WITNESS: OKAY. I'M NOT TALKING TOO LOUD, AM I?

13 THE COURT: NO, SIR. YOU'RE DOING FINE.

14 THE WITNESS: I'M HALF DEAF.

15 THE COURT: YOU'RE FINE.

16 THE WITNESS: ALL RIGHT, SIR.

17 MR. LITTLEJOHN: YOUR HONOR, THOSE ARE ALL THE
18 QUESTIONS I HAVE FOR MR. FULLER AT THIS TIME.

19 CROSS-EXAMINATION

20 BY MR. MYERS:

21 Q. MR. FULLER, YOU SAID, "I'M A CONVICT. I DON'T
22 BELIEVE IN TALKING WITH THE POLICE." WHAT DO YOU MEAN YOU'RE
23 A CONVICT?

24 A. I'M A CRIMINAL. THAT'S WHAT I'VE BEEN DOING ALL MY
25 LIFE PRETTY MUCH, SIR, AND---

1 Q. HOW ARE YOU A CRIMINAL?

2 A. JUST IGNORANCE.

3 Q. HAVE YOU BEEN TO PRISON?

4 A. YES, SIR, I HAVE, AND I ALSO KNOW THAT PEOPLE GET
5 HURT FOR TELLING.

6 Q. HOW MUCH OF YOUR LIFE HAVE YOU SPENT IN PRISON?

7 A. I'VE DONE PROBABLY ABOUT SIX -- SIX AND A HALF
8 YEARS, SIR. I WAS A YOUTHFUL OFFENDER AND THEN I GOT A
9 THREE-YEAR SENTENCE FOR A PROBATION VIOLATION AFTER I
10 FINISHED MY YOUTHFUL OFFENDER SENTENCE, SIR.

11 Q. YOU GOT MORE THAN A YOUTHFUL OFFENDER SENTENCE,
12 DIDN'T YOU?

13 A. I HAD A TEN-YEAR SUSPENDED TO FIVE YEARS PROBATION.

14 Q. BURGLARY?

15 A. YES, SIR, BURGLARY SECOND, SIR. I HAD A COUPLE, BUT
16 I THINK IT WAS TWO OR THREE. I CAN'T REMEMBER. THERE WAS A
17 COUPLE OF THEM.

18 Q. UH-HUH.

19 A. I GOT A -- I GOT A NICE RECORD OVER THERE, SIR.

20 Q. YES, SIR. AGGRAVATED ASSAULT AND BATTERY?

21 A. YES, SIR.

22 Q. A COUPLE OF THOSE.

23 A. YEAH, TWO OF THOSE, SIR. ABOUT FIVE C.D.V.'S.

24 Q. YES, SIR.

25 A. PUBLIC DISORDER, POSSESSION OF A CONTROLLED

1 SUBSTANCE, ABOUT TWO OR THREE BURGLARY SECONDS.

2 Q. COCAINE?

3 A. A LOT OF IT I DONE WHEN I WAS 17 YEARS OLD, SIR.

4 I'M ALMOST 30 NOW.

5 Q. COCAINE.

6 A. COCAINE? NO, CONTROLLED -- IT WAS A CONTROLLED
7 SUBSTANCE. IT WAS XANAX.

8 Q. UH-HUH. WHEN WAS THE LAST TIME YOU GOT OUT OF
9 PRISON?

10 A. OCTOBER, SIR.

11 Q. OF WHEN?

12 A. LAST YEAR, SIR.

13 Q. AND YOU WANT TO GO BACK TO PRISON NOW.

14 A. SIR, I DID THE CRIME; I'VE GOT TO DO THE TIME.

15 Q. SO I THINK YOU SAID HERE THAT YOU DON'T WANT ANY
16 HELP. YOU WANT TO GO TO PRISON.

17 A. YES, SIR.

18 Q. AND YOU SAID HERE THAT YOU DON'T BELIEVE IN TALKING
19 WITH THE POLICE.

20 A. NO, SIR, I REALLY DON'T.

21 Q. DO YOU BELIEVE IN WRITING THE POLICE?

22 A. I REALLY DIDN'T, BUT I'M TALKING TO YOU AND WRITING
23 YOU NOW.

24 Q. DO YOU BELIEVE IN WRITING THE SOLICITOR'S OFFICE?

25 A. NOW I DO. WELL, I MEAN...

1 Q. YOU SAID SOMETHING HERE ABOUT MARCUS THOMPSON HAVING
2 STONES REMOVED, THAT HE CAME BACK AND HE WAS -- I FORGOT WHAT
3 YOU SAID. HE WAS -- HE WAS HOPPED UP OR SOMETHING?

4 A. YEAH, HE WAS DOPED UP.

5 Q. DOPED UP. AND YOU SAID HE STARTED TALKING ABOUT
6 SHOOTING TRACY DAVIS.

7 A. THAT'S THE GUY THAT GOT KILLED?

8 Q. WELL, THAT'S WHAT---

9 A. YEAH.

10 Q. ---YOU PUT---

11 A. YEAH.

12 Q. ---IN YOUR---

13 A. YEAH.

14 Q. ---LETTER TO ME THAT---

15 A. YEAH.

16 Q. ---WAS THE GUY THAT GOT KILLED?

17 A. YEAH, TRACY DAVIS.

18 Q. YOU GAVE A SIGNED AFFIDAVIT TO THE DEFENSE AND MR.
19 LITTLEJOHN THAT IT WAS EVEN SERGEANT TRACY DAVIS I THINK YOU
20 REFERRED TO HIM.

21 A. YEAH. WELL, THAT'S BECAUSE AT THE TIME I WAS JUST
22 -- JUST GOT FINISHED TALKING TO HIM---

23 Q. UH-HUH.

24 A. ---AND THIS HAD BEEN MONTHS AGO, SO...

25 Q. WELL, NO, THIS WAS JULY THE 31ST. YOU PUT IN HERE

1 THAT, "I CONTACTED THE SOLICITOR'S OFFICE, GAVE A STATEMENT
2 TO LAW ENFORCEMENT BECAUSE I THINK MARCUS THOMPSON IS A VERY
3 SICK PERSON---

4 A. YES, SIR.

5 Q. ---AND THE VICTIM'S FAMILY SHOULD KNOW THE TRUTH
6 ABOUT WHAT HAPPENED TO SERGEANT DAVIS."

7 A. YES, SIR.

8 Q. HOW DID YOU KNOW HE WAS A SERGEANT?

9 A. BECAUSE THAT'S WHAT MARCUS THOMPSON TOLD ME.

10 Q. MARCUS THOMPSON---

11 A. YEAH.

12 Q. ---TOLD YOU THAT IT WAS SERGEANT TRACY DAVIS.

13 A. YEAH.

14 Q. AND YOU JUST ASKED ME WAS THAT THE FELLOW'S NAME.
15 IS THAT WHAT YOU---

16 A. WELL, I -- JUST NOW I DIDN'T REMEMBER HIS NAME.

17 Q. JUST NOW YOU DIDN'T REMEMBER HIS NAME.

18 A. TO ME THIS IS REALLY NO BIG -- YOU KNOW---

19 Q. IT'S NO WHAT?

20 A. IT'S NOT A---

21 Q. IT'S WHAT?

22 A. IT REALLY DON'T CONCERN ME---

23 Q. WHAT?

24 A. ---DONNIE MYERS.

25 MR. LITTLEJOHN: WAIT A MINUTE. I'D ASK THE

1 SOLICITOR TO LET HIM FINISH HIS ANSWER.

2 THE COURT: LET HIM FINISH HIS ANSWER.

3 THE WITNESS: THAT HE HAS---

4 MR. MYERS: THIS IS NO BIG THING? IS THAT WHAT
5 YOU'RE SAYING?

6 MR. LITTLEJOHN: YOUR HONOR, THAT'S MY SAME
7 OBJECTION.

8 THE COURT: WELL, WE -- I'M GOING TO ASK THE
9 SOLICITOR TO RE-ASK THE QUESTION AND THEN, OF COURSE, WE'LL
10 LET THE WITNESS ANSWER THE QUESTION.

11 BY MR. MYERS:

12 Q. YOU SAID THIS IS NO BIG THING? THIS IS NO BIG DEAL
13 TO YOU?

14 A. I DIDN'T -- I DIDN'T MEAN IT LIKE THAT---

15 Q. WELL, HOW DID YOU MEAN IT?

16 A. ---MR. MYERS. WHAT I MEANT IS I HAVE NOTHING TO DO
17 WITH KEVIN MERCER OR MARCUS THOMPSON. I'VE GOT THREE PETTIES
18 -- WELL, NOT PETTY BUT I'VE GOT THREE C.D.V. CHARGES, YOU
19 KNOW, AND I JUST -- YOU KNOW, I DIDN'T KNOW IT WAS REALLY
20 GOING TO CAUSE THIS MUCH TROUBLE FOR TELLING THE TRUTH.

21 Q. AND YOU GOT THREE C.D.V. CHARGES AND YOU DON'T WANT
22 ANY HELP ON THOSE.

23 A. NO, I DON'T WANT HELP ON THEM, SIR. NONE.

24 Q. NOW, LET'S GET BACK TO WHAT I WAS ASKING YOU. YOU
25 WERE SAYING THAT MARCUS THOMPSON WENT UP TO THE HOSPITAL ON

1 SOME STONES, HAD THEM REMOVED. HE CAME BACK. HE WAS DRUGGED
2 UP, AND HE TOLD YOU THAT Y'ALL BONDED. YOU HAD A ROLL-UP.
3 YOU ROLLED UP SOME PAPER. WHAT DID YOU PUT IN THAT PAPER TO
4 SMOKE?

5 A. TOBACCO, SIR.

6 Q. WHERE DID YOU GET THAT FROM?

7 A. FROM ANOTHER INMATE, SIR.

8 Q. ANOTHER INMATE?

9 A. YES, SIR.

10 Q. CONTRABAND.

11 A. YES, SIR.

12 Q. OKAY. AND THEN Y'ALL KIND OF BONDED AND THAT'S WHEN
13 YOU SAY MARCUS THOMPSON TOLD YOU HE SHOT SERGEANT TRACY
14 DAVIS.

15 A. YES, SIR. HE COME CLEAN WITH IT THAT DAY. HE WAS
16 TALKING ABOUT IT BEFOREHAND, BUT WHEN HE COME BACK, HE
17 BLUNTLY TOLD ME THAT HE SHOT MR. DAVIS BEHIND HIS EAR IN HIS
18 HEAD. AND THEN THE NEXT DAY HE SAID IT AGAIN, AND THAT'S --
19 THAT'S WHEN I PUSHED THAT PAPERWORK TO YOU.

20 Q. THE NEXT DAY YOU PUSHED THE PAPERWORK TO ME. OKAY.
21 LET'S GET THIS STRAIGHT NOW. HE CAME BACK FROM THE HOSPITAL,
22 TOLD YOU FOR THE FIRST TIME THAT HE'S THE ONE THAT SHOT
23 SERGEANT TRACY DAVIS.

24 A. CORRECT.

25 Q. AND THEN Y'ALL TALKED ABOUT IT THAT NIGHT WHEN HE

1 CAME BACK FROM THE HOSPITAL.

2 A. YES, SIR.

3 Q. THE NEXT DAY AFTER HE CAME BACK FROM THE HOSPITAL HE
4 SAID IT AGAIN.

5 A. YES, SIR.

6 Q. THE SECOND TIME.

7 A. YES, SIR.

8 Q. AND THAT'S WHEN YOU PUSHED THAT PAPERWORK TO ME.

9 A. I CAN'T REMEMBER EXACTLY IF IT WAS THE SECOND DAY OR
10 WHATEVER, SIR.

11 Q. AFTER HE GOT OUT OF THE HOSPITAL.

12 A. AFTER HE GOT -- YEAH, I PUSHED ONE TO YOU BEFORE HE
13 WENT TO THE HOSPITAL MENTIONING THAT, YOU KNOW, HE WAS
14 NOTICING ABOUT THAT MURDER, AND I SENT ANOTHER ONE TO YOU.

15 Q. WELL, WAIT A MINUTE. LET'S GET THIS STRAIGHT.
16 BEFORE THE HOSPITAL YOU SENT A LETTER TO ME? YOU SENT A
17 LETTER TO ME BEFORE THOMPSON WENT TO THE HOSPITAL OR AFTER?

18 A. I BELIEVE BEFORE.

19 Q. YOU BELIEVE BEFORE?

20 A. YES, SIR.

21 Q. WHAT DID THAT LETTER SAY?

22 A. JUST LETTING YOU KNOW, YOU KNOW, THAT HE HAD
23 MENTIONED THAT HE WAS INVOLVED IN THAT MURDER.

24 Q. HE WAS INVOLVED IN THAT MURDER.

25 A. YEAH.

1 Q. I NEVER GOT A LETTER LIKE THAT FROM YOU.

2 A. WELL, I SENT YOU ONE. I ALSO SENT ONE TO THE
3 INVESTIGATOR AT THE LEXINGTON COUNTY DETENTION CENTER THAT
4 THE INVESTIGATOR SAID HE NEVER GOT.

5 Q. LET ME SHOW YOU THIS. THIS IS THE FIRST LETTER I
6 GOT FROM YOU. LOOK OVER THAT.

7 A. (THE WITNESS COMPLIES.) YES, SIR.

8 Q. THAT'S THE FIRST LETTER YOU SENT ME?

9 A. I BELIEVE SO.

10 MR. MYERS: WE OFFER THIS AS AN EXHIBIT.

11 MR. LITTLEJOHN: NO OBJECTION, YOUR HONOR.

12 THE COURT: IT'S ADMITTED.

13 MR. MYERS: THANK YOU.

14 (STATE'S EXHIBIT 2 WAS RECEIVED IN EVIDENCE.)

15 BY MR. MYERS:

16 Q. STATE'S EXHIBIT NUMBER 2, YOU SENT THAT LETTER TO ME
17 BEFORE THOMPSON WENT TO THE HOSPITAL OR AFTER HE CAME BACK
18 FROM THE HOSPITAL?

19 A. I'M SORRY; I CAN'T REMEMBER.

20 Q. WELL, WHAT DOES THE LETTER SAY?

21 A. IT DON'T SAY NOTHING ABOUT THE HOSPITAL.

22 Q. WHAT DOES IT SAY?

23 A. "MY NAME IS KEVIN FULLER. I'M LOCKED UP WITH MARCUS
24 ANTONIO THOMPSON WHO HELPED KEVIN MERCER IN THE MURDER. WE
25 STAY IN THE SAME ROOM, AND SEVERAL TIMES AT NIGHT HE BRAGS

1 ABOUT KILLING TRACY DAVIS AND KEVIN GETTING THE BLAME."

2 Q. LET ME STOP YOU RIGHT THERE FOR A MINUTE. YOU SAID
3 THE FIRST TIME HE TOLD YOU HE KILLED TRACY DAVIS WAS THE
4 NIGHT HE GOT BACK FROM THE HOSPITAL. YOU JUST SAID THAT.

5 A. NO, I SAID THAT HE POINTBLANK SAID THAT HE SHOT HIM
6 BEHIND THE EAR AFTER THAT DAY. HE DIDN'T -- HE TOLD ME HE
7 KILLED HIM TO START WITH, BUT HE TOLD ME POINTBLANK IN DETAIL
8 HOW HE SHOT HIM IN THE EAR AFTER THAT THERE. HE WENT INTO
9 DETAIL HOW HE SHOT HIM, BLOOD SPLATTERED, AND ALL THAT THERE.

10 Q. SO YOU'RE TELLING ME THAT THIS MAN TOLD YOU BEFORE
11 THAT LETTER THAT HE SHOT TRACY DAVIS, AND YOU NEVER CONTACTED
12 ANYBODY?

13 A. NO, SIR, I AIN'T HAD NO CHANCE. THE MAN'S STUCK IN
14 THE ROOM WITH ME, AND I'M NOT DYING FOR THE NEXT MAN.

15 Q. WELL, NOW, HE WASN'T STUCK IN THE ROOM WITH YOU
16 BECAUSE YOU (SIC) WENT TO THE HOSPITAL.

17 A. WELL, I DIDN'T KNOW---

18 Q. THE NIGHT BEFORE THE HOSPITAL HE WAS DOWNSTAIRS IN
19 THE FIRST FLOOR. THE NEXT DAY HE WAS IN THE HOSPITAL ALL
20 DAY. YOU HAD PLENTY OF CHANCE TO CONTACT ME. HOW COME YOU
21 DIDN'T DO IT?

22 A. WELL, YOU GOT TO HAVE AN ENVELOPE AND GOT TO HAVE
23 SOME MONEY TO DO THAT, SIR.

24 Q. HOW DID THAT APPEAR---

25 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE

1 SOLICITOR INTERRUPTING THE WITNESS AGAIN.

2 BY MR. MYERS:

3 Q. ARE YOU FINISHED?

4 A. YES, SIR, I'M FINISHED.

5 Q. WELL, HOW DID YOU COME BY THAT ENVELOPE AND STUFF TO
6 MAIL THAT TO ME?

7 A. I GOT MONEY. I GET TEN DOLLARS EVERY OTHER WEEK
8 FROM MY GRANDMA.

9 Q. AND ALL OF A SUDDEN THAT TEN DOLLARS CAME ON THIS
10 PARTICULAR DAY?

11 A. ABOUT A DAY OR TWO, GIVE OR TAKE, IT COME, YES, SIR.

12 Q. YOU REALLY DON'T KNOW WHEN IT WAS, DO YOU?

13 A. NOT -- NOT TO THE DATE AND TIME, NO, SIR, I DON'T.

14 Q. HOW LONG WAS THOMPSON IN THE CELL WITH YOU?

15 A. PROBABLY ABOUT TWO WEEKS.

16 Q. PROBABLY ABOUT TWO WEEKS. WOULD YOU SAY IT WAS LESS
17 THAN TWO WEEKS?

18 A. NO.

19 Q. DO YOU REMEMBER WHEN YOU CAME OVER TO MY OFFICE ON
20 JULY THE 19TH WITH YOUR LAWYER?

21 A. YES, SIR.

22 Q. AND YOU TALKED WITH ME?

23 A. YES, SIR.

24 Q. AND SOME POLICE OFFICERS WERE IN THERE.

25 A. YES, SIR.

1 Q. AS A MATTER OF FACT, THIS OFFICER RIGHT THERE --
2 STAND UP. HE WAS ASKING YOU QUESTIONS.

3 A. THE INVESTIGATOR, YES, SIR.

4 Q. AND WHEN HE CAME IN THERE, YOU SAID THAT MR.
5 THOMPSON STARTED TALKING IMMEDIATELY WHEN HE CAME INTO THE
6 CELL.

7 A. HE'S GOT A BIG MOUTH.

8 Q. AND THEN LATER ON YOU SAID IT WAS A GOOD WHILE AFTER
9 HE CAME IN THE CELL, ABOUT A GOOD WEEK, BEFORE HE SAID
10 SOMETHING ABOUT THE MURDER.

11 A. HE REALLY STARTED -- I MEAN, HE BOASTED ABOUT THE
12 KILLING AND HOW IT HAPPENED, AND THEN AFTER HE CAME BACK FROM
13 THE HOSPITAL HE BLUNTLY SAID THAT HE TOOK THAT GUN AND SHOT
14 THAT MAN, PUT THE GUN TO THAT MAN AND SHOT THAT MAN BEHIND
15 HIS EARS.

16 Q. I UNDERSTAND THAT, BUT WHAT I'M ASKING YOU -- IF YOU
17 DON'T UNDERSTAND MY QUESTIONS, ASK ME TO REPEAT THEM. WHILE
18 YOU WERE IN MY OFFICE TALKING WITH US ON JULY THE 19TH, YOU
19 CHANGED YOUR STORY THREE TIMES. FIRST OF ALL, YOU SAID THAT
20 THOMPSON IMMEDIATELY WHEN HE CAME INTO THE CELL TOLD YOU
21 ABOUT SHOOTING DAVIS. ISN'T THAT RIGHT?

22 A. YES, SIR.

23 Q. AND THEN YOU SAID, NO, IT WAS A GOOD WEEK AFTER HE
24 CAME INTO THE CELL BEFORE HE TOLD US HE SHOT DAVIS. ISN'T
25 THAT RIGHT?

1 A. YES, SIR. YOU'RE CORRECT.

2 Q. AND THEN YOU SAID, NO, IT WAS A GOOD WEEK AND A HALF
3 AFTER HE CAME INTO THE CELL BEFORE HE SAID ABOUT SHOOTING
4 DAVIS. ISN'T THAT RIGHT?

5 A. WELL, THAT WAS BECAUSE THE WAY YOUR INVESTIGATOR WAS
6 WORDING THINGS, HE WAS TRYING TO CROSS ME UP. WHAT I MEANT
7 TO SAY AND I MEAN -- LOOK, I AIN'T GOT THE BEST EDUCATION IN
8 THE WORLD. OKAY? BUT I KNOW FOR GOOD AND WELL THAT THIS MAN
9 TOLD ME THAT HE KILLED THAT FELLOW, AND THEN A COUPLE OF DAYS
10 LATER HE TOLD ME THAT IN DETAIL HOW HE KILLED THE GUY.

11 Q. WELL, WAS IT IMMEDIATELY? WAS IT A WEEK AFTER OR
12 WAS IT A WEEK AND A HALF AFTER?

13 A. IT WAS ABOUT A -- IT WAS ABOUT A WEEK, WEEK AND A
14 HALF, SIR.

15 Q. IT WAS A WEEK AND A HALF AFTERWARDS.

16 A. I'M NOT SURE, HONESTLY. YOU'RE ASKING ME A QUESTION
17 I -- I -- I CAN'T REMEMBER.

18 Q. YOU JUST DON'T REMEMBER.

19 A. I DON'T REMEMBER.

20 Q. YOU SAID---

21 A. I REMEMBER HIM TELLING ME HE SHOT THAT GUY IS ALL I
22 REMEMBER, SIR.

23 Q. YOU GOT YOUR POINT ACROSS ON THAT. THIS GUY RIGHT
24 HERE WAS TRYING TO CROSS YOU UP WHEN HE WAS TALKING TO YOU IN
25 MY OFFICE?

1 A. . HE WAS ASKING ME THE SAME -- THE SAME QUESTION THREE
2 OR FOUR DIFFERENT KINDS OF WAYS.

3 Q. WELL, DID YOU OR YOUR LAWYER EVER TELL HIM TO STOP
4 ASKING YOU QUESTIONS?

5 A. NO, BECAUSE I THOUGHT I WAS -- I WAS ANSWERING THEM
6 -- I WAS ANSWERING THEM HONESTLY.

7 Q. BUT YOU TOLD THREE DIFFERENT STORIES ABOUT WHEN
8 THOMPSON TOLD YOU, AND YOU'VE ADMITTED THAT. YOU CAN'T GET
9 YOUR STORIES RIGHT?

10 A. OKAY. WELL, I'M SORRY.

11 Q. WELL, I DON'T CARE WHETHER YOU'RE SORRY OR NOT.
12 YOU---

13 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE
14 SOLICITOR ARGUING WITH THE WITNESS.

15 THE COURT: I SUSTAIN THAT LAST QUESTION AS
16 ARGUMENTATIVE.

17 BY MR. MYERS:

18 Q. WELL, LET ME ASK YOU A QUESTION. THAT SAME OFFICER,
19 YOU GAVE A STATEMENT TO HIM ON MAY THE 9TH. DO YOU REMEMBER
20 YOU WROTE ME THAT LETTER AND I SENT AN OFFICER OVER THERE TO
21 TALK TO YOU?

22 A. YES, SIR.

23 Q. THAT SAME OFFICER CAME OVER AND YOU GAVE HIM A
24 STATEMENT ON MAY THE 9TH; ISN'T THAT RIGHT?

25 A. YES, SIR.

1 Q. AS A MATTER OF FACT, HERE'S A COPY OF THAT
2 STATEMENT... LOOK OVER THAT AND SEE IF THAT'S THE STATEMENT
3 THAT YOU GOT FROM THAT OFFICER OR YOU GAVE HIM ON MAY THE
4 9TH.

5 A. (THE WITNESS COMPLIES.) YEAH, THIS -- BECAUSE
6 REMEMBER Y'ALL TOLD ME THAT I HAD LEFT STUFF---

7 Q. I ASKED YOU ONE QUESTION. IS THAT THE STATEMENT---

8 A. YEAH.

9 Q. ---YOU GAVE TO THIS OFFICER?

10 A. YES, SIR, IT IS.

11 Q. WE OFFER IT INTO EVIDENCE.

12 A. YES, SIR.

13 MR. LITTLEJOHN: YOUR HONOR, I THINK HE HAS A RIGHT
14 TO EXPLAIN HIS ANSWER.

15 THE COURT: HE DIDN'T GET ASKED ANYTHING BUT WHETHER
16 HE GAVE A STATEMENT AND WHETHER THAT WAS THE STATEMENT HE
17 GAVE---

18 MR. LITTLEJOHN: ALL RIGHT, SIR.

19 THE COURT: ---AND HE LAUNCHED INTO AN EXPLANATION
20 THAT WAS NON-RESPONSIVE. SO I---

21 MR. LITTLEJOHN: I HAVE NO OBJECTION TO THE
22 STATEMENT COMING IN.

23 THE WITNESS: THAT'S WHAT HE GAVE ME, SIR.

24 THE COURT: THE STATEMENT IS ADMITTED.

25 (STATE'S EXHIBIT 3 WAS RECEIVED IN EVIDENCE.)

1 BY MR. MYERS:

2 Q. THE FIRST LINE ON THERE YOU SAY, "ON WEDNESDAY, THE
3 3RD, A COUPLE DAYS AFTER MARCUS THOMPSON MOVED INTO F. DORM,
4 ROOM 7, HE WENT TO THE HOSPITAL AND CAME BACK BRAGGING."

5 A. YES, SIR.

6 Q. "ABOUT BEING FUCKED UP ON PAIN PILLS."

7 A. YES, SIR.

8 Q. "AND THEN HE STARTED TALKING ABOUT SHOOTING."

9 A. YES, SIR.

10 Q. NOW, HERE'S A STATEMENT THAT YOU HAVE GIVEN TO AN
11 OFFICER, YOU'VE SIGNED YOUR NAME TO, AND NOW YOU'RE SAYING
12 IT'S A COUPLE OF DAYS AFTER HE CAME INTO THE CELL---

13 A. YES, SIR.

14 Q. ---THAT IT WAS ON WEDNESDAY, MAY THE 3RD. AND MAY
15 THE 3RD IS ON A WEDNESDAY. THAT THAT'S THE FIRST TIME HE
16 TOLD YOU ABOUT SHOOTING SERGEANT DAVIS. ISN'T THAT RIGHT?

17 A. YES, SIR. YOU'RE RIGHT.

18 Q. WELL, NOW, WHAT IS IT? DID HE TELL YOU BEFORE HE
19 WENT TO THE HOSPITAL OR AFTER?

20 A. HE -- MR. MYERS, THE MAN TOLD ME BEFORE HE WENT TO
21 THE HOSPITAL ABOUT THE MURDER, ABOUT BEING INVOLVED IN THE
22 MURDER, AND THEN WHEN THE MAN COME BACK FROM THE HOSPITAL HE
23 POINTBLANK TOLD ME THAT HE WAS THE MAN THAT PULLED THE
24 TRIGGER AND KILLED MR. DAVIS, SIR.

25 Q. WHY DIDN'T YOU PUT IN THAT STATEMENT THAT HE TOLD

1 YOU HE WAS INVOLVED IN THIS MURDER BEFORE WEDNESDAY?

2 A. BECAUSE I WAS TOLD TO WRITE A BRIEF STATEMENT ON
3 WHAT HAPPENED AND, SIR, THIS---

4 Q. WHO TOLD YOU THAT?

5 A. THE INVESTIGATOR.

6 Q. HE TOLD YOU WHAT TO WRITE?

7 A. NO, HE DID NOT TELL ME WHAT TO WRITE. AS A MATTER
8 OF FACT, THERE'S ANOTHER PIECE TO THIS.

9 Q. WAIT A MINUTE. LET ME ASK YOU ONE MORE TIME. HE
10 TOLD YOU WHAT TO WRITE?

11 A. NO, HE DIDN'T TELL ME WHAT TO WRITE; NO, SIR.

12 Q. SO YOU COULD WRITE WHAT YOU WANT TO.

13 A. YES, SIR, I COULD.

14 Q. WHY DIDN'T YOU PUT IN THERE THAT BEFORE WEDNESDAY,
15 MAY THE 3RD, THAT THOMPSON SUPPOSEDLY TOLD YOU HE SHOT TRACY
16 DAVIS?

17 A. I DON'T KNOW.

18 Q. IS THAT THE ONLY EXPLANATION: YOU DON'T KNOW?

19 A. WELL, I MEAN, I JUST WANTED TO HURRY UP AND GET OUT
20 OF HIS OFFICE; THAT WAY I'M NOT CALLED A SNITCH. AND I
21 FIGURED THE BIGGEST PART OF WHAT I PUT IN THERE WAS WHAT WAS
22 SAID TO ME. EVERYTHING ELSE TO ME REALLY DIDN'T MATTER
23 EXCEPT FOR THE FACT THAT, YOU KNOW, THAT BOY TOLD ME HE SHOT
24 MR. DAVIS.

25 Q. ARE YOU THROUGH?

1 A. YES, SIR.

2 Q. YOU WANTED TO HURRY UP AND GET OUT OF HIS OFFICE.

3 A. YES, SIR.

4 Q. IS THAT WHAT YOU'RE TELLING US?

5 A. YES, SIR.

6 Q. WELL, IN THIS FIRST LETTER YOU WROTE TO ME YOU SAID
7 YOU WOULD GIVE ME A WEEK TO GET BACK IN TOUCH WITH YOU OR YOU
8 WOULD WRITE THE NEWS OR KEVIN'S LAWYER.

9 A. YEAH.

10 Q. SO I SEND SOMEBODY TO SEE YOU, AND YOU JUST WANT TO
11 GET OUT OF THEIR OFFICE?

12 A. WELL, I MEAN, I DONE WROTE A REQUEST ONE TIME
13 THROUGH LEXINGTON COUNTY DETENTION CENTER THAT'S GOT ON THE
14 PIECES OF PAPER THAT YOU GOT DOWN THERE WHERE YOU CAN CHECK
15 THE INVESTIGATOR. I GIVE THE PAPER TO THE OFFICER SAYING I
16 NEED TO SEE AN INVESTIGATOR, AND NOBODY COME AND SEEN ME AND
17 I---

18 Q. IS THAT RESPONSIVE TO MY QUESTION?

19 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE
20 SOLICITOR INTERRUPTING HIM.

21 MR. MYERS: I JUST ASKED HIM IS THAT RESPONSIVE TO
22 MY QUESTION.

23 THE COURT: I OVERRULE THE OBJECTION. YOU MAY
24 PROCEED.

25

1 BY MR. MYERS:

2 Q. DO YOU KNOW WHAT I ASKED YOU?

3 A. YES, SIR. I UNDERSTAND---

4 Q. AND HERE---

5 A. I UNDERSTAND---

6 Q. ---YOU WRITE ME A LETTER WANTING TO GIVE US

7 INFORMATION, WANTING TO HELP. I SEND SOMEBODY THERE, AND ALL

8 YOU WANT TO DO IS NOT TELL THE TRUTH AND TO GET OUT OF THE

9 OFFICE?

10 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE WAY

11 HE'S PHRASED THE QUESTION.

12 THE WITNESS: NO, SIR, I TOLD THE TRUTH.

13 THE COURT: HOLD ON JUST A SECOND, SIR.

14 MR. LITTLEJOHN: I REALIZE WE DON'T HAVE A JURY

15 HERE, BUT THAT'S A MISCHARACTERIZATION OF THE WITNESS'S

16 TESTIMONY.

17 THE COURT: SOLICITOR, CAN YOU REPHRASE THE QUESTION

18 WITHOUT---

19 MR. MYERS: YES, SIR.

20 BY MR. MYERS:

21 Q. WHEN YOU GAVE THIS STATEMENT IN STATE'S EXHIBIT

22 NUMBER 2 THAT'S DATED---

23 A. YES, SIR.

24 Q. ---MAY THE 9TH---

25 A. YES, SIR.

1 Q. ---IS THAT THE COMPLETE TRUTH?

2 A. YES, SIR.

3 Q. BUT WHY DIDN'T YOU PUT IN THAT STATEMENT THAT
4 THOMPSON TOLD YOU BEFORE WEDNESDAY, MAY THE 3RD, ABOUT
5 SHOOTING SERGEANT DAVIS?

6 A. I DIDN'T -- I JUST DIDN'T DO IT, SIR.

7 Q. WHY? IF YOU WANT TO TELL THE TRUTH. WHY?

8 A. IT DIDN'T.

9 Q. WHY?

10 A. IT DIDN'T COME TO ME AT THE TIME. I JUST...

11 Q. WHY DIDN'T IT COME TO YOU AT THE TIME? YOU WANTED
12 ME TO SEND SOMEBODY OVER THERE TO GET THE TRUTH FROM YOU.

13 WHY DIDN'T YOU TELL US THE WHOLE TRUTH?

14 A. WELL, I MEAN, I DID SIT THERE AND TALK TO THAT MAN
15 BEFORE I WROTE THIS STATEMENT.

16 Q. WHY DIDN'T YOU PUT IT IN THE STATEMENT THE WHOLE
17 TRUTH?

18 A. BECAUSE I'M NOT -- I'M NOT THAT GOOD AT WRITING.

19 Q. YOU'RE NOT THAT GOOD AT WRITING.

20 A. YOU KNOW, AND ALL I BLUNTLY KNOW IS WHAT THAT MAN
21 TOLD ME. YOU KNOW, I CAN'T WORD FOR WORD -- I'M NOT NO
22 SECRETARY.

23 Q. WELL, YOU WROTE OUT A WHOLE PAGE OF STUFF THERE.

24 A. YEAH, AND YOU CAN BARELY READ IT, AND NOW I KNOW WHY
25 TELLING THE TRUTH DON'T GET YOU NOWHERE.

1 Q. TELLING THE TRUTH DON'T GET YOU NOWHERE. YOU WROTE
2 ME ANOTHER LETTER. HERE'S A LETTER YOU WROTE ME. IT'S POST-
3 MARKED MAY THE 12TH, JUST A COUPLE OF DAYS AFTER YOU GAVE
4 THAT STATEMENT. ISN'T THAT THE THIRD OR SECOND LETTER YOU
5 YOU'VE WRITTEN?

6 A. (THE WITNESS LOOKS AT THE DOCUMENT.) YEAH, THAT'S
7 TELLING YOU ABOUT MY CASE.

8 Q. IS THAT THE SECOND LETTER THAT YOU HAVE WRITTEN?

9 A. YES, SIR.

10 MR. MYERS: WE OFFER IT INTO EVIDENCE.

11 MR. LITTLEJOHN: NO OBJECTION.

12 THE COURT: IT'S ADMITTED.

13 (STATE'S EXHIBIT 4 WAS RECEIVED IN EVIDENCE.)

14 BY MR. MYERS:

15 Q. NOW, ALL YOU WANT TO DO IS TO TELL US THE TRUTH
16 ABOUT MARCUS THOMPSON, AND YOU'RE A CONVICT AND YOU DON'T
17 WANT ANY HELP IN YOUR CASE. THAT'S YOUR TESTIMONY.

18 A. YES, SIR.

19 Q. LOOK AT STATE'S EXHIBIT NUMBER 4.

20 A. I KNOW EXACTLY WHAT IT SAYS. I'M ASKING---

21 Q. WELL, I DO, TOO. WHAT DOES IT SAY?

22 A. ASKING YOU TO LOOK INTO MY CASE.

23 Q. HOW MANY TIMES IS THE WORD HELP IN THERE?

24 A. A COUPLE.

25 Q. WELL, YOU SAY IN HERE, "MY NAME IS KEVIN FULLER."

1 THAT'S HOW YOU START ALL YOUR LETTERS, ISN'T IT?

2 A. YEAH. "MY NAME KEVIN FULLER. I WROTE YOU"---

3 Q. I'LL READ IT FOR YOU SINCE YOU CAN'T READ AND WRITE
4 TOO GOOD.

5 A. OKAY.

6 Q. "I WROTE YOU LETTING YOU KNOW ABOUT MARCUS THOMPSON
7 TELLING ME HE KILLED MR. DAVIS. THE INVESTIGATOR CAME BY AND
8 TALKED TO ME AND GOT A STATEMENT. I INFORMED HIM THAT I
9 DIDN'T WANT MYSELF PUT IN THE PAPER OR TO TESTIFY WHILE I'M
10 HERE. I WILL HELP ANY WAY I CAN. THOUGH BECAUSE THE GUY IS
11 BRAGGING ABOUT HOW HE KILLED THIS GUY. I DON'T KNOW NOTHING
12 ABOUT THE GUY THAT GOT KILLED." THAT'S WHAT YOU SAID WHEN
13 YOU STARTED OFF TESTIFYING. YOU DIDN'T KNOW THE GUY'S NAME
14 THAT GOT KILLED, DID YOU?

15 A. YEAH.

16 Q. BUT YOU PUT IN AN AFFIDAVIT TO MR. LITTLEJOHN AND
17 THEM THE GUY'S NAME WAS SERGEANT TRACY---

18 A. YEAH, BECAUSE I'M STEADY SITTING THERE TALKING TO
19 MARCUS THOMPSON.

20 Q. BUT YOU DIDN'T KNOW IT WHEN YOU TALKED TO MR.
21 LITTLEJOHN AND THEM OR THEY GAVE YOU THAT NAME OR YOU -- HOW
22 COME YOU DIDN'T REMEMBER IT TODAY BUT YOU REMEMBERED IT WHEN
23 YOU TALKED WITH MARCUS THOMPSON?

24 A. BECAUSE I'VE DONE TALKED TO MY LAWYER AND EVERYBODY
25 ELSE.

1 Q. WELL, HOW COME YOU DIDN'T REMEMBER IT TODAY WHEN YOU
2 CAME IN HERE?

3 A. BECAUSE I'M GETTING BADGERED. I MEAN---

4 Q. YOU'RE GETTING BADGERED?

5 A. ---90,000 QUESTIONS AT ONE TIME---

6 Q. WELL, I'LL SLOW DOWN AND GIVE YOU ONE QUESTION AT
7 ONE TIME. HOW IS THAT?

8 A. AND, YOU KNOW, YOU'RE MAKING IT SEEM LIKE I'M
9 GETTING YOU MAD, SIR, AND I HAVE NO REASON TO---

10 Q. I'M NOT MAD AT ALL.

11 A. I'M NOT TRYING TO, YOU KNOW, COME IN HERE AND
12 MANIPULATE NO SYSTEM OR LIE OR NOTHING LIKE THAT.

13 Q. I DON'T GET MAD ANYMORE; I'M TOO OLD.

14 A. I MEAN, I WAS---

15 MR. LITTLEJOHN: YOUR HONOR, I'M GOING TO OBJECT TO
16 THE SOLICITOR INTERRUPTING AGAIN.

17 THE COURT: I OBJECT TO THE WHOLE DIALOGUE. LET'S
18 ASK HIM A QUESTION AND WE'LL GET AN ANSWER.

19 BY MR. MYERS:

20 Q. WELL, RIGHT ON DOWN HERE RIGHT AFTER IT STARTS OFF,
21 "I DID ASK MR. DONNIE MYERS THAT YOU TALK TO SHANNON HEATH"
22 -- WHO IS SHANNON HEATH?

23 A. MY SOLICITOR.

24 Q. WHO -- WHAT ABOUT -- WHAT ABOUT HER?

25 A. I WANTED TO SEE IF YOU WOULD GO AHEAD AND GET HER TO

1 LET ME PLEAD GUILTY TO MY CHARGES.

2 Q. WELL, LET'S SEE IF THAT'S WHAT IT SAYS IN HERE.

3 "MR. DONNIE MYERS, I ASK THAT YOU TALK TO SHANNON HEATH ABOUT
4 MY TWO C.D.V. CHARGES OR OVERLOOK THEM YOURSELF. MY
5 GIRLFRIEND, CHERYL PRICE, PUT THESE CHARGES ON ME AND HOPES
6 TO GET ME HELP, NOT JAIL."

7 A. YEAH.

8 Q. GET YOU HELP.

9 A. YEAH.

10 Q. "SHE NEVER SIGNED THE WARRANTS, AND SHE ASKED FOR ME
11 TO GO TO MORRIS VILLAGE. I'M BIPOLAR. AND SHE WANT ME HOME
12 BUT TO GET HELP."

13 A. YEAH, AND SHE DOES WANT ME HOME AND SHE WANTS ME TO
14 GET HELP, BUT ALSO I KNOW FOR A FACT BECAUSE OF MY PRIOR
15 CRIMINAL RECORD I'M NOT GOING HOME. I'LL GET HELP AT SOME
16 INSTITUTION, BUT IT WON'T BE AT NO MORRIS VILLAGE. IT SOUNDS
17 NICE, BUT IT AIN'T GOING TO HAPPEN.

18 Q. ARE YOU THROUGH?

19 A. YES, SIR.

20 Q. "YOU CAN CALL HER AT WORK OR HOME. SHE WRITES ME
21 ALL THE TIME AND ASKS IF THERE'S ANYTHING SHE COULD DO.
22 COULD YOU GET SOME HELP IF MY FAMILY PAYS FOR IT AND SOME
23 PROBATION?"

24 A. YEAH.

25 Q. YOU'RE NOT ASKING FOR ME TO GIVE YOU ANYTHING?

1 A. I'M STILL GOING TO HAVE TO DO THE TIME.

2 Q. WELL, WHY ARE YOU ASKING FOR PROBATION?

3 A. BECAUSE THAT WAY YOU DON'T HIT ME WITH THE MAX. NOW
4 THAT I KNOW YOU'RE MAD AT ME, AS SOON AS I COME IN FRONT OF
5 YOU WITH THESE C.D.V. CHARGES, I'M GOING TO GET THE MAX.

6 Q. I'M GOING TO SENTENCE YOU?

7 A. NO, BUT ONE OF THE PEOPLE THAT WORK UNDER YOU ARE.

8 Q. SOMEBODY THAT WORKS UNDER ME? WHO WORKS UNDER ME
9 THAT SENTENCES?

10 A. ALL THE SOLICITORS.

11 Q. THEY SENTENCE FOLKS?

12 A. THEY DON'T SENTENCE; THE JUDGE DOES. BUT, I MEAN,
13 THEY'RE GOING TO LET YOU KNOW INSTEAD OF ME BEING ABLE TO ASK
14 FOR, YOU KNOW, A MINIMUM SENTENCE, THAT'S SHOT OUT THE WINDOW
15 NOW.

16 Q. "PLEASE LOOK OVER IT AND LET SHANNON HEATH KNOW."
17 SO YOU DON'T WANT ANY HELP AND YOU'RE NOT ASKING FOR HELP.

18 A. NO, SIR. AND YOU KNOW WHAT? IF YOU COULD GO AHEAD
19 AND SENTENCE ME, I'D BE HAPPY. THAT WAY -- THAT WAY THERE'S
20 -- THAT QUESTION ABOUT ME WANTING ANY TIME CUTS OR
21 ANYTHING---

22 Q. UH-HUH.

23 A. ---WILL BE -- IT CAN GO RIGHT OUT THE DOOR BECAUSE
24 ALL I'M DOING IS TRYING TO LET A FAMILY KNOW THAT ANOTHER MAN
25 KILLED SOMEBODY AND -- AND OTHER THAN THAT THERE, I DON'T

1 WANT NOTHING ELSE TO DO WITH THIS.

2 Q. OKAY. ALL YOU WANT TO DO IS GO TO PRISON.

3 A. WELL, NO, I'D GO RATHER GO TO DISNEYLAND BUT I
4 MEAN... IF I GOT -- IF I GOT TO GO TO PRISON TO PAY FOR --
5 I'M GOING TO PLEAD GUILTY TO MY CHARGES IS WHAT I'M SAYING.

6 Q. LET'S TALK ABOUT THAT. SHANNON HEATH BROUGHT YOU
7 OVER ONE DAY TO PLEAD GUILTY, TOLD YOU SHE WAS GOING TO
8 RECOMMEND ABOUT FIVE YEARS IN PRISON.

9 A. YEAH.

10 Q. DID YOU PLEAD GUILTY?

11 A. NO, I'M NOT PLEADING TO NO FIVE YEARS.

12 Q. SO YOU WANT TO GO TO PRISON, BUT YOU WANT TO TALK
13 ABOUT FOR HOW LONG.

14 A. I'D LIKE TO, YEAH. I MEAN, YOU KNOW, I DON'T WANT
15 TO, YOU KNOW -- BEING THAT, YOU KNOW, THE VICTIM'S ON MY
16 SIDE, I MEAN, I'D RATHER TALK TO MY LAWYER BEFORE I TALK
17 ABOUT ANYTHING ABOUT MY CHARGES.

18 Q. WELL, YOU WROTE A LETTER TO SHANNON HEATH AND YOU
19 TOLD HER---

20 A. I DIDN'T KNOW I WAS HERE FOR MY CHARGES.

21 Q. YOU'RE HERE FOR EVERYTHING. YOU WROTE A LETTER TO
22 SHANNON HEATH---

23 A. YES, SIR.

24 Q. ---SAYING THAT YOU WANT TO COME ON OVER AND PLEAD
25 GUILTY.

1 A. YES, SIR, I DID.

2 Q. SAID SOMETHING ABOUT THREE TO FIVE YEARS OR FIVE
3 YEARS PROBATION, BUT ALL YOU SAID IN HERE IS YOU WANTED HELP.

4 A. YES, SIR.

5 Q. KEPT WANTING HELP.

6 A. IF I DO GO TO PRISON -- I'VE BEEN TO PRISON THREE
7 TIMES, SIR, AND EACH TIME I WENT TO PRISON -- I'VE GOT A DRUG
8 PROBLEM AND I'VE GOT A PROBLEM WITH HITTING ON WOMEN AND
9 VERBALLY ABUSING THEM, AND IT'S GOT TO STOP.

10 Q. WELL, LET'S TALK ABOUT YOUR PROBLEMS SOME. YOU'VE
11 GOT A DRUG PROBLEM.

12 A. YES, SIR.

13 Q. OUTSIDE DRUG PROBLEM; RIGHT?

14 A. YES, SIR. YES, SIR. I LIKE TO TAKE CONTROLLED
15 SUBSTANCES, XANAXES AND VALIUMS AND STUFF LIKE THAT.

16 Q. YOU LIKE TO TAKE METH---

17 A. SMOKE A GOOD OLD JOINT EVERY NOW AND AGAIN.

18 Q. YOU LIKE METH, TOO, DON'T YOU?

19 A. NO, I DON'T EVEN MESS WITH METH. I GOT ALL MY TEETH
20 IN MY MOUTH.

21 Q. WELL, YOU'VE BEEN TO RICHLAND SPRINGS.

22 A. UH-HUH.

23 Q. WHAT FOR?

24 A. FOR PILLS.

25 Q. AND ATTEMPTED SUICIDE.

1 A. AND ATTEMPTED SUICIDE. I WAS 16 YEARS OLD, AND MY
2 15-YEAR-OLD GIRLFRIEND LEFT ME AND IT WAS MY FIRST LOVE AND I
3 THOUGHT IT WAS THE END OF THE WORLD.

4 Q. SO YOU WENT TO RICHLAND SPRINGS---

5 A. YEAH.

6 Q. ---FOR MENTAL PROBLEMS.

7 A. FOR ATTENTION MOSTLY.

8 Q. YOU WENT TO THE BRYAN CENTER TWO TIMES WHEN YOU WERE
9 18 AND 20.

10 A. YEAH, TO GET COUNSELING.

11 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE
12 RELEVANCY OF THIS.

13 MR. MYERS: TO SHOW HIS MENTALITY AND HIS MENTAL
14 STATE.

15 THE WITNESS: I DON'T MIND ANSWERING IT.

16 THE COURT: JUST HOLD ON. SOLICITOR?

17 MR. MYERS: TO SHOW HIS MENTALITY, HIS MENTAL STATE,
18 HIS MANIPULATION, HIS MENTAL PROBLEMS.

19 THE COURT: I -- I AM -- I BELIEVE THAT A LIMITED
20 INQUIRY INTO THIS IS RELEVANT TO SHOW HIS MENTAL STATE FROM
21 THE STANDPOINT OF EFFORTS THAT HE HAS MADE IN THE PAST, AS
22 YOU ALLEGE, AND TIE THOSE IN WITH EFFORTS THAT YOU ALLEGE
23 HE'S MAKING NOW TO MANIPULATE THE SYSTEM TO GET WHAT HE WANTS
24 OUT OF IT. AND SO THAT WITH THAT LIMITED SCOPE -- AND I
25 DON'T KNOW HOW LIMITED THAT IS, BUT I'M GOING TO OVERRULE THE

1 OBJECTION, BUT I DON'T ANTICIPATE A COMPLETE EXAMINATION OF
2 HIS ENTIRE MENTAL HISTORY.

3 BY MR. MYERS:

4 Q. YOU WENT TO THE BRYAN CENTER TWICE.

5 A. YES, SIR. I'M VERY---

6 Q. AND -- GO AHEAD. I'M SORRY.

7 A. I GOT HIGH -- I'M HYPERTENSIVE. I MEAN, I SHAKE.

8 I'M NOT ONE TO RUN OUT IN FRONT OF TRAFFIC OR BITE PEOPLE ON
9 THE LEGS OR NOTHING LIKE THAT. I JUST -- I'M HYPER.

10 Q. YOU'RE BIPOLAR.

11 A. YEAH. I'M HYPER. I'M VERY HYPER.

12 Q. YOU'VE GOT A PERSONALITY DISORDER, TOO.

13 A. NO.

14 Q. YOU'RE NARCISSISTIC.

15 A. I DON'T HAVE A PERSONALITY DISORDER. I'M JUST
16 CONSTANTLY HYPER AND HIGH STRUNG AT ALL TIMES.

17 Q. THEY DIAGNOSED YOU AS BIPOLAR, NARCISSISTIC,
18 ANXIETY, PERSONALITY DISORDERS AS WELL, DIDN'T THEY?

19 A. NOT PERSONALITY DISORDER.

20 Q. THEY'VE BEEN GIVING YOU---

21 MR. LITTLEJOHN: YOUR HONOR, I OBJECT. I DON'T SEE
22 HOW THIS HAS---

23 THE COURT: I'M GOING TO -- I'M GOING TO SUSTAIN THE
24 OBJECTION TO THAT. NOW, IF THIS -- IF THIS IS TIED INTO
25 SPECIFIC EFFORTS, WHICH I THOUGHT THAT'S WHAT YOU WERE DOING

1 AT FIRST, TO TRY TO GET HIMSELF INTO A DIFFERENT SITUATION
2 THAN WHERE HE IS NOW OR WHERE HE HAS BEEN IN THE PAST, THEN I
3 THINK THAT'S RELEVANT. BUT JUST TO GO THROUGH HIS PROBLEMS
4 AND DISCUSS THOSE, I DON'T UNDERSTAND THE RELEVANCE OF THAT,
5 AND IF YOU WANT TO EXPLAIN IT, I'LL GIVE YOU A CHANCE.

6 MR. MYERS: I CAN GO ON TO ANOTHER AREA.

7 BY MR. MYERS:

8 Q. SEEING THOSE DOCTORS OVER THERE AT THE JAIL, YOU
9 TOLD THEM YOU WERE IN JAIL JUST BECAUSE THERE WAS A CUSTODY
10 BATTLE WITH YOUR SEVEN-YEAR-OLD DAUGHTER, DIDN'T YOU?

11 A. NO.

12 Q. DR. CHERRY?

13 A. NO, I DIDN'T.

14 Q. DR. LANCE?

15 A. NO, I DID NOT.

16 Q. THE NURSES?

17 A. NO, I DID NOT.

18 Q. DO YOU HAVE A SEVEN-YEAR-OLD DAUGHTER?

19 A. NO, I DON'T HAVE NO KIDS.

20 Q. YOU DON'T HAVE ANY KIDS.

21 A. NO. THEY GOT THE WRONG PERSON THERE.

22 Q. SO YOU DIDN'T TELL THEM THAT AT ALL.

23 A. NO. AS A MATTER OF FACT, I WISH I COULD SPEAK TO
24 DR. CHERRY.

25 Q. AND THEN WHEN YOU'RE TALKING ABOUT THE GUN -- LET'S

1 GO BACK TO THE CRIME.

2 A. UH-HUH.

3 Q. WHEN YOU MAKE ALL THESE STATEMENTS ABOUT THE GUN AND
4 WHAT THOMPSON SAID HE DID WITH THE GUN, YOU'VE TOLD DIFFERENT
5 STORIES ON THAT, HAVEN'T YOU?

6 A. NOT THAT I KNOW OF.

7 Q. WELL---

8 A. OH, YEAH, I KNOW -- I KNOW EXACTLY WHAT YOU'RE
9 REFERRING TO.

10 Q. WHAT AM I REFERRING TO?

11 A. YOU'RE REFERRING TO THE FIRST STATEMENT THAT I MADE
12 IN THE CONVERSATION ABOUT THE GUN AND HIM PLANTING IT -- HOW
13 HE PLANTED IT BUT MARCUS THOMPSON HAD THE GUN IN THE CAR BUT
14 THEN KEVIN MERCER HAD IT IS WHAT YOU'RE REFERRING TO, THE
15 SAME QUESTION THE INVESTIGATOR ASKED ME THE OTHER WEEK WHEN I
16 WAS IN THE OFFICE.

17 Q. WELL, WHAT WAS HE ASKING?

18 A. WHY DID I SAY THAT MARCUS THOMPSON HAD THE GUN WHEN
19 KEVIN MERCER INITIALLY DROVE OFF WITH IT. IS THAT CORRECT?

20 Q. WELL, WHY DID YOU?

21 A. WELL, BECAUSE WHEN KEVIN MERCER DROVE OFF WITH THE
22 ESCALADE OR NAVIGATOR OR WHATEVER KIND OF TRUCK IT WAS, HE
23 SET THE GUN IN THE SEAT, AND THEN WHEN THEY DROPPED OFF KEVIN
24 MERCER'S CAR, MARCUS THOMPSON JUMPED IN THERE AND THEN THEY
25 GOT PULLED OVER AND THEN KEVIN MERCER -- THEY TOLD HIM TO GET

1 OUT OF THE CAR. I DON'T KNOW EXACTLY WHAT THEY DONE, BUT HE
2 SAID THAT IT TOOK FIVE TO TEN MINUTES BEFORE THEY EVEN CALLED
3 MARCUS THOMPSON OUT OF THE CAR, AND HE DONE STUCK THE GUN
4 OVER THERE ON KEVIN MERCER'S SIDE.

5 Q. DO YOU REMEMBER---

6 A. HIS EXACT WORDS WAS, "HE'S A STUPID NIGGER." THAT'S
7 HIS EXACT WORDS.

8 Q. DO YOU REMEMBER BEING IN MY OFFICE ON JULY THE 19TH?

9 A. YEAH.

10 Q. DO YOU REMEMBER TELLING THIS OFFICER THAT THOMPSON
11 SAID AS SOON AS HE SHOT SERGEANT DAVIS, HE GAVE THE GUN TO
12 KEVIN MERCER THEN?

13 A. YEAH, THAT'S WHAT I JUST SAID.

14 Q. SO YOU'VE TOLD THREE DIFFERENT STORIES ABOUT WHAT
15 HAPPENED TO THE GUN. IS THAT RIGHT?

16 A. NO. I TOLD -- I MISWROTE THIS ONE BECAUSE I WAS IN
17 A HURRY.

18 Q. MISWROTE WHICH ONE?

19 A. THE FIRST STATEMENT BECAUSE MARCUS THOMPSON WAS
20 BEHIND ME. ON THE SECOND STATEMENT WHEN I---

21 Q. MARCUS THOMPSON WAS BEHIND YOU. WHAT DO YOU MEAN?

22 A. HE WAS IN THE ROOM WITH ME WHEN I WROTE THE FIRST
23 LETTER TO YOU.

24 Q. WHAT'S THAT GOT TO DO WITH ANYTHING?

25 A. BECAUSE I WAS IN A HURRY TO GET IT OUT. I DIDN'T

1 WANT TO HAVE TO FIGHT.

2 Q. WELL, WHAT ABOUT THAT STATEMENT YOU GAVE TO THE
3 OFFICER, THE WRITTEN STATEMENT?

4 A. ABOUT THE STATE -- THE STATEMENT I GAVE TO THE
5 OFFICER---

6 Q. WAS THOMPSON IN THE ROOM WITH YOU THEN?

7 A. NO. HOW COULD HE BE IN THE ROOM IF THE OFFICER IS
8 THERE?

9 Q. WHAT DID YOU SAY THEN?

10 A. WHAT I SAID? I SAID THAT MARCUS THOMPSON GIVE THE
11 GUN TO KEVIN MERCER.

12 Q. WHEN?

13 A. AT THE CRIME SCENE.

14 Q. IS THAT WHAT IT SAYS IN THAT STATEMENT?

15 A. THAT'S STATEMENT EXHIBIT 4; RIGHT? WHICH ONE IS IT?
16 I GOT THREE OF THEM HERE.

17 Q. LET'S---

18 A. I CAN'T READ IT -- I CAN'T READ...

19 Q. DO YOU WRITE DIFFERENT THINGS IN DIFFERENT
20 STATEMENTS?

21 A. PROBABLY SO.

22 Q. WHY IS THAT? WHY DO YOU WRITE DIFFERENT---

23 A. BECAUSE I GOT A SEVENTH GRADE EDUCATION, IF THAT. I
24 COULDN'T---

25 Q. SO YOU CAN'T TELL THE TRUTH BECAUSE YOU'VE GOT A

1 SEVENTH GRADE EDUCATION?

2 A. NO, I CAN TELL THE TRUTH---

3 MR. LITTLEJOHN: YOUR HONOR, I OBJECT TO THE
4 SOLICITOR'S QUESTION.

5 THE WITNESS: I CAN TELL THE TRUTH. IT'S JUST---

6 THE COURT: HOLD ON A SECOND.

7 MR. LITTLEJOHN: ARGUMENTATIVE.

8 THE COURT: HOLD ON. HOLD ON. I SUSTAIN THE
9 OBJECTION.

10 BY MR. MYERS:

11 Q. NUMBER THREE, THIS STATEMENT YOU GAVE THE OFFICER
12 OVER THERE---

13 A. UH-HUH.

14 Q. ---ON MAY THE 9TH---

15 A. YES, SIR.

16 Q. WHERE DO YOU SAY THAT THOMPSON GAVE MERCER THE GUN?

17 A. IT DOESN'T SAY, NOT THAT I SEE. OH, YEAH, HERE IT
18 IS. ALL IT SAYS IS HE PUT THE GUN -- ALL IT SAYS IS HE PUT
19 THE GUN UNDER THE SEAT OF THE TRUCK.

20 Q. AFTER THE COPS STOPPED THEM.

21 A. AFTER THE COPS STOPPED HIM.

22 Q. DO YOU REMEMBER---

23 A. LOOK, SIR, MR. MYERS, THE STATEMENT MIGHT NOT BE A
24 COLLEGE-TYPED STATEMENT, BUT I IN DETAIL TOLD YOU EXACTLY
25 WHAT HAPPENED AND WHAT WAS UP IN THE OFFICE WORD FOR WORD.

KEVIN FULLER - CROSS-EXAM BY MR. MYERS

1 THIS STUFF IS NEW TO ME. I'M ALREADY NERVOUS TO START WITH
2 BECAUSE EVERYBODY AT THE DETENTION CENTER IS TALKING ABOUT
3 IT. AS A MATTER OF FACT THIS MORNING, GUESS WHO WAS SITTING
4 BESIDE ME? MARCUS THOMPSON. SO THAT'S HOW GOOD OF A JOB
5 THEY'RE DOING. AND, YEAH, I'M NERVOUS AND I REALLY DON'T
6 WANT TO BE HERE.

7 Q. DID I ASK YOU WHAT KIND OF JOB THE SHERIFF'S
8 DEPARTMENT WAS DOING AND WHETHER YOU WANT TO BE HERE OR NOT?
9 DID I ASK YOU THAT?

10 A. NO, SIR.

11 Q. HOW ABOUT ANSWERING MY QUESTIONS? IN THAT STATEMENT
12 YOU SAY---

13 A. WELL, MY LIFE'S MORE IMPORTANT THAN YOUR QUESTIONS.

14 THE COURT: ALL RIGHT. I THINK THAT I'M GOING --
15 I'M GOING TO REMIND YOU THAT YOU'RE HERE TO ANSWER QUESTIONS
16 AND NOT TO MAKE COMMENTS.

17 THE WITNESS: YES, SIR.

18 THE COURT: SO THE SOLICITOR IS GOING TO ASK YOU
19 QUESTIONS, AND WHEN HE ASKS YOU A QUESTION, YOU ANSWER THE
20 QUESTION.

21 THE WITNESS: YES, SIR. SORRY, SIR.

22 BY MR. MYERS:

23 Q. IN THAT STATEMENT ON MAY THE 9TH IN MY OFFICE WITH
24 THE SHERIFF'S DEPARTMENT YOU SAY THAT THOMPSON SAYS HE PUT
25 THE GUN UNDER THE SEAT AFTER THEY WERE STOPPED BY THE COPS.

1 A. YES, SIR, I DID, SIR.

2 Q. AND AT MY OFFICE ON JULY THE 19TH WITH YOUR LAWYER
3 THERE, WITH THOMPSON NOT THERE, YOU SAID THOMPSON TOLD YOU
4 THAT HE GAVE THE GUN TO KEVIN MERCER RIGHT AT THE SCENE AFTER
5 THOMPSON SHOT THE SERGEANT. ISN'T THAT RIGHT?

6 A. YES, SIR, AND THOMPSON -- I MEAN, KEVIN MERCER TOOK
7 THE GUN, EITHER STUCK IT IN HIS LAP OR EITHER STUCK IT IN HIS
8 SEAT IN BETWEEN WHERE HIM AND MARCUS THOMPSON WAS GOING TO
9 SIT. KEVIN MERCER DROVE WHATEVER KIND OF TRUCK IT WAS DOWN
10 THE ROAD TO WHEREVER HE INITIALLY HAD HIS STUFF PARKED. THEY
11 DROPPED OFF KEVIN MERCER'S CAR. THEY BOTH GOT INTO THE
12 TRUCK, AND WHEN THEY WAS DRIVING DOWN THE ROAD, THEY WENT TO
13 JUMP ON THE HIGHWAY AND THEY GOT PULLED OVER. THAT'S WHEN
14 THEY TOLD KEVIN MERCER TO STEP OUT OF THE CAR. WHEN KEVIN
15 MERCER STEPPED OUT OF THE CAR, MARCUS THOMPSON TOOK THE THING
16 AND STUCK IT WHEREVER IN THE TRUCK. THAT WAY IT LOOKED LIKE
17 THAT KEVIN HAD THE GUN ON HIM.

18 THAT'S THE REASON WHY THEY FOUND MARCUS THOMPSON
19 WITH BULLETS AND GLOVES ON HIM THAT WENT TO THAT GUN BECAUSE
20 HE INITIALLY HAD THE GUN THE WHOLE TIME. THEY WASN'T
21 SUPPOSED TO SHOOT THAT MAN. THAT MAN WAS ON HIS CELL PHONE
22 IS EXACTLY WHAT HE TOLD ME, BUT HE THOUGHT THE MAN WAS
23 PULLING A GUN OR A KNIFE OR SOMETHING TO DO SOMETHING TO
24 KEVIN.

25 Q. ARE YOU THROUGH?

1 A. YES, SIR.

2 Q. DO YOU REMEMBER ON JULY THE 19TH IN OUR OFFICE YOU
3 ALSO SAID THAT THOMPSON SAID HE SHOT THE SERGEANT WHILE HE
4 WAS IN HIS TRUCK?

5 A. AS HE WAS GETTING OUT OF HIS TRUCK.

6 Q. YOU SAID THAT THE SERGEANT HAD BLOOD ON HIS HAND AND
7 HE PUT BLOOD ON THE TRUCK FROM WHERE HE WAS SHOT.

8 A. THAT'S WHAT MARCUS THOMPSON TOLD ME.

9 Q. AND THERE WAS SMEARED BLOOD ON THE TRUCK FROM THE
10 SHOT TO THE SERGEANT.

11 A. THAT'S WHAT HE TOLD ME.

12 Q. AND THEN IN YOUR STATEMENT LATER ON YOU SAID -- IN
13 THE STATEMENT YOU GAVE THE OFFICER ON MAY THE 9TH YOU SAID,
14 NO, HE SHOT HIM OUTSIDE THE TRUCK AND HE FELL ON THE
15 SIDEWALK.

16 A. HE SHOT HIM -- HE MADE IT SOUND LIKE THE GUY WAS
17 JUMPING OUT TO JUMP ON KEVIN MERCER, AND THAT'S WHEN HE SHOT
18 HIM.

19 Q. LET ME ASK YOU SOMETHING. BACK WHEN YOU WROTE ME
20 THESE LETTERS---

21 A. YES, SIR.

22 Q. ---HOW COULD YOU HELP YOURSELF BY SAYING THAT KEVIN
23 FULLER (SIC) WAS THE SHOOTER?

24 A. I'M KEVIN FULLER.

25 Q. HOW COULD YOU SAY -- HOW COULD YOU HELP YOURSELF BY

1 SAYING KEVIN MERCER WAS THE SHOOTER?

2 A. NOTHING. I HAVEN'T DONE NOTHING BUT CAUSE MYSELF A
3 BUNCH OF GRIEF IS WHAT I'VE DONE.

4 Q. ALL RIGHT. I'M GOING TO REPEAT THAT BECAUSE YOU'RE
5 NOT ANSWERING MY QUESTION. HOW COULD YOU HELP YOURSELF BACK
6 WHEN YOU WROTE ME THESE LETTERS BY SAYING THAT KEVIN MERCER
7 WAS THE SHOOTER WHO HAD ALREADY GOTTEN THE DEATH PENALTY?
8 HOW COULD YOU HELP YOURSELF?

9 A. HOW COULD I HELP MYSELF BY SAYING HE WAS THE
10 SHOOTER?

11 Q. UH-HUH.

12 A. I COULDN'T.

13 Q. BUT YOU COULD HELP YOURSELF IF YOU SAID THOMPSON
14 MADE ALL OF THESE STATEMENTS.

15 A. NO. EVERYBODY KNOWS Y'ALL DON'T CUT NO DEALS WITH
16 NOBODY. IT'S AGAINST THE LAW.

17 Q. WHO IS YOUR -- WHO IS Y'ALL'S THIRD ROOMMATE?

18 A. ROCKY. TIMOTHY JOHNSTON.

19 Q. AND YOU'RE SAYING THAT TIMOTHY JOHNSTON, ROCKY, ALSO
20 HEARD ALL THIS.

21 A. HE HEARD US TALKING ABOUT THE MURDER.

22 Q. HE HEARD MARCUS THOMPSON CONFESSING?

23 A. NO, I'M NOT SURE IF HE HEARD ALL THAT THERE. HE
24 HEARD US TALKING ABOUT THE MURDER AND STUFF. HE ALSO LOOKED
25 AT THE, YOU KNOW, THE PAPERWORK AND STUFF LIKE THERE AND

1 HEARD THEM BRAGGING ABOUT THE---

2 Q. WHAT PAPERWORK?

3 A. I GUESS HIS WARRANTS WHERE Y'ALL BONDED -- LET HIM
4 BOND OUT OR WHATEVER.

5 Q. WHAT KIND OF PAPERWORK?

6 A. I DON'T KNOW, WHATEVER KIND OF PAPERWORK Y'ALL GIVE
7 SOMEBODY FOR KILLING SOMEBODY. A WARRANT.

8 Q. WHO HAD THE PAPERWORK?

9 A. HUH?

10 Q. WHO HAD THE PAPERWORK?

11 A. MARCUS THOMPSON.

12 Q. HE WAS SHOWING YOU ALL HIS PAPERWORK?

13 A. HE WASN'T SHOWING ME HIS PAPERWORK. HE TOLD ME
14 EVERYTHING I -- EVERYTHING I TOLD YOU, HE TOLD ME.

15 Q. AND YOU TOLD US ON JULY THE 19TH THAT ROCKY COULD
16 VERIFY EVERYTHING THAT YOU ARE SAYING.

17 A. YEAH.

18 Q. THAT WHAT YOU'RE SAYING NOW ROCKY CAN VERIFY.

19 A. YEAH.

20 Q. OKAY. AND ROCKY WOULDN'T SAY THAT YOU'RE LYING.
21 YOU'RE JUST SAYING THAT---

22 MR. LITTLEJOHN: YOUR HONOR, I OBJECT. THAT CALLS
23 FOR SPECULATION ON HIS PART.

24 THE WITNESS: I WOULDN'T SEE WHY.

25 MR. LITTLEJOHN: WAIT A MINUTE.

1 THE COURT: SIR, HOLD ON A SECOND.

2 THE WITNESS: I'M SORRY. I DIDN'T MEAN TO...

3 THE COURT: I THINK IT'S BASICALLY REPEATING THE
4 PREVIOUS QUESTION.

5 MR. MYERS: NO PROBLEM. THAT'S NO PROBLEM.

6 BY MR. MYERS:

7 Q. I'M GOING TO CALL ROCKY TO TESTIFY.

8 A. YES, SIR.

9 Q. AND YOU'RE STICKING TO YOUR STORY?

10 A. YES, SIR, I AM.

11 Q. ARE YOU STICKING THAT ROCKY HEARD ALL THIS AND ROCKY
12 CAN VERIFY WHAT YOU'RE SAYING?

13 A. I KNOW ROCKY HEARD ABOUT THE MURDER. I DON'T KNOW
14 IF ROCKY IN DETAIL HEARD ABOUT HIM SAYING THAT HE SHOT THAT
15 BOY BEHIND THE EAR OR NOT BECAUSE I WAS CLOSER TO THE BOY
16 THAN ROCKY WAS. AS A MATTER OF FACT, HIM AND ROCKY ALMOST
17 GOT IN A FIGHT ONE TIME IN THE ROOM, SO THEY WASN'T REALLY
18 TOO CLOSE OF FRIENDS AFTER A COUPLE OF DAYS. BUT, YEAH, I---

19 Q. TALKING ABOUT THOMPSON.

20 A. YEAH.

21 Q. THOMPSON AND ROCKY WEREN'T CLOSE.

22 A. YEAH, THEY WEREN'T CLOSE.

23 Q. YOU WERE CLOSER TO THOMPSON.

24 A. YEAH, I WAS ALL RIGHT WITH HIM UNTIL I HEARD ALL
25 THIS.

KEVIN FULLER - CROSS-EXAM BY MR. MYERS

1 Q. I WANT YOU TO LISTEN TO ME REAL CAREFULLY. I DON'T
2 WANT THERE TO BE ANY MISTAKE ABOUT THIS. DIDN'T YOU SAY TO
3 ROCKY SOMETHING TO THE EFFECT OF, "IF YOU BLAME THIS ON
4 THOMPSON, IT CAN HELP YOU WITH YOUR CHARGES"?

5 A. NO.

6 Q. THAT YOU COULD GET HELP ON YOUR CHARGES BY USING
7 THIS AGAINST MARCUS THOMPSON.

8 A. NO.

9 Q. OKAY. I'M GOING TO CALL HIM -- I'M GOING TO CALL
10 HIM TO TESTIFY.

11 A. OKAY.

12 Q. YOU'RE STILL GOING TO STICK TO THAT.

13 A. YEAH. AND FOR THE RECORD, I DON'T WANT NO HELP.
14 CRANK THE BUS UP; LET ME GO.

15 Q. AND YOU WEREN'T ASKING FOR HELP IN STATE'S EXHIBIT
16 4, THIS LETTER YOU WROTE TO ME, WHERE YOU USED THE WORD HELP
17 ABOUT EIGHT TIMES.

18 A. I WAS -- I WAS ASKING YOU TO LOOK INTO MY CASE, SIR,
19 AND WHAT I MEAN BY HELP IS, YOU KNOW, I'VE DONE BEEN TO
20 PRISON, LIKE I SAID, THREE TIMES, AND EVERY TIME I WENT TO
21 PRISON I'VE NEVER GOTTEN DRUG COUNSELING; I'VE NEVER GOT
22 HELP. Y'ALL HAVE ALWAYS SENT ME TO, YOU KNOW, TURBEVILLE,
23 SOMEWHERE WHERE IT'S JUST A SUPER-MAX YARD, AND THERE'S NO
24 KIND OF CLASSES THERE FOR ME TO TAKE; YOU KNOW. I'M GETTING
25 READY TO TURN 30 YEARS OLD, AND THESE SHACKLES IS GETTING

1 VERY OLD.

2 Q. DO YOU KNOW WHAT QUESTION I ASKED YOU?

3 A. WHAT?

4 Q. DO YOU KNOW WHAT QUESTION I ASKED YOU?

5 A. JUST NOW?

6 Q. YEAH.

7 A. NO.

8 Q. OKAY. YOU'RE JUST RAMBLING ON AGAIN; RIGHT?

9 A. YEAH.

10 Q. RIGHT HERE ON THIS STATEMENT NUMBER 3 THAT YOU GAVE
11 TO THE OFFICER ON MAY THE 9TH, YOU SAY RIGHT HERE---

12 A. YES, SIR.

13 Q. ---THAT THOMPSON WENT TO THE HOSPITAL ON WEDNESDAY,
14 MAY THE 3RD.

15 A. UH-HUH.

16 Q. IS THAT RIGHT?

17 A. I BELIEVE SO.

18 Q. WELL, YOU PUT IT DOWN THERE.

19 A. YEAH, I PUT IT DOWN THERE.

20 Q. WEDNESDAY, MAY THE 3RD. AND THAT'S THE NIGHT HE
21 CAME BACK AND TOLD YOU ABOUT THE DETAILS.

22 A. NO. HE SPENT THE NIGHT IN THE HOSPITAL.

23 Q. HE SPENT THE NIGHT IN THE HOSPITAL.

24 A. YEAH, HE STAYED -- HE STAYED IN THE HOSPITAL.

25 Q. HE SPENT WEDNESDAY NIGHT IN THE HOSPITAL? YOU DON'T

1 REMEMBER HIM COMING BACK TO THE---

2 A. I REMEMBER WHEN HE---

3 Q. ---TO THE CELL?

4 A. ---WHEN HE COME BACK ON WEDNESDAY HE -- WEDNESDAY IS
5 -- THE 3RD IS WHEN HE MOVED IN THERE OR WENT TO THE HOSPITAL.

6 Q. WHAT ARE YOU TALKING ABOUT? I DON'T UNDERSTAND WHAT
7 YOU'RE EVEN SAYING.

8 A. WEDNESDAY, THE 3RD, HE WENT TO THE HOSPITAL.

9 Q. AND HE CAME BACK.

10 A. HE STAYED THERE ALL NIGHT. HE -- WELL, I GUESS THE
11 MAJORITY OF THE NIGHT AND THEN HE COME BACK. WHEN HE COME
12 BACK, HE WAS DOPED UP AND HE WAS JUST BOASTING ABOUT THIS
13 MURDER, AND THEN THE NEXT DAY I WAS LIKE -- I WAS LIKE,
14 "DAMN, YOU REALLY -- YOU KNOW, YOU REALLY ARE A THUG, YOU
15 KNOW," AND HE WAS LIKE, "HA, HA. I'M NOT GOING TO JAIL FOR
16 IT," THIS, THAT, AND THE OTHER.

17 Q. AND THAT'S THE FIRST TIME THAT HE TOLD YOU IN DETAIL
18 ABOUT SHOOTING THIS OFFICER IN THE HEAD.

19 A. IN DETAIL.

20 Q. OKAY. OKAY. NOW, YOU WROTE ME THIS FIRST LETTER,
21 STATE'S EXHIBIT NUMBER 2, AND YOU SAY IN HERE THAT MARCUS
22 ANTONIO THOMPSON WAS INVOLVED IN THE MURDER, THAT KEVIN IS
23 GETTING THE BLAME. HE SAID KEVIN SNATCHED THE DOOR OPEN ON
24 THE TRUCK AND HE SHOT TRACY IN THE HEAD; THEN KEVIN DROVE
25 OFF. SO THAT'S WHEN HE TOLD YOU HE SHOT THE FELLOW IN THE

1 HEAD.

2 A. YES, SIR. HE TOLD ME POINTBLANK HE SHOT HIM BEHIND
3 HIS EAR.

4 Q. HE TOLD YOU THAT THAT NIGHT.

5 A. YES, SIR.

6 Q. OKAY. AND THAT'S WHEN HE GOT BACK FROM THE
7 HOSPITAL.

8 A. YES, SIR.

9 Q. AND THEN YOU WROTE THIS LETTER WHEN?

10 A. PROBABLY A DAY OR TWO LATER. I CAN'T---

11 Q. PROBABLY A DAY OR TWO LATER.

12 A. I CAN'T -- I CAN'T RECALL, SIR, HONESTLY, YOU KNOW,
13 TIMES AND DATES AND---

14 Q. IF YOU WROTE THIS LETTER A DAY OR TWO LATER, HOW IS
15 IT POSTMARKED MAY THE 4TH AT 1 P.M.?

16 A. WELL, I GUESS I WROTE IT THAT DAY.

17 Q. HOW IS IT POSTMARKED---

18 A. BECAUSE IT WENT OUT.

19 Q. ---IF YOU MAILED IT A DAY OR TWO LATER?

20 A. IF I HAD MAILED IT TODAY, THAT MEANS IT WENT OUT
21 THAT DAY. IT WAS POSTMARKED THAT DAY FROM THE JAIL, AND IT
22 GOES OUT TO THE MAIL OFFICE. THE MAILMAN POSTMARKS IT.

23 Q. SO YOU WROTE IT THAT MORNING OR THAT NIGHT?

24 A. PROBABLY THAT NIGHT -- THAT MORNING. I PROBABLY --
25 NO, AS A MATTER OF FACT, I DID WRITE IT THAT MORNING BECAUSE

1 WE HAD MORNING REC AND I WROTE IT. THAT'S WHY THEY'RE ALL
2 SLOPPY LIKE THEY ARE BECAUSE I WAS ALWAYS IN A HURRY. YOU
3 CAN TELL -- YOU CAN TELL THE LETTERS I WROTE IN A HURRY AND
4 YOU CAN TELL THE LETTERS I TOOK MY TIME WITH.

5 Q. SO YOU WROTE THIS THING AND THEY'RE SO SLOPPY THAT
6 IT GETS TO THE COLUMBIA POST OFFICE POSTMARKED AT 1 P.M. ON
7 MAY THE 4TH. HOW DO YOU EXPLAIN THAT?

8 A. I DON'T KNOW.

9 Q. THAT'S BECAUSE YOU'RE MAKING ALL THIS UP, ISN'T IT?

10 A. NO, I'M NOT MAKING UP NOTHING.

11 Q. IT'S BECAUSE YOU'RE NOT TELLING THE TRUTH, ISN'T IT?

12 A. NO.

13 Q. HOW DO YOU KNOW THOMPSON'S NAME IS MARCUS ANTONIO
14 THOMPSON?

15 A. BECAUSE HE WAS MY ROOMMATE. HE TOLD ME.

16 Q. HOW DID HE TELL YOU HIS NAME WAS MARCUS ANTONIO
17 THOMPSON?

18 A. BECAUSE HE TOLD ME.

19 Q. HE TOLD YOU HIS FULL NAME?

20 A. YEAH, HE TOLD ME HIS FULL NAME JUST LIKE I'M KEVIN
21 LEE FULLER.

22 Q. AND WHAT ABOUT THE RAP SONGS? TELL ME ABOUT THE RAP
23 SONGS.

24 A. HE MADE SONGS ABOUT MO' MURDER AND STUFF LIKE... I
25 DON'T GET INTO THAT STUFF. I CAN'T -- I SURELY CAN'T SING.

1 I'M WHITE AND COUNTRY.

2 Q. WELL, LET ME ASK YOU A QUESTION. I GOT YOUR BOOKING
3 SHEET OVER THERE WHEN YOU CHECKED INTO THE JAIL. IN FEBRUARY
4 AND IN MARCH YOU PUT DOWN YOU WERE A MUSLIM.

5 A. YEAH, SO I CAN GET A SPECIAL TRAY.

6 Q. SO YOU LIED ABOUT THAT, TOO?

7 A. YEAH, I LIED ABOUT THAT. YEAH. WHO WANTS TO EAT
8 JAIL FOOD?

9 Q. SO YOU CAN GET A SPECIAL---

10 A. LOOK, I'VE NEVER SAID I HAVEN'T LIED, SIR, AND, YOU
11 KNOW, THIS IS -- RIGHT HERE IS NOTHING TO LIE ABOUT, AND
12 REALLY I DON'T CARE WHAT HAPPENS TO KEVIN MERCER OR MARCUS
13 THOMPSON, YOU KNOW, I MEAN, TO BE HONEST WITH YOU.

14 Q. AND ROCKY IS GOING TO VERIFY EVERYBODY YOU SAY
15 INCLUDING THE RAP SONGS.

16 MR. LITTLEJOHN: YOUR HONOR, I---

17 THE WITNESS: YES, SIR.

18 MR. LITTLEJOHN: ---OBJECT. THIS IS SPECULATION.

19 THE WITNESS: I DON'T KNOW ABOUT THE RAP SONGS.

20 MR. LITTLEJOHN: HE CAN'T SPECULATE AS TO WHAT
21 ROCKY'S GOING TO DO.

22 THE COURT: I -- I THINK THAT'S -- I OVERRULE THAT
23 OBJECTION.

24 BY MR. MYERS:

25 Q. BUT ROCKY HEARD ALL THIS.

KEVIN FULLER REDIRECT EXAM BY MR. LITTLEJOHN

1 A. I'M PRETTY SURE HE DID.

2 Q. ROCKY HEARD THOMPSON SINGING.

3 A. YEAH. YEAH.

4 MR. MYERS: THAT'S ALL I HAVE.

5 REDIRECT EXAMINATION

6 BY MR. LITTLEJOHN:

7 Q. JUST A COUPLE OF THINGS, MR. FULLER. IF -- WHO WAS
8 THE THIRD GUY IN THE ROOM? TIMOTHY JOHNSON?

9 A. TIMOTHY JOHNSTON A.K.A. ROCKY. HE'S FROM PELION.

10 Q. ALL RIGHT, SIR. AND AS THE SOLICITOR ASKED YOU, IF
11 HE TELLS THE TRUTH, HE'LL VERIFY WHAT YOU'VE SAID; RIGHT?

12 A. OF COURSE.

13 Q. OKAY.

14 A. HE'S IN THE DEPARTMENT OF CORRECTIONS RIGHT NOW.

15 Q. OKAY. MR. FULLER, THE SOLICITOR ASKED YOU A NUMBER
16 OF KIND OF PICKY QUESTIONS ABOUT WHEN THESE VARIOUS
17 STATEMENTS WERE MADE. IS THERE ANY QUESTION IN YOUR MIND
18 THAT MARCUS THOMPSON TOLD YOU HE WAS THE SHOOTER?

19 A. REPEAT THE QUESTION AGAIN.

20 Q. IS THERE ANY DOUBT IN YOUR MIND THAT MARCUS THOMPSON
21 TOLD YOU HE WAS THE PERSON THAT SHOT SERGEANT DAVIS?

22 A. NO. I'M ABSOLUTELY SURE THAT THAT'S WHAT MARCUS
23 THOMPSON TOLD ME, THAT HE POINTBLANK SHOT THAT MAN BEHIND HIS
24 EAR IN HIS HEAD.

25 Q. HOW MANY TIMES DID HE TELL YOU THAT?

1 A. NUMEROUS TIMES. MORE THAN FIVE.

2 Q. OKAY. AND IT WAS---

3 A. HE BOASTED ON IT. HE'S SICK. YOU CAN TALK TO HIM
4 AND TELL THAT HE'S NOT RIGHT.

5 Q. AND HE GAVE YOU THE DETAILS AFTER HE CAME BACK FROM
6 GETTING HIS KIDNEY STONES CHECKED?

7 A. THAT AND THE NEXT DAY AND THE NEXT DAY AND THEN
8 FINALLY ALL OF A SUDDEN SERGEANT PHANTOM STEELE COME IN THERE
9 AND MOVED ME AND HIM.

10 Q. OKAY.

11 A. FOR WHAT REASON I DO NOT KNOW. THEY PUT ME IN A.
12 POD AND PUT HIM IN B. POD. EVER SINCE THEN I'VE BEEN GETTING
13 DEATH MAIL AND DEATH THREATS.

14 Q. OKAY. AND SOLICITOR MYERS ASKED YOU ABOUT WANTING
15 TO GET OUT OF THE INVESTIGATOR'S OFFICE. WHY DID YOU WANT TO
16 GET OUT OF THE INVESTIGATOR'S OFFICE?

17 A. BECAUSE IT WAS AGGRAVATING.

18 Q. OKAY. BESIDES THAT.

19 A. NO, NO REALLY REASON.

20 Q. WERE YOU AFRAID PEOPLE WOULD THINKING YOU WERE---

21 A. NO. I MEAN, YEAH, I'M SNITCHING. SEE, IF YOU'RE --
22 IF YOU LOOK AT HOW YOU HAVE TO GO TO AN INVESTIGATOR'S OFFICE
23 AT RICHLAND COUNTY, YOU HAVE TO WALK RIGHT PAST A ROW OF
24 WINDOWS RIGHT---

25 Q. RICHLAND COUNTY OR LEXINGTON COUNTY?

1 A. LEXINGTON COUNTY.

2 Q. OKAY.

3 A. EXCUSE ME. YOU HAVE TO WALK PAST A ROW OF WINDOWS
4 WHICH IS ON LOCKUP; OKAY? YOU'VE GOT THREE GUYS TO A ROOM IN
5 THERE. YOU GOT 30 ROOMS YOU'RE WATCHING. WHOEVER IS WALKING
6 PAST IT -- WE CALL IT THE SNITCH DORM IS WHAT WE CALL IT. IF
7 YOU GO AROUND THE CORNER AND GO THAT WAY TOWARDS THE
8 DEPARTMENT, YOU'RE GOING TO TELL SOMETHING OR SOMETHING IS
9 NOT GOOD. WELL, IF YOU GOT THREE MEN IN THERE, IT'S LIKE A
10 BIG SOAP OPERA; OKAY? EVERYBODY IS IN THERE JUST TALKING,
11 AND EVEN IF YOU DIDN'T SAY NOTHING, SOMEBODY IS GOING TO MAKE
12 SOMETHING UP AND SAY YOU SAID SOMETHING. THAT'S JUST LIKE
13 WHEN I GET BACK TODAY, I DON'T EVEN KNOW WHAT TO EXPECT.

14 Q. OKAY. BUT YOUR POINT WAS YOU WANT TO BE IN THERE AS
15 SHORT A TIME AS POSSIBLE; IS THAT RIGHT?

16 A. YEAH, OR EITHER MOVE ME TO A DIFFERENT JAIL OR
17 PROSECUTE ME AND SEND ME TO PRISON, BUT I MEAN; DON'T
18 PROSECUTE ME JUST BECAUSE I GOT THE PROSECUTORS MAD AND HIT
19 ME IN THE HEAD WITH THE MAXIMUM ON MY CHARGES. YOU KNOW WHAT
20 I'M SAYING? LOOK AT MY CHARGE. SEE -- YOU KNOW, SEE, YOU
21 KNOW, WHAT -- WHAT REALLY HAPPENED. THE VICTIMS WROTE THE
22 JUDGE A STATEMENT, YOU KNOW, ON BEHALF... I NEED HELP.

23 Q. OKAY.

24 A. BUT ALSO -- I ALSO HAVE TO PAY FOR MY CRIME.

25 MR. LITTLEJOHN: OKAY. THANK YOU, MR. FULLER. NO

1 FURTHER QUESTIONS, YOUR HONOR.

2 MR. MYERS: NO QUESTIONS.

3 THE COURT: THANK YOU.

4 THE WITNESS: ARE THESE MINE, SIR?

5 THE COURT: NO, SIR.

6 OFFICER: NO, YOU HAVE TO LEAVE THAT.

7 THE WITNESS: CAN I ASK YOU A QUESTION, SIR?

8 THE COURT: NO, SIR.

9 THE WITNESS: CAN YOU LET MY LAWYER KNOW I NEED TO
10 TALK TO HIM?

11 OFFICER: HE'S COMING.

12 (MR. FULLER IS EXCUSED FROM THE COURTROOM.)

13 MR. LITTLEJOHN: YOUR HONOR, THAT WOULD BE THE
14 DEFENDANT'S PRESENTATION AT THIS TIME.

15 THE COURT: SOLICITOR, WHAT DO YOU ANTICIPATE IN
16 TERMS OF---

17 MR. LITTLEJOHN: YOUR HONOR, EXCUSE ME. PERHAPS
18 BEFORE WE REST OUR PRESENTATION I SHOULD NOTE FOR THE RECORD
19 THAT WE HAD MADE A REQUEST TO HAVE THE GUNSHOT RESIDUE
20 TESTING DONE ON THE GLOVES THAT ARE IN THE POSSESSION OF THE
21 LEXINGTON COUNTY SHERIFF'S DEPARTMENT AND---

22 THE COURT: WELL, IF I DECIDE -- AS I TOLD Y'ALL IN
23 THE CONVERSATIONS THAT WE HAD, IF I DECIDE TO ORDER THAT
24 TESTING, CERTAINLY THE RECORD WILL BE KEPT OPEN FOR ITS
25 ADMISSION.

1 MR. LITTLEJOHN: ALL RIGHT, SIR. AND YOU'LL PUT ON
2 THE RECORD AT SOME POINT IF YOU DENY THAT REQUEST.

3 THE COURT: YEAH. WE'LL HAVE A DISCUSSION ABOUT IT
4 AT THE END OF THIS HEARING.

5 MR. LITTLEJOHN: ALL RIGHT, SIR. I JUST WANTED TO
6 MAKE SURE WE'RE PRESERVED FOR THE RECORD.

7 THE COURT: ALL RIGHT.

8 MR. MYERS: I'M SORRY?

9 THE COURT: WHAT DO YOU ANTICIPATE IN TERMS OF THE
10 LENGTH OF YOUR PRESENTATION?

11 MR. MYERS: WE PROBABLY COULD BE THROUGH IN ABOUT
12 45, 50 MINUTES.

13 THE COURT: ALL RIGHT. DO YOU WANT TO START NOW OR
14 DO YOU WANT -- DO EITHER OF YOU HAVE ANY PREFERENCE ABOUT
15 WHETHER WE JUST TAKE A -- WE COULD TAKE A SHORT BREAK OR WE
16 COULD TAKE A LUNCH BREAK.

17 MR. MYERS: LET'S TAKE A SHORT BREAK AND SEE IF WE
18 CAN GET ONE UP BEFORE LUNCH, IF YOU DON'T MIND.

19 THE COURT: ALL RIGHT.

20 (WHEREUPON, A SHORT BREAK WAS TAKEN.)

21 THE COURT: BE SEATED, PLEASE. ARE YOU READY?

22 MR. HUBBARD: YES, SIR.

23 THE COURT: ALL RIGHT. GO AHEAD.

24 MR. HUBBARD: THE STATE CALLS TIMOTHY JOHNSTON.

25 TIMOTHY M. JOHNSTON, JR., AFTER BEING DULY

1 SWORN, TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. HUBBARD:

4 Q. MR. JOHNSTON, WILL YOU STATE YOUR FULL NAME FOR THE
5 RECORD?

6 A. TIMOTHY MARK JOHNSTON, JR.

7 Q. DO YOU GO BY A NICKNAME?

8 A. ROCKY.

9 Q. ROCKY?

10 A. (WITNESS NODDED HEAD UP AND DOWN.)

11 Q. I SEE YOU'RE IN PRISON GARB. WHERE ARE YOU STAYING
12 THESE DAYS?

13 A. OVER IN MANNING CORRECTIONAL INSTITUTE.

14 Q. AND WHAT KIND OF TIME ARE YOU SERVING OVER THERE?

15 A. THREE YEARS.

16 Q. ON WHAT CHARGE?

17 A. ON A VIOLATION OF PROBATION.

18 Q. AND WHAT PROBATION? WHAT WAS THE CHARGE OF
19 PROBATION ON?

20 A. C.D.V.

21 Q. LET ME ASK YOU: BACK IN MAY OF THIS YEAR, MAY 1ST
22 TO MAY 7TH, WHERE WERE YOU HOUSED?

23 A. LEXINGTON COUNTY DETENTION CENTER.

24 Q. AND DID YOU HAVE ROOMMATES AT THAT TIME?

25 A. YES, SIR.

1 Q. HOW MANY ROOMMATES DID YOU HAVE?

2 A. TWO ROOMMATES.

3 Q. WHO WERE THOSE ROOMMATES?

4 A. KEVIN FULLER AND...

5 Q. MARCUS THOMPSON?

6 A. YES, SIR, MARCUS THOMPSON.

7 Q. WHEN YOU WERE IN THAT CELL, WHO WAS IN THAT CELL

8 FIRST? YOU? FULLER? THOMPSON? OR HOW DID THAT GO?

9 A. I WAS IN THERE FIRST AND THEN KEVIN FULLER GOT PUT
10 IN THE CELL, AND THEN A FEW DAYS LATER THOMPSON GOT PUT IN.
11 THERE WAS THREE OF US.

12 Q. DID YOU AND MARCUS THOMPSON GET ALONG OKAY?

13 A. YES, SIR.

14 Q. DID YOU AND KEVIN FULLER GET ALONG OKAY?

15 A. YES, SIR.

16 Q. DO YOU RECALL SOMETIME AFTER MARCUS THOMPSON ARRIVED
17 IN THAT CELL HIM TALKING ABOUT HIS CHARGES?

18 A. YES, SIR.

19 Q. NOW, WHEN HE TALKED ABOUT HIS CHARGES, DID HE BRAG
20 IN ANY WAY?

21 A. NO, SIR.

22 Q. WHAT DID HE SAY ABOUT HIS CHARGES?

23 A. HE JUST TOLD ME ONE OF THE -- OR THE STORY THAT HE
24 TOLD ME ABOUT WHAT HAD HAPPENED AND SAID THAT HE WAS ASKING
25 US WHAT HE THOUGHT THEY WAS GOING TO DO TO HIM FOR IT OR OUR

1 OPINION, YOU KNOW.

2 Q. DID HE TELL YOU WHAT HE WAS CHARGED WITH?

3 A. HE SAID MURDER.

4 Q. DID HE SAY HE HAD OTHER CHARGES, TOO?

5 A. NO, SIR. HE SAID HE HAD AN OLD CHARGE. IT WAS A
6 MARIJUANA CHARGE FROM YEARS AGO OR SOMETHING.

7 Q. DID HE SAY HE HAD OTHER CHARGES WITH THAT MURDER
8 CHARGE?

9 A. NO, SIR.

10 Q. OKAY.

11 A. NO, SIR.

12 Q. HIS FOCUS WAS ON THAT MURDER CHARGE?

13 A. YES, SIR.

14 MR. LITTLEJOHN: I CAN'T SEE THE WITNESS, RICK.

15 BY MR. HUBBARD:

16 Q. NOW, WHEN HE TALKED ABOUT HIS CHARGE AND WAS TALKING
17 TO YOU, WAS HE TALKING TO KEVIN FULLER AS WELL?

18 A. YES, SIR.

19 Q. HAD YOU BEEN TO PRISON BEFORE?

20 A. YES, SIR.

21 Q. HAD KEVIN FULLER BEEN TO PRISON BEFORE?

22 A. YES, SIR.

23 Q. DID HE SAY WHETHER HE HAD BEEN TO PRISON BEFORE -
24 MARCUS THOMPSON?

25 A. YES, SIR. HE SAID HE HAD NEVER BEEN TO PRISON.

1 Q. AND WHEN HE WAS TALKING TO YOU ABOUT HIS CHARGES, IN
2 WHAT MANNER WAS HE TALKING?

3 A. AS IN?

4 Q. WAS HE -- WAS HE BRAGGING ABOUT HIS CHARGE OR WAS HE
5 ASKING WHAT Y'ALL THOUGHT HE NEEDED TO DO?

6 A. NO, HE WAS JUST ASKING US WHAT WE THOUGHT WAS GOING
7 TO HAPPEN TO HIM AND WHAT HE NEEDED TO DO.

8 Q. AND DID HE TELL YOU WHAT HAPPENED THAT GOT HIM IN
9 JAIL?

10 A. BASICALLY, YES, SIR. YES, SIR.

11 Q. WHAT DID HE SAY?

12 A. HE JUST SAID THAT -- OUT OF WHAT I CAN REMEMBER, HE
13 SAID THAT THE STORY OF WHAT HAPPENED WAS THAT HE HAD DROPPED
14 KEVIN OFF -- KEVIN MERCER OFF OVER AT AN APARTMENT COMPLEX BY
15 RAINTREE AND SAID THAT KEVIN USED A CUT OR SOMETHING OR
16 ANOTHER TO GO THROUGH AND GET THE TRUCK.. AND HE SAID -- AND
17 THEN HE SAID THE GUY GOT KILLED, BUT THE GIRL WAS ON THE
18 PHONE -- THAT THE GUY'S GIRLFRIEND WAS ON THE TELEPHONE AND
19 HEARD EVERYTHING GO DOWN AND HEARD THERE WAS TWO CAR DOORS
20 SHUT, AND THAT'S WHY THEY'RE TRYING TO SAY THAT HE WAS ON THE
21 SITE ALSO, BUT OUT OF WHAT HE TOLD ME, HE WASN'T. HE WAS AT
22 THE OTHER APARTMENT COMPLEX.

23 Q. LET ME BACK YOU UP A LITTLE BIT IF I CAN.

24 A. OKAY.

25 Q. IS THIS THE FIRST TIME HE TALKED TO YOU ABOUT THIS?

1 A. YES.

2 Q. AND WHEN HE TALKED TO YOU ABOUT DROPPING KEVIN
3 MERCER OFF AND KEVIN GOES INTO AN ADJOINING COMPLEX NEXT TO
4 RAINTREE -- IS THAT WHAT HE SAID?

5 A. YES, SIR.

6 Q. AND KEVIN MERCER GOES DOWN A CUT TO RAINTREE.

7 A. (WITNESS NODDED HEAD UP AND DOWN.)

8 Q. DID HE TELL YOU WHAT HE DID AT THAT TIME - MARCUS
9 THOMPSON? WHAT DID HE DO?

10 A. HE SAID HE WAITED FOR A FEW MINUTES AND ENDED UP
11 DRIVING TO THE MOTEL.

12 Q. DID HE SAY HE WAS THERE WHEN THE SHOOTING TOOK
13 PLACE?

14 A. NO, SIR.

15 Q. WHO DID HE SAY DID THAT SHOOTING?

16 A. HE SAID KEVIN MERCER DID.

17 Q. OKAY. AND ALL THIS TALK ABOUT WHAT HAPPENED AT THE
18 SCENE, THE CELL PHONE AND THIS GIRLFRIEND AND SOME OF THESE
19 OTHER THINGS YOU MENTIONED, DID HE TELL YOU -- WHERE DID HE
20 TELL YOU HE GOT THAT INFORMATION?

21 A. HE SAID THAT'S WHAT IT SAYS IN THE REPORTS.

22 Q. IN HIS DISCOVERY ON HIS CHARGES?

23 A. YES, SIR.

24 Q. OKAY.

25 A. YES, SIR.

1 Q. BUT HE SAYS HE WASN'T THERE.

2 A. CORRECT.

3 Q. ALL RIGHT. NOW, WHEN HE TOLD YOU THIS, WAS KEVIN
4 FULLER THERE AT THE SAME TIME?

5 A. YES, SIR.

6 Q. NOW, DID HE HAVE ANOTHER OCCASION TO TALK ABOUT
7 THIS?

8 A. YES, SIR, ONE OTHER TIME. HE TOLD ME THE STORY
9 AGAIN, BUT KEVIN WAS ASLEEP THAT NIGHT WHEN HE TOLD IT. IT
10 WAS LATE. I MEAN, IT WAS LIKE PROBABLY ONE OR TWO O'CLOCK IN
11 THE MORNING. WE WAS UP. HE SEEMED KIND OF WORRIED ABOUT IT,
12 AND HE TOLD ME THE STORY AGAIN, BUT THE ONLY THING THAT
13 DIDN'T MATCH ON THAT STORY WAS THE FIRST TIME HE TOLD ME THE
14 STORY HE SAID THAT HE MET KEVIN BACK AT THE MOTEL. HE WAS
15 DRIVING THE CAR HE DROPPED KEVIN OFF WITH TO BEGIN WITH. THE
16 SECOND TIME HE SAID THAT HE WAS IN THE TRUCK ITSELF THAT GOT
17 STOLEN.

18 Q. WHEN THEY GOT STOPPED?

19 A. RIGHT. AND I ASKED HIM ABOUT IT, BUT HE DIDN'T --
20 HE DIDN'T REALLY COMMENT ON IT. I MEAN, HE JUST LEFT IT AT
21 THAT.

22 Q. SO THAT DIDN'T MAKE SENSE TO YOU.

23 A. RIGHT. THAT'S ONE OF THOSE THINGS THAT DIDN'T MATCH
24 WITH WHAT HE TOLD ME.

25 Q. THE FIRST TIME HE TALKS TO YOU HE SAYS HE MEETS

1 KEVIN MERCER AT THE HOTEL. THE SECOND TIME THEY GET STOPPED
2 ON THE SIDE OF THE ROAD IN THE STOLEN VEHICLE.

3 A. RIGHT. RIGHT. PULLING INTO THE MOTEL.

4 Q. DID Y'ALL EVER TALK ABOUT WHAT WAS IN THE
5 NEWSPAPERS?

6 A. NO, SIR.

7 Q. WERE THERE ANY NEWSPAPERS IN YOUR CELL?

8 A. NO, SIR.

9 Q. WHERE DID ALL THE INFORMATION YOU GOT ABOUT THIS
10 CASE COME FROM?

11 A. FROM KEVIN -- I MEAN THOMPSON.

12 Q. OKAY. AND, AGAIN, DID HE EVER MAKE RAP SONGS ABOUT
13 WHAT WAS GOING ON?

14 A. NO, SIR.

15 Q. NOW, LET ME ASK YOU THIS. LET'S TALK ABOUT KEVIN
16 FULLER A LITTLE BIT. AGAIN, YOU AND KEVIN FULLER, Y'ALL GOT
17 ALONG JUST FINE.

18 A. YES, SIR. IN FACT, THAT'S WHY THEY HOUSED ME WITH
19 HIM. WE ACTUALLY ASKED THE SERGEANT TO HOUSE US TOGETHER
20 BECAUSE WE WAS FRIENDS IN THERE, YOU KNOW, SO...

21 Q. SO YOU DON'T HAVE A BEEF AGAINST MR. FULLER.

22 A. NO, SIR.

23 Q. NOW, WHEN YOU'RE IN WITH MR. FULLER AND MR. THOMPSON
24 AND MR. THOMPSON TELLS YOU THIS STORY, DOES MR. FULLER EVER
25 COME TO YOU AND ASK YOU ABOUT THIS?

1 A. YEAH, HE ASKED ME AT THE PHONE. WE WAS ON THE PHONE
2 BECAUSE THE PHONE WAS ON A COLUMN. THERE'S FOUR OF THEM NOT
3 EVEN A FOOT APART. WHEN WE COME OUT ON REC, I USUALLY GO TO
4 THE PHONE AND SO DID KEVIN. AND WHEN THOMPSON WASN'T AROUND,
5 KEVIN ASKED ME IF HE THOUGHT---

6 MR. LITTLEJOHN: YOUR HONOR, I OBJECT ON THE GROUNDS
7 OF HEARSAY. THIS ISN'T A STATEMENT WHICH MR. FULLER WAS
8 ASKED ABOUT. HE DIDN'T DENY MAKING THE STATEMENT.

9 MR. MYERS: YES, HE DID. I ASKED HIM DID HE TALK
10 WITH ROCKY ABOUT IT. COULD THEY USE THIS TO HIS ADVANTAGE?

11 MR. LITTLEJOHN: YOUR HONOR, I UNDERSTAND ONE -- ONE
12 SOLICITOR IS HANDLING ONE WITNESS. ONE IS HANDLING ANOTHER.

13 MR. HUBBARD: I'LL RESPOND IF YOUR HONOR WISHES ME
14 TO.

15 THE COURT: I DON'T MIND AS -- AS Y'ALL RECALL FROM
16 THE ENTIRE TRIAL, I DON'T MIND GIVING ALL COUNSEL SOME
17 FLEXIBILITY IN ARGUING POINTS OF LAW. LET ME HEAR -- LET ME
18 HEAR WHOEVER IS GOING TO ARGUE FROM THE SOLICITOR.

19 MR. HUBBARD: YOUR HONOR, I'LL JUST SAY HE WAS --
20 MR. THOMPSON -- MR. FULLER WAS ASKED ON CROSS BY MR. MYERS
21 ABOUT TALKING TO ROCKY, MR. JOHNSTON, ABOUT HOW HE COULD USE
22 THIS STORY THAT THOMPSON TOLD HIM TO HIS BENEFIT. I'M ASKING
23 HIM THAT BECAUSE HE DENIED IT. NOW I GET TO ASK THIS
24 WITNESS.

25 THE COURT: I'M GOING TO HAVE TO -- IN ORDER -- I

1 THINK I KNOW WHAT MY RULING IS GOING TO BE, BUT I HAVE TO
2 HEAR THE STATEMENT BEFORE I CAN RULE. I HAVE TO HEAR WHAT
3 THE ANSWER TO THE QUESTION IS, AND THEN I'LL RULE.

4 MR. LITTLEJOHN: ALL RIGHT, SIR.

5 THE COURT: I MEAN, I REALIZE IT BEING NON-JURY
6 THAT'S SORT OF -- THAT SEEMS SORT OF UNUSUAL THAT IT WOULD---

7 MR. LITTLEJOHN: OH, I UNDERSTAND.

8 THE COURT: BUT THAT'S THE ONLY WAY I KNOW TO DO IT.

9 MR. LITTLEJOHN: I UNDERSTAND. MY ONLY OBJECTION
10 WAS IF THEY ASKED FULLER A GENERAL QUESTION AND THEN THEY'RE
11 COMING IN HERE ASKING MORE SPECIFICS WITHOUT GIVING FULLER
12 THE OPPORTUNITY TO RESPOND TO THAT SPECIFIC, I DON'T THINK
13 THAT'S PROPER IS MY -- THAT'S MY OBJECTION. I UNDERSTAND THE
14 COURT'S RULING.

15 THE COURT: WELL -- AND I'M GOING TO SAY THAT I
16 DON'T THINK IT'S HEARSAY IN THE FIRST PLACE, I DON'T THINK,
17 BECAUSE IT'S NOT OFFERED TO PROVE THE TRUTH OF WHAT THE
18 STATEMENT IS, I BELIEVE. IT'S OFFERED TO PROVE THAT FULLER
19 HAD IT IN HIS MIND A MOTIVE TO MAKE THE -- TO SAY WHAT
20 SUPPOSEDLY MARCUS THOMPSON SAID. AND SO WHETHER -- IF THE
21 STATEMENT RELATES TO WHAT FULLER WANTED TO GET OR HOPED TO
22 GET IN THE WAY OF A DEAL, THEN IT WOULDN'T BE OFFERED FOR THE
23 TRUTH. IT WOULD BE SIMPLY OFFERED TO PROVE THAT IT WAS SAID,
24 AND IN THAT EVENT IT WOULD NOT BE HEARSAY. BUT IN EITHER
25 EVENT, I'VE GOT TO HEAR THE STATEMENT SO I KNOW WHAT IT IS

1 AND THEN -- AND THEN IF IT IS OFFERED TO PROVE THE TRUTH,
2 THEN I'VE GOT TO FIGURE OUT WHETHER OR NOT IT FITS IN AS A
3 PRIOR INCONSISTENT STATEMENT, AS EXTRINSIC EVIDENCE OF A
4 PRIOR INCONSISTENT STATEMENT.

5 MR. LITTLEJOHN: YES, SIR.

6 BY MR. HUBBARD:

7 Q. MR. JOHNSTON, LET ME ASK YOU THIS AGAIN. WHEN
8 THOMPSON TALKS TO YOU, YOU AND FULLER -- YOU ALL THREE ARE IN
9 YOUR CELL.

10 A. YES, SIR.

11 Q. AND NOW YOU SAY THERE'S A TIME WHEN YOU GET ON REC?
12 RECREATION?

13 A. YES, SIR.

14 Q. YOU'RE USING THE PHONE. WHO ELSE IS USING THE PHONE
15 AT THAT TIME?

16 A. KEVIN FULLER IS ALSO USING THE PHONE RIGHT BESIDE
17 ME.

18 Q. RIGHT BESIDE YOU. WHAT, IF ANYTHING, DID KEVIN
19 FULLER SAY TO YOU ABOUT WHAT MARCUS THOMPSON HAD SAID TO BOTH
20 OF YOU?

21 A. KEVIN ASKED ME IF OUT OF WHAT MARCUS TOLD US COULD
22 HE USE IT TO HIS ADVANTAGE TO HAVE HIS CHARGES DISMISSED OR
23 POSSIBLY GET PROBATION RATHER THAN GO TO PRISON. I TOLD HIM
24 I WASN'T SURE. I SAID, "YOU'D PROBABLY BE DISCREDITED
25 BECAUSE YOU'RE LOCKED UP WITH CHARGES AND THEY'D PROBABLY

1 LOOK AT YOU AND THINK YOU WAS TRYING TO GET YOUR CHARGES
2 DROPPED." THAT'S EXACTLY WHAT I TOLD HIM.

3 THE COURT: ALL RIGHT. AS TO THAT STATEMENT BY
4 KEVIN FULLER, I OVERRULE THE OBJECTION AS IT NOT BEING
5 HEARSAY IN THE FIRST PLACE BECAUSE IT'S NOT OFFERED TO PROVE
6 THE TRUTH OF THE MATTER ASSERTED.

7 BY MR. HUBBARD:

8 Q. ALL RIGHT. THEN YOU SAID THERE WAS A SECOND
9 STATEMENT THAT THOMAS (SIC) GAVE TO YOU OR HE TALKED TO YOU A
10 SECOND TIME.

11 A. YES, SIR.

12 Q. WHERE WERE Y'ALL AT THAT POINT?

13 A. IN THE ROOM. IN OUR CELL.

14 Q. AND YOU TALK ABOUT THOMPSON TALKING TO YOU. COULD
15 YOU TELL WHO HE WAS CLOSER TO? TO YOU OR TO KEVIN FULLER?

16 A. I'D SAY TO ME.

17 Q. WHY WOULD YOU SAY THAT?

18 A. TO BE HONEST WITH YOU, I DON'T REALLY HAVE A REASON,
19 BUT I JUST GOT THE FEELING THAT HE WAS -- HE CONFIDED A
20 LITTLE MORE IN ME THAN HE DID KEVIN. I MEAN, FOR ONE THING,
21 WE WAS ALL TALKING THAT NIGHT AND HE WAITED 'TIL KEVIN WAS
22 ASLEEP AND BROUGHT THE WHOLE THING BACK UP AGAIN.

23 Q. OKAY.

24 A. YOU KNOW, AND RE-TOLD IT TO ME AGAIN.

25 Q. IN THAT SECOND STATEMENT OR THE SECOND TIME HE

1 TALKED TO YOU, DID HE SAY ANYTHING AT ALL ABOUT PULLING THAT
2 TRIGGER?

3 A. NO, SIR.

4 Q. IS THIS THE FIRST DAY THAT YOU HAVE ACTUALLY
5 UNDERSTOOD WHAT WAS GOING ON IN THIS CASE WITH THIS HEARING?

6 A. YES, SIR.

7 Q. PRIOR TO THIS WHEN YOU TALKED WITH ME, WHO WAS WITH
8 YOU?

9 A. WHAT DO YOU MEAN WHO WAS WITH ME?

10 Q. WERE YOU -- DID YOU HAVE AN ATTORNEY WITH YOU?

11 A. YES, SIR.

12 Q. OKAY. AND WAS OFFICER ROY MEDFORD ALSO THERE?

13 A. YES, SIR.

14 Q. DID WE EVER TALK ABOUT ANY PENDING CHARGES YOU HAVE?

15 A. NO, SIR.

16 Q. NOW, DID MARCUS THOMPSON EVER MENTION GLOVES?

17 A. YES, SIR, BECAUSE I---

18 Q. WHAT DID HE SAY ABOUT THOSE?

19 A. WELL, I HAD ASKED HIM -- BECAUSE HE TOLD ME A STORY.
20 I ASKED HIM -- I SAID, "DO THEY HAVE ANY MORE EVIDENCE ON
21 YOU?" YOU KNOW, BECAUSE HE WAS BASICALLY ASKING ME WHAT I
22 THOUGHT WAS GOING TO HAPPEN TO HIM, YOU KNOW. THEN HE TOLD
23 ME -- HE SAID, "WELL, THEY HAD SOME GLOVES THEY GOT OFF OF
24 ME." I SAID, "WHAT WAS YOU DOING WITH GLOVES, MAN?" HE SAID
25 THAT WAS FROM HIS WORK, FROM HIS JOB. HE SAID HE STILL HAD

1 THEM ON HIM.

2 Q. DID HE SAY WHAT ELSE THEY FOUND ON HIM?

3 A. YES, SIR, SOME BULLETS.

4 Q. WHAT DID HE SAY ABOUT THE PISTOL?

5 A. SIR, HE REALLY DIDN'T -- HE DIDN'T SAY ANYTHING
6 ABOUT THE PISTOL.

7 Q. DID HE EVER SAY HE USED IT?

8 A. NO, SIR.

9 Q. DID HE EVER TALK ABOUT TARGET PRACTICE?

10 A. NO, SIR.

11 Q. DID HE EVER GO AROUND AND EVER MAKE THIS COMMENT:

12 "I, MARCUS ANTONIO THOMPSON, AM A KILLER BOY" OR ANYTHING TO
13 THAT EFFECT?

14 A. NO, SIR.

15 Q. DID HE EVER BRAG IN ANY WAY?

16 A. NO, SIR.

17 Q. IF YOU WOULD GIVE ME JUST A MINUTE, MR. JOHNSTON.

18 MR. JOHNSTON---

19 A. YES, SIR.

20 Q. ---IF YOU WOULD ANSWER ANY QUESTIONS THE DEFENSE
21 MIGHT HAVE FOR YOU.

22 CROSS-EXAMINATION

23 BY MR. LITTLEJOHN:

24 Q. MR. JOHNSTON, I BELIEVE YOU INDICATED TO MR. HUBBARD
25 YOU'RE DOING A THREE-YEAR SENTENCE FOR A PROBATION VIOLATION?

1 A. YES, SIR.

2 Q. OKAY. AND YOU'VE BEEN CONVICTED OF OTHER VIOLATIONS
3 IN THE PAST, HAVE YOU NOT?

4 A. YES, SIR.

5 Q. WHAT ALL HAVE YOU BEEN CONVICTED OF SO I DON'T HAVE
6 TO GO DOWN THIS RAP SHEET?

7 A. C.D.V.'S, SHOPLIFTING, FAILURE TO STOP, A COUPLE OF
8 D.U.S.'S AS FAR AS CONVICTIONS GO.

9 Q. OKAY. CRIMINAL DOMESTIC VIOLENCE?

10 A. YES, SIR.

11 Q. POSSESSION OF MARIJUANA?

12 A. NO, SIR, NEVER HAD ANY DRUG CHARGES, SIR.

13 Q. YOU NEVER HAD A DRUG CHARGE IN 2003?

14 A. NO, SIR---

15 Q. OKAY.

16 A. ---I'VE NEVER HAD ANY DRUG CHARGES.

17 Q. THE RAP SHEET MUST BE WRONG. NOW, PRESENTLY YOU
18 HAVE CHARGES PENDING IN LEXINGTON COUNTY, DO YOU NOT?

19 A. YES, SIR.

20 Q. AND YOU'VE GOT A BURGLARY FIRST DEGREE?

21 A. YES, SIR.

22 Q. FOR WHICH YOU COULD RECEIVE UP TO A LIFE SENTENCE?

23 A. YES, SIR.

24 Q. YOU'VE GOT A BURGLARY SECOND DEGREE WHICH YOU COULD
25 RECEIVE UP TO A 15-YEAR SENTENCE?

1 A. YES, SIR.

2 Q. YOU'VE GOT A C.D.V. THIRD, THREE COUNTS?

3 A. YES, SIR.

4 Q. WHAT ARE YOU LOOKING AT ON THOSE?

5 A. TO BE HONEST WITH YOU, I'M NOT SURE. I THINK---

6 Q. ARE THEY AGGRAVATED?

7 A. SIR?

8 Q. ARE THEY AGGRAVATED C.D.V.'S?

9 A. NO, SIR.

10 Q. OKAY. YOU'VE ALSO GOT A PROBATION VIOLATION?

11 A. YES, SIR. I'M SERVING MY TIME ON THAT NOW.

12 Q. OKAY. AND ARE ALL THOSE CHARGES BEING HANDLED BY
13 THE LEXINGTON COUNTY SOLICITOR'S OFFICE.

14 A. YES, SIR.

15 Q. THEY'RE THE ONES PROSECUTING YOU.

16 A. YES, SIR.

17 Q. AND YOU'RE LOOKING AT UP TO A LIFE SENTENCE.

18 A. YES, SIR.

19 Q. OKAY. AND, MR. JOHNSTON, ARE YOU LOOKING FOR SOME
20 HELP ON THOSE CHARGES?

21 A. NO, SIR. THEY'VE ALREADY BEEN THROWN OUT ONE TIME
22 BY JONATHAN HARLING, A SOLICITOR, IN 2003---

23 Q. UH-HUH.

24 A. ---BUT THEY'RE SHOWING STILL PENDING IN THE
25 COMPUTER. HE NO LONGER WORKS FOR THIS AGENCY. JUDGE

1 WESTBROOK GAVE A \$5,000 P.R. BOND ON THEM---

2 Q. UH-HUH.

3 A. ---BECAUSE THE YOUNG LADY, MS. DOVE, SHOWED UP IN
4 COURT STATING THAT I HAD PERMISSION TO GO IN THE HOUSE AND
5 NEVER PUT MY HANDS ON NOBODY. THEY'RE JUST TRYING TO FIND
6 THE RECORDS OF THEM BEING DISMISSED; THAT'S ALL.

7 Q. OKAY. SO THE CHARGES ARE STILL PENDING.

8 A. YES, SIR, THEY'RE STILL SHOWING PENDING.

9 Q. AND THEY'RE BEING HELD BY THE SOLICITOR'S OFFICE.

10 A. YES, SIR.

11 Q. THEY'RE STILL OVER YOUR HEAD.

12 A. YES, SIR, BUT THERE'S NOTHING -- I DON'T HAVE
13 ANYTHING TO WORRY ABOUT ON THEM.

14 Q. YOU'RE NOT WORRIED ABOUT THEM BECAUSE THEY KNOW
15 ABOUT IT; RIGHT? THEY KNOW WHAT DISPOSITION IS GOING TO
16 HAPPEN TO YOU?

17 A. NO, SIR.

18 Q. BUT YOU'RE NOT WORRIED ABOUT IT.

19 A. THE SOLICITOR'S OFFICE IS SAYING THEY'RE STILL
20 PENDING. I'M TRYING TO FIGHT AND SHOW THAT THEY'RE NOT.

21 Q. UH-HUH. BUT YOU'RE FIGHTING THEM OVER IT.

22 A. CORRECT.

23 Q. AND YOU HOPE THEY DISMISS THOSE CHARGES, DON'T YOU?

24 A. JUST AS SOON AS THEY FIND THE PAPERWORK ON THEM,
25 THEY SHOULD.

1 Q. OKAY. SO YOU WON'T BE LOOKING AT A LIFE SENTENCE.

2 A. I SHOULDN'T, NO, SIR.

3 Q. NOW, MR. JOHNSTON, FROM WHAT I UNDERSTOOD FROM YOUR
4 TESTIMONY, MARCUS THOMPSON GAVE YOU A LIMITED AMOUNT OF
5 DETAILS ABOUT WHAT HAPPENED---

6 A. YES, SIR.

7 Q. ---WHEN THE SERGEANT GOT KILLED?

8 A. YES, SIR.

9 Q. HE RECOUNTED TO YOU SOME THINGS THAT WERE IN THE
10 DISCOVERY MATERIAL?

11 A. YES, SIR.

12 Q. FOR INSTANCE, THERE WAS A WITNESS THAT HEARD TWO
13 DOORS SLAM.

14 A. YES, SIR.

15 Q. HE RELATED THAT TO YOU.

16 A. YES, SIR.

17 Q. THAT WAS IN THE DISCOVERY MATERIAL, WASN'T IT?

18 A. I -- YES, SIR. HE DIDN'T HAVE THE DISCOVERY WITH
19 HIM; HE WAS JUST TELLING ME.

20 Q. OKAY. AND HE TOLD YOU THAT SOMEBODY WENT DOWN
21 THROUGH A CUT AND THEN HE MET UP WITH KEVIN MERCER AND THEY
22 GOT ARRESTED DOWN THE ROAD?

23 A. YES, SIR.

24 Q. BASICALLY IS THAT WHAT HE TOLD YOU?

25 A. BASICALLY, YES, SIR.

1 Q. HE DIDN'T GO INTO DETAILS ABOUT WHO PULLED THE
2 TRIGGER OR WHO SHOT WHAT OR WHO HAD THE GUN OR ANYTHING LIKE
3 THAT.

4 A. YES, SIR. HE SAID, WELL, KEVIN HAD THE GUN. HE
5 SAID---

6 Q. SAID KEVIN HAD THE GUN.

7 A. ---HE DROPPED KEVIN OFF. KEVIN WENT DOWN THE PATH
8 TO GET THE TRUCK, AND HE SAID HE SHOWED UP AT THE MOTEL. THE
9 FIRST -- THE FIRST TIME HE TOLD ME THE STORY HE SAID HE
10 SHOWED UP AT THE MOTEL. HE PULLED UP IN THE CAR AND KEVIN
11 PULLED UP IN THE TRUCK, AND THE POLICE PULLED UP.

12 Q. OKAY. DID HE TELL YOU HOW HE KNEW TO GO TO THE
13 MOTEL?

14 A. THAT WAS THE PLAN OR WHATEVER I GUESS, YOU KNOW.

15 Q. DO YOU RECALL THAT SPECIFICALLY?

16 A. SIR?

17 Q. DO YOU RECALL THAT SPECIFICALLY?

18 A. YES, SIR.

19 Q. OKAY. DO YOU RECALL WHEN HE MADE THESE STATEMENTS
20 TO YOU?

21 A. I'D BE LYING IF I SAID ANY CERTAIN DATE. I'M NOT
22 POSITIVE; NO, SIR.

23 Q. HARD TO REMEMBER THOSE DATES, ISN'T IT?

24 A. YES, SIR.

25 Q. OKAY. AND THOMPSON INDICATED TO YOU THAT HE HAD

1 SOME GLOVES?

2 A. YES, SIR.

3 Q. AND HE TOLD YOU THAT THOSE WERE WORK GLOVES?

4 A. YES, SIR.

5 Q. WHERE WAS HE WORKING? DID HE TELL YOU THAT?

6 A. HE DIDN'T SAY.

7 Q. HE DIDN'T SAY WHERE HE WAS WORKING.

8 A. NO, SIR.

9 Q. HE DIDN'T TELL YOU WHY HE NEEDED THOSE GLOVES
10 INCIDENT TO HIS WORK, DID HE?

11 A. NO, SIR.

12 Q. OKAY. DO YOU KNOW IF HE EVER TOLD ANYBODY ELSE THAT
13 THOSE GLOVES WERE FOR WORK PURPOSES?

14 A. KEVIN. KEVIN FULLER.

15 Q. KEVIN FULLER.

16 A. I MEAN, WE WAS IN THE ROOM TOGETHER WHEN HE WAS
17 TELLING US---

18 Q. OKAY.

19 A. SO, THEREFORE, YEAH.

20 Q. OF COURSE, Y'ALL WEREN'T IN THE ROOM 24 HOURS A DAY,
21 WERE YOU?

22 A. NO, SIR.

23 Q. YOU GOT OUT IN THE -- IN THE -- IN THE REC AREA?

24 A. YES, SIR.

25 Q. AND THAT'S A COUPLE OF TIMES A DAY?

1 A. YES, SIR.

2 Q. OKAY. WHEN YOU'RE OUT IN THE REC AREA, GUYS GO OUT
3 INTO THE OUTSIDE AND THEY GO INTO ALSO THE BIG COMMON AREA,
4 DO THEY NOT?

5 A. YES, SIR...

6 Q. THE CELLS ARE OPEN DURING THAT TIME?

7 A. NO, SIR.

8 Q. THEY'RE CLOSED. YOU CAN'T GO BACK IN YOUR CELL?

9 A. YOU CAN, BUT YOU HAVE TO HAVE THE OFFICER TO OPEN
10 THEM.

11 Q. OKAY. BUT THE OFFICER WILL LET YOU GO BACK IN
12 THERE..

13 A. YES, SIR.

14 Q. OKAY. DURING THOSE PERIODS OF TIME, YOU'RE TALKING
15 TO OTHER INMATES IN THERE?

16 A. YES, SIR.

17 Q. YOU HAD OTHER FRIENDS?

18 A. YES, SIR.

19 Q. MADE FRIENDS WHILE YOU WERE IN THERE?

20 A. RIGHT. YES, SIR.

21 Q. OKAY. YOU WEREN'T THERE FOR EVERY CONVERSATION
22 BETWEEN MARCUS THOMPSON AND KEVIN FULLER, WERE YOU?

23 A. I CAN'T RIGHTFULLY SAY, YES, I WAS, YOU KNOW,
24 BECAUSE I'M NOT SURE.

25 Q. OF COURSE YOU CAN'T.

1 A. AS FAR AS I KNOW, THEY DIDN'T ASSOCIATE OUT ON REC.

2 Q. AS FAR AS YOU KNOW.

3 A. YES, SIR. KEVIN AND -- KEVIN AND THOMPSON DIDN'T
4 ASSOCIATE OUT ON REC. ME AND KEVIN HUNG OUT TOGETHER ON REC.

5 Q. AND YOU SAY YOU THINK YOU WERE CLOSER TO MARCUS
6 THOMPSON THAN KEVIN FULLER, BUT YOU DON'T HAVE ANY REASON TO
7 BELIEVE THAT.

8 A. THE ONLY REASON THAT MAKES ME BELIEVE THAT IS HE
9 CONFIDED IN ME MORE THAN HE DID KEVIN.

10 Q. ALL RIGHT. IF HE CONFIDED IN KEVIN ON SOMETHING,
11 HOW WOULD YOU KNOW THAT?

12 A. I GUESS I WOULDN'T IF I WOULDN'T HAVE BEEN AROUND.

13 Q. OKAY.

14 A. BUT I WAS ALWAYS AROUND.

15 Q. YOU WERE ALWAYS AROUND. YOU WEREN'T EVER ON THE REC
16 YARD BY YOURSELF WITH OTHER PEOPLE?

17 A. NO. ME AND KEVIN HUNG OUT LIKE THAT---

18 Q. UH-HUH.

19 A. ---ON REC.

20 Q. Y'ALL ARE LIKE SIAMESE TWINS.

21 A. BASICALLY, YES, SIR.

22 Q. UH-HUH. AND, MR. JOHNSTON, IT'S YOUR HOPE AND
23 DESIRE AND WISH THAT YOUR BURGLARY FIRST CHARGE AND ALL YOUR
24 OTHER CHARGES GO AWAY WHEN THE SOLICITOR DISMISSES THEM.
25 ISN'T THAT RIGHT?

1 A. JUST THE BURGLARY FIRST.

2 Q. JUST THE BURGLARY FIRST. YOU WANT TO TAKE THE OTHER
3 CHARGES?

4 A. YES, SIR. I'M GOING TO PLEAD TO THEM.

5 Q. SO YOU GOT A 15-YEAR BURGLARY SECOND HANGING OVER
6 YOUR HEAD.

7 A. YES, SIR.

8 Q. THAT YOU'RE GOING TO PLEAD TO.

9 A. YES, SIR.

10 Q. OKAY. AND THE SOLICITOR'S OFFICE IS HANDLING THAT.

11 A. MY LAWYER IS HANDLING IT BASICALLY.

12 Q. OKAY.

13 A. BUT, YES, SIR, THE SOLICITOR'S OFFICE---

14 Q. THE SOLICITOR'S OFFICE IS PROSECUTING YOU, AREN'T
15 THEY?

16 A. CORRECT.

17 Q. AND THEY CAN MAKE RECOMMENDATIONS; RIGHT?

18 A. YES, SIR.

19 Q. AND THEY CAN DO PLEA AGREEMENTS.

20 A. YES.

21 Q. RIGHT? AND ALL OF THOSE ARE GOING TO AFFECT YOUR
22 FUTURE; ISN'T THAT RIGHT?

23 A. YES, SIR.

24 MR. LITTLEJOHN: NOTHING FURTHER, YOUR HONOR.

25 MR. HUBBARD: NOTHING FURTHER.

1 THE COURT: ALL RIGHT. TAKE HIM DOWN.

2 (MR. JOHNSTON WAS EXCUSED FROM THE COURTROOM.)

3 MR. MYERS: CAN WE TAKE A LUNCH BREAK AT THIS TIME
4 NOW, YOUR HONOR?

5 THE COURT: YES, SIR. WE'LL START BACK AT 2:00.

6 MR. LITTLEJOHN: YOUR HONOR, COULD WE GET A ROUGH
7 IDEA HOW LONG THE STATE'S GOING TO TAKE JUST FOR---

8 MR. MYERS: TWENTY MINUTES.

9 MR. LITTLEJOHN: ---SCHEDULING PURPOSES? ALL RIGHT.

10 (WHEREUPON, A LUNCH BREAK WAS TAKEN.)

11 THE COURT: BE SEATED, PLEASE.

12 MR. MYERS: YOUR HONOR, THE ONLY OTHER THING THE
13 STATE HAS AT THIS TIME IS WE'D LIKE TO OFFER INTO EVIDENCE
14 TRUE CERTIFIED COPIES FROM THE CLERK'S OFFICE ON THE GUILTY
15 PLEAS OF MARCUS ANTONIO THOMPSON, THAT THOSE PLEAS AND
16 SENTENCES DIDN'T OCCUR UNTIL JUNE 20TH, 2006.

17 THE COURT: ALL RIGHT. ANY OBJECTION?

18 MR. LITTLEJOHN: NO, YOUR HONOR.

19 THE COURT: ALL RIGHT. THEY'RE ADMITTED.

20 (STATE'S EXHIBITS 5 AND 6 WERE RECEIVED IN
21 EVIDENCE.)

22 MR. MYERS: YOUR HONOR, THAT'S ALL THE STATE WOULD
23 HAVE AT THIS TIME, SIR.

24 THE COURT: ANY REPLY?

25 MS. KIMBROUGH: NONE, YOUR HONOR.

1 THE COURT: DOES EITHER SIDE WISH TO MAKE ANY
2 ARGUMENT?

3 MR. LITTLEJOHN: YOUR HONOR, I THINK BRIEFLY IF MS.
4 KIMBROUGH COULD ADDRESS THE COURT FIRST.

5 THE COURT: CERTAINLY.

6 MS. KIMBROUGH: THANK YOU, YOUR HONOR. I'D JUST
7 LIKE TO BRIEFLY RECAP WHAT WE BELIEVE THE STANDARD IS THAT
8 MR. MERCER HAS TO MEET TODAY. AS DISCUSSED, I DON'T -- I
9 DON'T THINK THERE'S ANY QUESTION THAT THIS IS AFTER-
10 DISCOVERED EVIDENCE, BUT REALLY THE ONLY QUESTION IS,
11 ASSUMING THAT THE NEW EVIDENCE IN THE FORM OF THAT TESTIMONY
12 FROM KEVIN FULLER -- ASSUMING THAT THAT EVIDENCE WAS CREDITED
13 BY THE JURY, IS IT LIKELY THAT THE RESULT OF A NEW TRIAL
14 WOULD BE DIFFERENT? AND WE CERTAINLY THINK THAT IT IS ON
15 BOTH AS GUILT OR INNOCENCE AS WELL AS SENTENCING. IF THE
16 JURY CREDITS MR. FULLER AS TELLING THE TRUTH AND BELIEVES
17 THAT THE STATEMENTS AGAINST INTEREST WERE MADE BY MARCUS
18 THOMPSON, THEY COULD EASILY HAVE ACQUITTED HIM FOR THE
19 MURDER. CERTAINLY HE MIGHT HAVE BEEN CONVICTED OF BEING AN
20 ACCESSORY AFTER THE FACT OR BEING SOMEHOW CONNECTED WITH A
21 CARJACKING, BUT IF KEVIN FULLER'S STATEMENTS AND TESTIMONY
22 WERE CREDITED, WE CERTAINLY BELIEVE THAT THAT WOULD HAVE A
23 DRAMATIC IMPACT ON THE JURY'S DETERMINATION OF HIS GUILT OR
24 INNOCENCE.

25 FURTHERMORE, I WOULD -- YOU KNOW, I WOULD POINT OUT

1 THAT IN SENTENCING, GIVEN THE CHARGE THAT WE GOT AT TRIAL, IF
2 THE JURY CREDITED THIS TESTIMONY AS BEING ACCURATE WITH MR.
3 THOMPSON AS THE SHOOTER RATHER THAN MR. MERCER, KEVIN MERCER
4 WOULD HAVE BEEN INELIGIBLE FOR THE DEATH PENALTY BY VIRTUE OF
5 THE CHARGE THAT WAS GIVEN. I MEAN, THEY COULD NOT HAVE
6 SENTENCED HIM TO DEATH. AND SO, YOUR HONOR, WE BELIEVE THAT
7 INsofar AS THE ONLY REAL PRONG THAT'S UNDER DISPUTE, WE
8 BELIEVE WE'VE MET IT, AND, YOUR HONOR, RESPECTFULLY WE WOULD
9 REQUEST THAT A NEW TRIAL BE GRANTED AND JUST -- AGAIN, JUST
10 BRIEFLY TOUCH UPON THE DECISION IN HOLMES VERSUS SOUTH
11 CAROLINA. I'D BE HAPPY TO PROVIDE A COPY TO THE COURT
12 ALTHOUGH I'M SURE YOU'RE ALREADY FAMILIAR WITH IT.

13 AND IT WAS PRETTY CLEAR HERE THAT LIKE THE CASE WE
14 HAVE NOW, THE THIRD PARTY IN QUESTION IN HOLMES DENIED THAT
15 HE SAID ANYTHING OR DID ANYTHING OR HAD ANYTHING TO DO WITH
16 IT, AND WE HAVE THE SAME SITUATION HERE. BUT THE COURT WAS
17 PRETTY CLEAR THAT DETERMINATIONS OF FACT AND CREDIBILITY ARE
18 FOR THE TRIER OF FACT, AND SOUTH CAROLINA RECOGNIZES THAT.
19 AND CERTAINLY MR. MERCER SHOULD HAVE AN OPPORTUNITY TO
20 PRESENT A MEANINGFUL DEFENSE AND INCLUDING THE NEW EVIDENCE
21 THAT WOULD BE ADMISSIBLE IF THE TRIAL RAN TODAY.

22 THE COURT: THANK YOU.

23 MS. KIMBROUGH: THANK YOU.

24 THE COURT: ANY ARGUMENT FROM THE STATE?

25 MR. MYERS: YOUR HONOR, WE JUST CONTEND THAT IF YOU

1 GO BACK AND LOOK AT THE TRIAL EVIDENCE, THE WITNESS, MR.
2 MAGWOOD, OF HIS IDENTIFICATION OF THE PERSON FITTING THE
3 DESCRIPTION OF KEVIN MERCER AND BEING THE PERSON THERE -- MR.
4 MAGWOOD WAS THE ROOMMATE. HE WAS COMING OUT AND SAW THE
5 PERSON IN THE PARKING LOT, SAW HIM LEAVE. THE EVIDENCE ALONG
6 WITH THAT -- AND ALSO AS TO THE HEARING, WE'VE GOT THREE
7 PEOPLE INVOLVED HERE. YOU'VE GOT THOMPSON. YOU'VE GOT
8 FULLER, AND YOU'VE GOT MR. JOHNSTON -- ROCKY I'LL CALL HIM
9 FOR SHORT.

10 NOW, OF THOSE, WHO HAS THE REASON TO TELL A LIE?
11 THE WHOLE THING -- IF YOU LOOK AT THESE LETTERS, THE WHOLE
12 THING FROM MR. FULLER IS: HELP, HELP, HELP. I WANT HELP.
13 AT THE TIME HE WROTE THESE THINGS, THE ONLY PERSON HE CAN GET
14 HELP FROM WAS BY SAYING SOMETHING AGAINST MARCUS THOMPSON.
15 MR. MERCER IS ALREADY SENTENCED. HE ASKED HIS ROOMMATE
16 ROCKY, I THINK, "CAN YOU USE THIS TO HELP US OR HELP ME OUT?"
17 AND HE'S STILL LOOKING FOR HELP. HE SAYS HE DOESN'T WANT TO
18 GO TO JAIL, BUT HE DOESN'T WANT FIVE YEARS OR WHATEVER IT WAS
19 WHEN HE BROUGHT HIM OVER FOR HIM TO PLEAD GUILTY. SO HE'S
20 PLAYING THESE GAMES STILL.

21 HE'S OBVIOUSLY A FELLOW WITH SOME MENTAL ILLNESS.
22 HE'S OBVIOUSLY GOT SOME EMOTIONAL PROBLEMS. HE'S GOT A
23 REASON TO LIE. WE SUBMIT TO YOU THAT UNDER THIS IT WOULDN'T
24 CHANGE IT, THAT HE'S NOT CREDIBLE, AND EVEN UNDER HOLMES I
25 THINK CREDIBILITY IS STILL AN ISSUE INVOLVED. WE SUBMIT TO

1 YOU THE OUTCOME WOULD STILL BE THE SAME AND THAT THIS IS ALL
2 A FANTASTIC TALE BROUGHT HERE BY MR. FULLER WHO HAS NOW
3 GOTTEN CAUGHT UP IN THE TANGLED WEB THAT HE'S WOVEN, A WEB OF
4 DECEIT AND LIES. WE SUBMIT IT FOR YOUR CONSIDERATION.

5 MR. LITTLEJOHN: YOUR HONOR, IF I COULD REPLY
6 BRIEFLY?

7 THE COURT: YES, SIR.

8 MR. LITTLEJOHN: SOLICITOR MYERS KEEPS HARPING ON
9 MR. FULLER SEEKING HELP. WELL, I THINK IT'S PRETTY EVIDENT
10 BY WHAT MR. FULLER DID BY GETTING ON THAT STAND TODAY THAT
11 THERE'S NO WAY HE'S GOING TO GET ANY HELP AND HE KNOWS THAT,
12 AND HE KNOWS THAT HE IS GOING TO BE FACING A STRAIGHT-UP PLEA
13 AND -- ON THE CHARGES THAT HE IS -- THAT HE'S FACING. AND SO
14 TO SAY HIS TESTIMONY IS COLORED BY HIM GETTING HELP OR
15 WANTING TO GET HELP, THAT JUST DOESN'T FLY UNDER THE
16 CIRCUMSTANCES. AND BY WHAT MR. FULLER KNOWS, HE KNOWS WHAT
17 HIS POSITION IS. HE KNOWS HE'S NOT GOING TO GET HELP. HE'S
18 SORRY HE EVER BROUGHT THE THING UP IS THE IMPRESSION I GOT
19 FROM HIM, AND HE WAS VERY SORRY TO BE HERE AND REALIZED THAT
20 HE HAD REALLY STIRRED UP A HORNET'S NEST, BUT HE DID IT
21 BECAUSE HIS GRANDMOTHER TOLD HIM THAT WAS THE RIGHT THING TO
22 DO. AND IT MADE HIM SICK WHAT MARCUS THOMPSON HAD TOLD HIM.

23 YOUR HONOR, WHEN WE TRIED THE CASE, WE FELT THAT
24 THERE WAS A REAL REASONABLE DOUBT ABOUT WHETHER KEVIN MERCER
25 WAS THE TRIGGERMAN IN THIS THING. OF COURSE, THE STATE TOOK

1 THE POSITION FROM THE VERY GET-GO FROM THEIR OPENING
2 STATEMENT IN THE TRIAL THAT KEVIN MERCER WAS THE GUY THAT
3 PULLED THE TRIGGER, AND THAT WAS THEIR POSITION. THAT WAS
4 THE STANCE THEY TOOK THROUGHOUT THE ENTIRE CASE. BUT AS THE
5 EVIDENCE UNFOLDED, THERE WERE A LOT OF THINGS THAT WE HAD TO
6 BRING OUT.

7 MARCUS THOMPSON HAD THE GLOVES. THE GLOVES HAD
8 NEVER BEEN TESTED. I'M NOT GOING TO GO THROUGH ALL THIS; I
9 KNOW THE COURT REMEMBERS ALL THAT. BUT MARCUS THOMPSON HAD
10 SEVENTEEN 357 CALIBER BULLETS IN HIS POCKET, THE SAME CALIBER
11 AS THE GUN, BUT THE MOST IMPORTANT THING AND I THINK -- AND
12 I'M NOT GOING TO DWELL ON IT BECAUSE THE COURT KNOWS IT.
13 THERE WAS NO GUNSHOT RESIDUE ON KEVIN MERCER. THERE WAS ONE
14 SHOT FIRED. SOMEBODY -- EITHER KEVIN MERCER OR MARCUS
15 THOMPSON HAD TO HAVE THE GUNSHOT RESIDUE. WELL, IT WASN'T ON
16 MERCER. IT MUST HAVE BEEN ON THE GLOVES.

17 IF A JURY IN ANOTHER TRIAL BELIEVED WHAT KEVIN
18 FULLER SAID MARCUS THOMPSON TOLD HIM, THAT COULD MAKE THE
19 HUGEST DIFFERENCE IN THIS CASE. WE THOUGHT THERE WAS A REAL
20 REASONABLE DOUBT; OBVIOUSLY THE JURY DIDN'T AGREE WITH US.
21 BUT WE THOUGHT GIVEN THE STATE -- THE WAY THE STATE WOULD
22 HAVE TO PUT THIS CASE UP, THE WAY THEY PUT IT UP IN APRIL,
23 THAT KEVIN FULLER'S TESTIMONY WOULD BE MATERIAL, WOULD BE
24 RELEVANT. IT WOULD BE SOMETHING THE JURY, WE THINK, WOULD
25 BELIEVE AND WOULD HAVE A DRASTIC OUTCOME ON THIS CASE.

1 MR. MYERS: I MUST NOT HAVE BEEN AT THE RIGHT TRIAL
2 BECAUSE I REMEMBER SOME RESIDUE BEING ON MR. MERCER'S HANDS
3 MYSELF, AND WITNESSES TESTIFIED TO THAT, AND WE FOUGHT THAT
4 BATTLE. BE THAT AS IT MAY, WE'LL LEAVE THAT IN YOUR CAPABLE
5 HANDS.

6 THE COURT: LET ME ASK Y'ALL -- AND I'M HAPPY TO
7 TAKE IT FROM HERE. BUT ARE THERE ANY SPECIFIC POINTS
8 REGARDING THE EVIDENCE THAT WE HEARD TODAY AND HOW IT MIGHT
9 HAVE BEEN CORROBORATED BY WHAT WE HEARD AT TRIAL, HOW IT
10 MIGHT HAVE BEEN CONTRADICTED BY WHAT WE HEARD AT TRIAL THAT
11 ANYBODY WANTS TO MAKE? OF COURSE, THERE'S SEVERAL -- THERE'S
12 SEVERAL THAT OCCURRED TO ME AS I WAS LISTENING TO THE
13 TESTIMONY TODAY, BUT I THINK IT WOULD BE HELPFUL TO ME NOW IF
14 ALL WOULD SHARE YOUR THOUGHTS ON THAT SUBJECT WITH ME BEFORE
15 WE LEAVE, IF YOU HAVE ANY SPECIFIC THOUGHTS.

16 MS. KIMBROUGH: I DO, YOUR HONOR. BRIEFLY, IN
17 RESPONSE TO MR. MYERS' STATEMENT THAT GUNSHOT RESIDUE WAS
18 FOUND ON KEVIN MERCER, I THINK EVEN THEIR OWN EXPERT,
19 JENNIFER STONER, WOULD DISAGREE WITH THAT STATEMENT. THERE
20 WERE TWO MICROSCOPIC ROUND LEAD PARTICLES.

21 THE COURT: WELL, I DIDN'T REALLY MEAN TO OPEN IT UP
22 FOR A RE-ARGUMENT OF HOW GOOD THE EVIDENCE WAS AT THE INITIAL
23 TRIAL. I MEANT TO SAY: IS THERE ANYTHING THAT HAPPENED
24 TODAY THAT PARTICULARLY DOES OR PARTICULARLY DOES NOT JIBE
25 WITH WHAT HAPPENED AT THE INITIAL TRIAL? FOR EXAMPLE, TODAY

1 FULLER TESTIFIED THAT MARCUS THOMPSON TOLD HIM THAT HE SHOT
2 SERGEANT DAVIS IN THE HEAD AND THEN DRAGGED HIS BODY OUT OF
3 THE CAR. DID I MISS THAT OR---

4 MS. KIMBROUGH: MY UNDERSTANDING WAS---

5 THE COURT: ACTUALLY WHAT I WROTE DOWN WAS HE SLID
6 OUT OF THE TRUCK. AT THE TRIAL MAGWOOD TESTIFIED THAT HE
7 WATCHED THE SHOOTING TAKE PLACE THROUGH THE WINDOW OF THE
8 APARTMENT AND THAT THE WAY THE SHOOTING OCCURRED WAS THAT MR.
9 -- THAT SERGEANT DAVIS WAS ESCORTED ESSENTIALLY AWAY FROM THE
10 TRUCK. HE WAS OVER IN THE GRASS ACROSS THE SIDEWALK, AS I
11 RECALL, ON HIS KNEES WITH HIS BACK TO THE TRUCK WHEN THE SHOT
12 WAS FIRED. AM I RIGHT OR WRONG ABOUT ANY OF THAT?

13 MS. KIMBROUGH: I DON'T THINK CLIFTON MAGWOOD SAID
14 HE SAW THE VICTIM ON HIS KNEES. I BELIEVE THAT THAT IS A
15 STORY THAT WAS CONJURED UP BY TERRY BROWN, THE SNITCH WHO
16 SAID, "OH, WELL, KEVIN MERCER SAID THAT HE PUT HIM ON HIS
17 KNEES AND HE SHOT HIM IN THE BACK OF THE HEAD," DESPITE THE
18 FACT THAT---

19 THE COURT: WELL, WHAT DID -- WHAT THEN DID MAGWOOD
20 TESTIFY HE SAW?

21 MS. KIMBROUGH: MY RECOLLECTION IS HE SAW A FIGURE
22 IN DARK CLOTHING ESCORTING THE VICTIM AROUND THE BACK OF THE
23 TRUCK. MY UNDERSTANDING ABOUT WHAT MR. FULLER SAID IS THAT
24 THE VICTIM WAS SHOT AS HE WAS COMING OUT OF THE -- OUT OF THE
25 NAVIGATOR AND...

1 MR. LITTLEJOHN: YOUR HONOR, MY RECOLLECTION WAS
2 SERGEANT MAGWOOD SAID HE WAS LOOKING OUT THE WINDOW. HE SAW
3 A FIGURE DRESSED IN DARK CLOTHING WEARING A DARK TOP, A DARK
4 HAT, DARK PANTS - I REMEMBER IT WASN'T SHORTS - STANDING
5 THERE, AND SERGEANT DAVIS WAS THERE ALSO. HE SAW THIS FOR A
6 FEW SECONDS. THEN HE PROCEEDED TO FIND THE GUN OR TO GO DOWN
7 THE STAIRS IS WHEN HE HEARD THE SHOT. HE DID NOT SEE THE
8 SHOOTING.

9 THE COURT: SO IT WAS -- IT WAS THE -- IT WAS THE
10 FIRST SNITCH THAT -- I DIDN'T MEAN TO MISCHARACTER -- TO
11 CHARACTERIZE ANYTHING NEGATIVELY, BUT IT WAS THE FIRST PERSON
12 THAT MR. MERCER SUPPOSEDLY SAID SOMETHING TO IN THE JAIL WHO
13 TALKED ABOUT THE KNEELING.

14 MR. LITTLEJOHN: THE ONLY MENTION OF KNEELING WAS
15 FROM TERRY BROWN, THE JAILHOUSE SNITCH, THAT I RECALL, YOUR
16 HONOR.

17 THE COURT: ALL RIGHT. WELL, HE -- SO I WAS
18 MISTAKEN ABOUT THAT, BUT IS THERE ANYTHING LIKE THAT,
19 ANYTHING THAT IS CORROBORATED OR NOT CORROBORATED THAT
20 ANYBODY WANTS TO POINT OUT?

21 MR. LITTLEJOHN: YOUR HONOR, THERE WERE A FEW THINGS
22 I THINK THAT WERE IMPORTANT THAT MARCUS THOMPSON TOLD FULLER:
23 THAT SERGEANT DAVIS WAS SHOT BEHIND THE EAR. HE ALSO SAID
24 THAT HE HAD TAKEN THE GUN WHEN IN VERY MUCH DETAIL HE SAID
25 THOMPSON EXPLAINED TO HIM HOW AFTER THEY WERE STOPPED BY THE

1 DEPUTY THAT KEVIN MERCER WAS TAKEN OUT OF THE VEHICLE, THAT
2 HE WAS IN THE BACK OF THE VEHICLE FOR SOME 10 TO 15 MINUTES
3 AND THAT DURING THAT TIME MARCUS THOMPSON TOOK THE GUN AND
4 PUT IT UNDER THE SEAT. AND THERE WAS REALLY NO EXPLANATION
5 OF THAT DURING THE TRIAL, AND IT SEEMS TO ME THAT WAS A --
6 THAT WAS OUR THEORY ALL ALONG, BUT IT WAS A PLAUSIBLE
7 EXPLANATION WHICH THOMPSON CERTAINLY CORROBORATED BY TELLING
8 KEVIN FULLER THAT. AND IT SEEMS LIKE THERE WERE A NUMBER OF
9 OTHER DETAILS THAT FULLER RECOUNTED THOMPSON TELLING HIM THAT
10 ONLY THOMPSON WOULD HAVE KNOWN.

11 THE COURT: OKAY.

12 MR. MYERS: FULLER HAS GOT SO MANY STORIES OF WHAT
13 HAPPENED; THAT'S WHY IT DOESN'T JIBE. NUMBER ONE, HE SAYS
14 THAT THE SERGEANT WAS SHOT AS HE WAS GETTING OUT OF THE
15 TRUCK. THAT DIDN'T HAPPEN. HIS BODY WAS WAY BACK BEHIND.
16 HE WASN'T DRUG BACK OVER THERE.

17 NUMBER TWO, HE SAID THAT WHEN HE WAS SHOT THAT THE
18 SERGEANT HAD BLOOD ALL OVER HIS HAND AND BLOOD WAS ON THE
19 SIDE OF THE TRUCK AS HE WENT DOWN. THERE WAS NO BLOOD ON THE
20 TRUCK. HE SAID THAT MERCER'S FINGERPRINTS WOULD HAVE BEEN ON
21 THE GUN. THERE WERE NO FINGERPRINTS ON THE GUN. AND AS FAR
22 AS WHAT MR. LITTLEJOHN SAID, I REMEMBER THAT OFFICER THAT
23 STOPPED THIS VEHICLE SAYING THERE'S NO WAY THAT THE PASSENGER
24 COULD HAVE MOVED AROUND TO PUT ANYTHING UNDER THE SEAT
25 BECAUSE I WAS WATCHING HIM, TOO, BECAUSE I KNEW I HAD JUST

1 HAD A HOMICIDE ON MY HAND AND THIS WAS THE DESCRIPTION THAT
2 MATCHED IT.

3 NOW, I TELL YOU HOW YOU CAN CORROBORATE WHAT
4 THOMPSON SAID. THOMPSON SAID THAT HE DROPPED MERCER OFF,
5 THAT HE DROVE MERCER'S CAR BACK TO THE HOTEL, THAT MERCER DID
6 THE KILLING, AND THEN MERCER GOT THE NAVIGATOR AND CAME
7 AROUND TO THE HOTEL AND PICKED HIM UP. THEY GOT ON THE
8 INTERSTATE IN THE NAVIGATOR, AND THAT'S WHERE HE WAS STOPPED
9 ON THE INTERSTATE. THE OFFICERS KNEW ABSOLUTELY NOTHING
10 ABOUT MERCER'S CAR BEING AT THAT MOTEL UNTIL THOMPSON TOLD
11 HIM.

12 WHEN HE GAVE THAT STATEMENT, HE SAID MERCER'S CAR IS
13 BACK AT THE MOTEL BECAUSE THAT'S WHERE I WENT, AND THAT'S
14 WHERE HE CAME AND MET ME AFTER HE SHOT THE SERGEANT AND TOOK
15 THE NAVIGATOR AND CAME OUT, AND I SAID, "HOW DID YOU GET IT?"
16 AND HE SAID, "I HAD TO SHOOT THE MAN TO GET IT." THE
17 OFFICERS DIDN'T KNOW A THING ABOUT MERCER'S CAR BEING AT THE
18 ECONOMY INN BACK ON BROAD RIVER ROAD UNTIL MARCUS THOMPSON
19 TOLD THEM THAT. THAT'S HOW THEY FOUND OUT BECAUSE THE
20 DEFENDANT CLAMMED UP; HE WOULDN'T TELL THE OFFICERS ANYTHING.
21 SO THAT CORROBORATES THOMPSON.

22 THE STUFF THAT FULLER SAYS IS UNCORROBORATED. THE
23 BODY WAS NOT DOWN THROUGH THE PASSENGER SEAT. HE WASN'T SHOT
24 IN THE PASSENGER SEAT. THERE'S NO BLOOD ON THE PASSENGER
25 SEAT. MERCER'S FINGERPRINTS WASN'T ON THE GUN. THAT'S JUST

1 SOME OFF THE TOP OF MY HEAD, AND I CAN TALK ABOUT
2 CORROBORATION OR NOT CORROBORATION. AND AS FAR AS KNOWING
3 WHERE THE FELLOW WAS SHOT, FULLER HIMSELF ADMITS HE WAS
4 READING NEWSPAPERS ABOUT THE CASE. HE WAS READING WHAT WAS
5 IN THE PAPERS.

6 THE COURT: ALL RIGHT.

7 MR. MYERS: AND AS I RECALL, HE WASN'T SHOT IN THE
8 BACK OF THE EAR. HE WAS SHOT IN THE BACK OF HIS HEAD BACK
9 THERE.

10 THE COURT: ALL RIGHT. ANYTHING FURTHER ON THAT
11 SUBJECT?

12 MS. KIMBROUGH: JUST VERY BRIEFLY, YOUR HONOR. I
13 WOULD POINT OUT THAT IN SOME OF THE ORIGINAL WITNESS
14 STATEMENTS THERE WAS AT LEAST ONE WITNESS WHO HEARD TWO DOORS
15 SLAM -- TWO DOORS SLAM SHUT. THAT WOULD CERTAINLY BE
16 CORROBORATED BY THE STATEMENT THAT FULLER GIVES---

17 MR. MYERS: I HATE TO INTERRUPT, BUT WHO TESTIFIED
18 TO THAT AT TRIAL?

19 MS. KIMBROUGH: THEY WEREN'T CALLED TO TESTIFY AT
20 TRIAL BECAUSE---

21 MR. MYERS: WE'RE TALKING ABOUT TRIAL EVIDENCE.

22 MS. KIMBROUGH: THEY COULD BE AT A NEW TRIAL. THERE
23 WAS A WITNESS -- WITNESS STATEMENTS PROVIDED IN DISCOVERY
24 WITH TWO DOORS SLAMMING. THAT CERTAINLY -- IF A NEW TRIAL
25 WAS HAD, THAT WITNESS COULD BE CALLED AND THAT WOULD

1 CORROBORATE WHAT FULLER IS SAYING THOMPSON TOLD HIM, THAT
2 THERE WERE TWO PEOPLE THERE, AND SO I WOULD SIMPLY POINT THAT
3 OUT.

4 MR. MYERS: AND THEN BY HEARING ON THAT, IF THAT
5 EXISTED, YOU'D HAVE TO NEGATE MAGWOOD'S EYESIGHT OF ONE
6 PERSON BEING THERE. AND WHAT COULD IT BE? SOMEBODY ELSE IN
7 THE PARKING LOT? COULD IT BE MERCER GETTING OUT OF THE CAR
8 AND SLAMMING THE DOOR AND THEN MAYBE THE SERGEANT'S DOOR
9 OPENING AND SHUTTING? THAT IS ALL SPECULATION, BUT YOU'VE
10 GOT EYEWITNESS TESTIMONY FROM MAGWOOD: ONE PERSON. NOT ONLY
11 THAT, HE DESCRIBED THE SHOOTER WEARING DENIM. THAT'S WHAT
12 MERCER HAD ON. THOMPSON DIDN'T HAVE ON DENIM. THEY WERE IN
13 THE HAT. MERCER HAD THE HAT; THOMPSON DIDN'T HAVE A HAT. SO
14 ALL OF THAT EYEWITNESS IDENTIFICATION IN THAT TRIAL COMES IN
15 AS TO ONE SHOOTER, THE ONE SHOOTER BEING MR. MERCER, NOT MR.
16 THOMPSON.

17 MR. LITTLEJOHN: YOUR HONOR, I MIGHT JUST POINT OUT:
18 IF WE CAN SIT HERE AND DEBATE THESE THINGS, A JURY, THE TRIER
19 OF FACT, CAN DEBATE THEM ALSO. AND IT DEPENDS ON HOW THE
20 TRIAL COMES OUT, BUT FROM WHAT THE COURT HAS HEARD FROM WHAT
21 FULLER RECOUNTED THOMPSON SAYING, WE SUBMIT THAT THAT WOULD
22 HAVE A DRAMATIC EFFECT AND COULD CHANGE THIS TRIAL AROUND.

23 THE COURT: ALL RIGHT. IF THERE'S NOTHING FURTHER,
24 THEN WE ARE ADJOURNED.

25 MR. MYERS: THANK YOU, YOUR HONOR.

1 (PAUSE IN PROCEEDINGS.)

2 THE COURT: WE'RE GOING TO GO BACK ON THE RECORD.

3 ALL RIGHT. THE DEFENSE HAS MADE A REQUEST EARLY ON FOR
4 FUNDING TO DO GUNSHOT RESIDUE TESTING ON THE GLOVES THAT
5 MARCUS THOMPSON WAS SUPPOSEDLY WEARING THAT NIGHT. LET ME --
6 LET ME HEAR FROM YOU ALL AS TO WHY YOU WANT THAT -- YOU WANT
7 THAT FUNDING AND THEN WE'LL DISCUSS IT.

8 MS. KIMBROUGH: THANK YOU, YOUR HONOR. AS I BELIEVE
9 THE -- SORT OF THE LAST POINT THAT WE ADDRESSED FOR YOUR
10 HONOR WAS THE QUESTION OF WHAT FACTS ESSENTIALLY CORROBORATE
11 FULLER, AND CERTAINLY THE PRESENCE OF GUNSHOT RESIDUE ON
12 THOSE GLOVES WOULD CORROBORATE HIS STORY. NOW, WE CONCEDED
13 IN OUR MOTION FOR FUNDING AND WE'LL CONCEDE IT AGAIN THAT
14 IT'S NOT CONCLUSIVE. IT IS INCONCLUSIVE, BUT IT IS STILL
15 RELEVANT. AND TO THE EXTENT THAT IT WOULD DISPOSE OF THE
16 QUESTION AS TO WHETHER OR NOT THOSE GLOVES WERE USED WHEN A
17 GUN WAS FIRED, WE THINK IT WOULD BE HELPFUL FOR THE COURT TO
18 HAVE THAT INFORMATION.

19 I REALIZE THAT, YOU KNOW, AGAIN IT'S NOT CONCLUSIVE,
20 BUT WE DON'T HAVE IN MOST CRIMINAL TRIALS CONCLUSIVE EVIDENCE
21 POINTING TO EITHER THE GUILT OR THE INNOCENCE OF THE ACCUSED.
22 I MEAN, THERE'S USUALLY, YOU KNOW, A LOT OF CIRCUMSTANCES,
23 AND CERTAINLY THE CIRCUMSTANCE OF GUNSHOT RESIDUE ON THOSE
24 GLOVES WOULD SUBSTANTIALLY CORROBORATE WHAT FULLER IS SAYING.

25 THE COURT: ALL RIGHT. WELL, YOUR -- FULLER --

1 LET'S SEE. FULLER TESTIFIED TODAY THAT IN ADDITION TO THE
2 SPECIFIC STATEMENTS THAT HAD BEEN MADE ABOUT -- ABOUT
3 THOMPSON SHOOTING SERGEANT DAVIS IN THE BACK OF THE HEAD THAT
4 THERE HAD BEEN GENERAL STATEMENTS MADE BEFOREHAND AND
5 AFTERWARDS ABOUT THE CRIME AND JUST NOW -- AND OTHER THINGS
6 ABOUT IT, THE FACT THAT THE CRIME OCCURRED AND OTHER THINGS.
7 DURING THE COURSE OF ANY OF THAT, DID HE TESTIFY THAT -- WHAT
8 WAS THE TESTIMONY TODAY ABOUT MARCUS THOMPSON USING THOSE
9 GLOVES WHILE FIRING A WEAPON AT SOMETIME OTHER THAN THE POINT
10 IN TIME WHEN SERGEANT DAVIS WAS KILLED?

11 MR. HUBBARD: YOUR HONOR, I THINK HIS TESTIMONY IS
12 EXACTLY WHAT HE PUT IN THE AFFIDAVIT, THAT HE -- AND THIS IS
13 FULLER TALKING ABOUT IT. THAT HE SAYS THAT THOMPSON AND
14 MERCER WERE SHOOTING THAT GUN EARLIER IN THE DAY, THAT
15 THOMPSON WAS WEARING THOSE GLOVES INSIDE OUT, THAT HE WORE
16 THEM DURING THE MURDER, AND THAT HE FLIPPED THEM BACK SIDE
17 AROUND AFTER HE GOT CAUGHT. SO WE'RE BACK TO WHERE WE WERE
18 BACK WHEN WE ARGUED THE SAME MOTION A LONG TIME AGO.

19 IF THERE'S G.S.R. ON THOSE GLOVES, IT'S FROM THE
20 EARLIER SHOOTING, AT LEAST FROM THE EARLIER SHOOTING. THOSE
21 GLOVES WILL PROVE NOTHING ABOUT THIS MURDER, AND ALL THEY'RE
22 ARGUING NOW IS IT WOULD SHOW THAT KEVIN FULLER IS TELLING THE
23 TRUTH THAT THERE'S G.S.R. ON THOSE GLOVES. IT DOESN'T GO TO
24 THE TRUTH OF THIS CASE THOUGH, THE WHOLE THING -- THE WHOLE
25 REASON WHY WE'RE HERE.

1 IN ADDITION, MARCUS THOMPSON TALKED ABOUT FROM THE
2 STAND AND IN HIS STATEMENTS THAT HE PUT THE GLOVES ON TO MOVE
3 THE PISTOL FROM THE FRONT SEAT OF THAT NAVIGATOR THAT HAD
4 JUST BEEN USED BY HIS COHORT OVER HERE TO KILL A MAN. SO
5 THERE MAY BE G.S.R. ON THOSE GLOVES BY THOMPSON'S TESTIMONY,
6 BUT THE WHOLE POINT IS: IT DOESN'T PROVE WHO THE SHOOTER
7 WAS, SO IT'S REALLY -- IT'S A RED HERRING.

8 THE COURT: OKAY. ALL RIGHT.

9 MS. KIMBROUGH: BRIEFLY, YOUR HONOR. AGAIN, THE
10 FACT THAT WE'RE DEBATING THIS SHOWS THAT IT'S A QUESTION FOR
11 A TRIER OF FACT. WE'RE NOT SAYING IT'S CONCLUSIVE. OF
12 COURSE IT'S NOT CONCLUSIVE. IF HE FIRED IT DURING THE TEST-
13 FIRING AND HE USED IT AT THE TIME OF THE CRIME, THEN, YEAH,
14 THERE WOULD BE GUNSHOT RESIDUE FROM -- FROM NOT ONLY THE
15 MURDER SCENE BUT ALSO FROM PRE -- PRIOR TO THAT, AND IF THIS
16 IS A SEARCH FOR THE TRUTH, I THINK THAT FULL INFORMATION
17 ABOUT ALL THE PHYSICAL EVIDENCE IS AN ABSOLUTE REQUIREMENT.
18 AND IF I WERE THE STATE AND I WANTED TO PROVE THAT KEVIN
19 FULLER WAS JUST MAKING THIS UP AND HE WAS JUST COMPLETELY
20 WRONG, I WOULD THINK I'D WANT THOSE GLOVES TESTED BECAUSE IF
21 THEY CAME BACK NEGATIVE, THERE WOULD BE A PROBLEM.

22 MR. HUBBARD: YOUR HONOR, THERE IS ONE OTHER ISSUE.
23 FIVE GLOVES WERE PUT INTO EVIDENCE BY THE DEFENSE. THEY WERE
24 ALL IN ONE BAG. LAW ENFORCEMENT GOT THOSE GLOVES -- THAT
25 FIFTH GLOVE OUT OF THAT CAR. THERE'S BEEN NO TESTIMONY AS TO

1 WHERE THAT GLOVE CAME FROM EITHER, BUT FIVE ARE IN EVIDENCE.

2 THE COURT: OKAY. ALL RIGHT. I'M GOING TO SAY ON
3 THE RECORD AND I'LL PUT IT IN THE ORDER THAT I DON'T THINK
4 THAT THE EXISTENCE OR NONEXISTENCE OF THE GUNSHOT RESIDUE CAN
5 HAVE ANY IMPACT ON THE -- ON THE BELIEVABILITY OF WHAT MR.
6 FULLER SAID OR WHAT MR. THOMPSON SAID. AND FOR PURPOSES OF
7 THIS -- OF MY ANALYSIS HERE, I'M JUST GOING TO ASSUME THAT
8 THERE IS GUNSHOT RESIDUE ON THOSE GLOVES. SO THAT'S THE WAY
9 I'M GOING TO TREAT THAT. I SEE NO REASON TO DO THAT, FOR THE
10 STATE TO PAY FOR -- FOR ME TO FUND THAT TESTING TO BE DONE.

11 NOW, I DID MEAN TO ASK ONE MORE QUESTION, AND SO --
12 BECAUSE I ASKED THIS IN THE BEGINNING. I SAID, "WHAT IS THE
13 AFTER-DISCOVERED EVIDENCE?" AND IN LIGHT OF THE WAY THE
14 TESTIMONY HAS GONE TODAY AND IN LIGHT OF WHAT I THINK IS AN
15 AGREEMENT AMONG EVERYBODY THAT THE STATEMENT OF -- THAT THE
16 TESTIMONY OF KEVIN FULLER WOULD NOT BE ADMISSIBLE WITHOUT THE
17 PRIOR TESTIMONY OF MARCUS THOMPSON, THEN IT SEEMS TO ME THAT
18 THE BODY OF EVIDENCE THAT I'M TO CONSIDER HERE IS EVERYTHING
19 I HEARD TODAY. DOES ANYBODY DISAGREE WITH THAT?

20 MS. KIMBROUGH: NO, YOUR HONOR.

21 MR. MYERS: NO, SIR.

22 THE COURT: ALL RIGHT. ALL RIGHT. THE SUPREME
23 COURT SAYS I'VE GOT 30 DAYS TO GET AN ORDER OUT. IF I'M --
24 I'LL EITHER HAVE AN ORDER OUT IN 30 DAYS OR I'LL BE SERVING
25 TIME DOWN THERE WITH THEM.

1 MR. MYERS: TWENTY-NINE AND A HALF DAYS.

2 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

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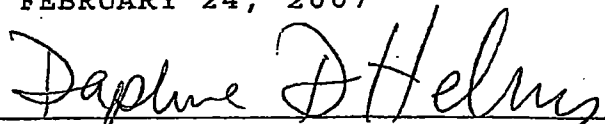
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25

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR LEXINGTON COUNTY, SOUTH CAROLINA, ON THE 9TH DAY OF AUGUST, 2006.

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

FEBRUARY 24, 2007


DAPHNE D. HELMS, COURT REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

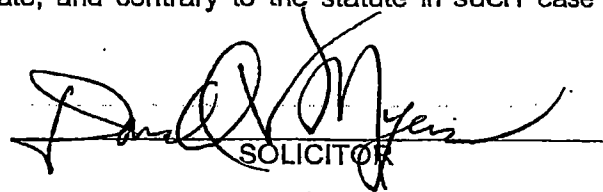
INDICTMENT FOR
COUNT ONE: MURDER
§16-3-10

At a Court of General Sessions, convened in FEBRUARY, 2003 the Grand Jurors of LEXINGTON County present upon their oath:

**COUNT ONE:
MURDER §16-3-10**

That **KEVIN J. MERCER**, did in Lexington County, on or about May 16, 2002, willfully, feloniously and with malice aforethought kill one **Tracy Lamar Davis** by means of shooting the victim in the head with a pistol, and the said Tracy Lamar Davis died as a proximate result thereof in Lexington County on or about May 16, 2002, in violation of Section 16-3-10 of the South Carolina Code of Laws of (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

LCSD

Frier

2-12-04 1:10 PM Def was arraigned
by the Clerk of Court Deputy
Joyce H. Frier

ARREST WARRANT NUMBER

H-128342

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 2-10-03

VERDICT

Guilty

Foreperson of Petit Jury

Date:

DOCKET NO. 2003-GS-32-

409

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2003

THE STATE

vs.

KEVIN J. MERCER

CDR# 116

Indictment for

COUNT ONE: MURDER

§16-3-10

DONALD V. MYERS, SOLICITOR

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & E.G.

2877

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

INDICTMENT FOR
COUNT TWO - ARMED ROBBERY
§16-11-330

At a Court of General Sessions, convened in FEBRUARY, 2003 the Grand Jurors of LEXINGTON County present upon their oath:

**COUNT TWO:
ARMED ROBBERY §16-11-330**

That **KEVIN J. MERCER**, did in Lexington County on or about May 16, 2002, while armed with a deadly weapon, to wit: a pistol, did, unlawfully and feloniously take from the person or in the presence of **Tracy Lamar Davis** by means of force or intimidation a vehicle, goods, monies or other personal property items of the said **Tracy Lamar Davis** or others, such vehicle, goods, monies or other personal items being described: a 1998 Lincoln Navigator vehicle, goods, monies or other personal items with the intent to permanently deprive the owner of said items, in violation of §16-11-330 of the South Carolina Code of Laws of (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

H-128344

ACTION OF GRAND JURY

TRUE BILL

2-10-03 *W. Hall*
Foreperson of Grand Jury
Date:

VERDICT

G. H. Key
Foreperson of Petit Jury
Date:

DOCKET NO. 2003-GS-32- 409

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2003

THE STATE

vs.

KEVIN J. MERCER

CDR# 139

Indictment for

COUNT TWO - ARMED ROBBERY
§16-11-330

DONALD V. MYERS, SOLICITOR

A TRUE COPY

Don
Lex. Co. C.C.C.P., G.S. & F.C.

2879

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

INDICTMENT FOR
COUNT THREE: POSSESSION OF FIREARM
WHILE IN THE COMMISSION OF A VIOLENT
CRIME

§16-23-490

At a Court of General Sessions, convened in FEBRUARY, 2003 the Grand
Jurors of LEXINGTON County present upon their oath:

**COUNT THREE:
POSSESSION OF FIREARM OR KNIFE
DURING COMMISSION OF A VIOLENT CRIME
§16-23-490**

That **KEVIN J. MERCER**, did in Lexington County on or about May 16, 2002,
willfully and unlawfully have in his possession, or did visibly display, a pistol during the
commission of a violent crime or crimes, to wit: Murder and/or Armed Robbery, as
defined in §16-1-60, all in violation of Section 16-23-490 of the South Carolina Code of
Laws of (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case
made and provided.


SOLICITOR

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

H-128343

ACTION OF GRAND JURY

TRUE BILL

W. Hall
Foreperson of Grand Jury

Date: *2-10-03*

VERDICT

C. Kelly
Foreperson of Petit Jury

Date:

DOCKET NO. 2003-GS-32- *409*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2003

THE STATE

vs.

KEVIN J. MERCER

CDR# 549

Indictment for

COUNT THREE: POSSESSION OF
FIREARM WHILE IN THE COMMISSION
OF A VIOLENT CRIME
§16-23-490

DONALD V. MYERS, SOLICITOR

A TRUE COPY

[Signature]
Lex. Co. C.C.C.P., G.S. & F.O.

2881

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
COUNT FOUR: CRIMINAL CONSPIRACY
§16-17-410

At a Court of General Sessions, convened in FEBRUARY, 2003 the Grand Jurors of LEXINGTON County present upon their oath:

**COUNT FOUR:
CRIMINAL CONSPIRACY
§16-17-410**

That **KEVIN J. MERCER**, did in Lexington County and other places, beginning on dates unknown to the Grand Jury, but including May 16, 2002, unlawfully, willfully, knowingly and wickedly conspire, unite, combine, agree and ban together with Marcus Antonio Thompson and have a tacit understanding with one another for the purpose of committing Armed Robbery by going to the area of Willow Creek Apartments and Raintree Apartments on Fernandina Road in Lexington County to unlawfully steal or rob, while armed with a deadly weapon (pistol), a vehicle to go to Atlanta, and in pursuance of said conspiracy and in furtherance of the common design, Thompson accompanied the defendant **MERCER** to said area, where **MERCER** committed the crimes Murder and Robbery of a Vehicle While Armed with a Deadly Weapon against Tracy Lamar Davis, in violation of §16-17-410 of the South Carolina Code of Laws of 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

WITNESSES

LCSD

Frier

ARREST WARRANT NUMBER

H-128341

ACTION OF GRAND JURY

TRUE BILL

W. Hall
Foreperson of Grand Jury

Date: *2-10-03*

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2003-GS-32- *409*

The State of South Carolina

County of LEXINGTON

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2003

THE STATE

vs.

KEVIN J. MERCER

CDR# 49

Indictment for

COUNT FOUR: CRIMINAL
CONSPIRACY
§16-17-410

DONALD V. MYERS, SOLICITOR

Not proved

Def was sentenced

to death by

gun on

4-22-06

Donald Myers

A TRUE COPY
[Signature]
Lex. Co. C.C.C.P., G.S. & F.C.

2883

IN THE SUPREME COURT OF SOUTH CAROLINA

In Re: State v. Kevin Jermaine Mercer

03-GS-32-409

MOTION FOR REMAND AND HEARING ON MOTION FOR NEW TRIAL
BASED ON AFTER-DISCOVERED EVIDENCE

RECEIVED

MAY 31 2003

S.C. SUPREME COURT

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

Cameron B. Littlejohn, Jr., Esquire
1720 Main Street Ste. 202
Columbia, S.C. 29201
(803) 799-1888.

Joseph L. Savitz, Esquire
South Carolina Commission
On Indigent Defense
1205 Pendleton Street, Rm. 315
Columbia, S.C. 29201
(803) 734-1343.

ATTORNEYS FOR DEFENDANT

I. INTRODUCTION

Beginning April 22, 2006, Kevin Jermaine Mercer has resided on South Carolina's death row for the murder of Sgt. Tracey Lamar Davis, an Army recruiter who was shot and killed during an apparent carjacking. On May 23, 2006, counsel for Kevin Mercer received compelling new information provided by the Lexington County Solicitor's Office that Marcus Thompson recently confessed to his cellmate Kevin Fuller that he shot Sgt. Davis. (see Attachments A-I). The new information, which consists of two letters written to Solicitor Myers and one sworn statement to law enforcement, creates a substantial likelihood that a new trial would yield a different result. The new information first came to light on May 3, 2006, which was eleven (11) days after Mr. Mercer was sentenced to die, and therefore was not discoverable prior to trial, is clearly material to the question of guilt or innocence, as well as a punishment, and is neither cumulative nor impeachment evidence. For these reasons, Kevin Mercer should be granted a new trial.

II. FACTS RELEVANT TO THIS MOTION

Kevin Jermaine Mercer was indicted on charges of capital murder and armed robbery by a Lexington County grand jury during its March 2006 term of court. The State called Mr. Mercer's case for trial on April 10, 2006. On April 19, 2006 the jury returned verdicts of guilt on both counts. On April 22, 2006, Mr. Mercer was sentenced to die. A timely notice of intent to appeal was filed with this Court.

The defense theory at trial was straight-forward: Marcus Antonio Thompson shot and killed Tracey Lamar Davis, and then pinned the crime on Kevin Mercer. The defense

theory rested upon several pieces of strong circumstantial evidence tending to implicate Marcus Thompson as the shooter. Significantly, Thompson and Mercer were arrested a mere eighteen minutes after the shooting. Kevin Mercer was driving the vehicle and Thompson was in the front passenger's seat. At the time he was removed from the car, Thompson was found to be in possession of a bag of bullets of the same caliber used in the shooting and had two pairs of balled up knit gloves, which fell out of his pocket at the time he was removed from the victim's vehicle.

The state's theory that Kevin Mercer was the shooter rested upon the results of gunshot residue tests performed on Marcus Thompson and Kevin Mercer. The tests showed no residue on Thompson's hands, whereas two microscopic lead particles were found on the back of Mercer's hand. SLED agent Jennifer Stoner testified that lead, along with barium and antimony, is one of three components found in gunshot residue. Agent Stoner conceded that a positive gunshot residue result requires the presence of all three elements and that, without barium and antimony being present on Mercer's hands, all she could say is that the lead was "consistent" with gunshot residue.

Not presented at trial were the statements of Marcus Thompson pointing the finger at Kevin Mercer as the shooter. Marcus Thompson gave two statements. The first statement was taken shortly after his arrest. Subsequent to his arrest, and based on the gunshot residue results, the state reduced Thompson's charges to that of accessory before the fact of carjacking and after the fact of murder. After the reduction in his charges, Thompson was granted bond and released. A short time later Thompson was re-arrested, charged and pled guilty to drug distribution charges for which he received probation. Astoundingly, and despite his continuing criminal conduct, the state did not seek to

revoke Thompson's bond. While on probation, Thompson was arrested again for a driving offense in North Carolina, and let out on bond.

Approximately one month prior to Kevin Mercer's trial, Marcus Thompson met with the Solicitor and gave a second statement that was so wildly inconsistent with the first statement that the Solicitor ended the interview and, not surprisingly, did not call Marcus Thompson to testify at trial. With Thompson gone, the state had only one witness to support its theory and place the murder weapon directly in Kevin Mercer's hand, and that person was career criminal named Terry Brown.

While Terry Brown was well-qualified for the role of jailhouse snitch, he was neither credible nor objective concerning Kevin Mercer, or the facts surrounding the murder of Tracey Davis. Brown and Mercer despised one another, and there was a history of bad blood between them. One month prior to his capital trial, Mercer was convicted of assaulting Brown with a sharpened toothbrush during a detention center squabble. Despite their deep-seated dislike for one another, Brown testified Kevin confessed to him that he had shot Tracey Davis execution style while he was on his knees.

It is doubtful that Kevin Mercer would have confessed to a person he loathed. Moreover, the uncontested physical evidence and pathologist's report indicate that Davis was shot in the back of the head with the trajectory of the bullet traveling upward from its point of entry into the lower left back side of the victim's skull. Despite the obvious credibility problems associated with Terry Brown's testimony, his testimony, if believed, was damning and extremely prejudicial.

Marcus Thompson's absence from the trial left defense counsel without any way

to show that he was more likely the shooter. Thompson's inconsistent statements and seeming inability to remember his previous lies to law enforcement raise a strong suspicion that he was being deceitful about his role in Sgt. Davis' killing. With no evidence to support the defense theory about Marcus Thompson, Kevin Mercer's conviction was virtually assured.

Had the new information been available at the time of Kevin Mercer's trial it is likely that the result of one or both of the proceedings would have been different. Kevin Fuller's statement to law enforcement is exactly what Kevin Mercer needed during the guilt or innocence phase of his trial, as Kevin Fuller has absolutely no connection to Kevin Mercer, or any apparent score to settle with Marcus Thompson. Furthermore, even had the jury returned with a verdict of guilty as to murder, Kevin Fuller's information, if believed, would have prevented the jury from returning with a sentence of death based on the trial court's charge that death was appropriate only if the jury believed Kevin Mercer was the triggerman.

On May 3 2006, Kevin Fuller had been Marcus Thompson's cellmate for a mere two days. There is absolutely no evidence that any bad blood existed between the two of them. What's more, Kevin Fuller asked for nothing in return for the information he gave to the Solicitor's Office. It was only after Fuller gave a sworn statement on May 9, 2006, that he broached the topic of his pending criminal domestic violence charges, and ask for "help" for his mental problems. However, even during this final letter, sent on or about May 12, 200, Kevin Fuller made it clear that he expected nothing in return for his information: "[e]ather (sic) way God wants me to help put away the guy who killed Mr. Davis and I'm there is you need me Sir." (see Attachment G)

III. APPLICABLE LEGAL PRINCIPLES

The substantive legal principles governing this motion are well settled. The South Carolina Supreme Court continually held that in order to obtain a new trial based on after-discovered evidence, the movant must show that the evidence:

- 1) is such as would probably change the result if a new trial is had;
- 2) has been discovered since the trial;
- 3) could not by the exercise of due diligence have been discovered before trial;
- 4) is material to the issue of guilt or innocence; and
- 5) is not merely cumulative or impeaching.

See e.g., Hayden v. State, 278 S.C. 610, 299 S.E.2d 854, 855 (1983); State v. Allen, 276 S.C. 412, 279 S.E.2d 365, 366 (1981); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 739 (1979); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195, 198 (1978).

Evidence about which the moving party was excusably ignorant and could not have been discovered with the exercise of due diligence by trial counsel before or during the first trial satisfies the requirements for newly discovered evidence. State v. Kelly, 285 S.C. 373, 329 S.E.2d 445 (1985); State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). Furthermore, sworn statements may be used to establish newly discovered evidence. See State v. Murray, 127 S.C. 340, 121 S.E.2d 265 (1923).

IV. BECAUSE THE NEWLY DISCOVERED EVIDENCE SUPPORTS HIS CLAIM THAT MARCUS THOMPSON SHOT AND KILLED SGT. TRACEY DAVIS, KEVIN MERCER SHOULD BE GRANTED A NEW TRIAL.

A. The new evidence is material and is such as will probably change the result if a new trial is granted.

The new evidence in this case would have a huge impact if a new trial were had. Marcus Thompson has admitted his role as triggerman in the murder of Sgt. Tracey Davis. Thompson's admission to the murder exposes him to the ultimate level of criminal liability, that for which a death sentence could be imposed.

Thompson's admission to Fuller includes details about which only an active participant in the murder would know, details that were unknown at the time of trial and, most significantly, consistent with the known physical evidence. Moreover, the new information contained in Fuller's statement was never provided in news or other media accounts. The significant details include the following:

- * That Thompson wore the gloves inside out so as to avoid leaving gunpowder residue (GSR) on the exterior portion of the gloves¹;
- * That Thompson and Kevin Mercer had shot the gun earlier in the day, which would explain why, several hours later, two particles of round lead were found on Mercer's hand²;

¹ Thompson erroneously believed that the gloves he had in his pocket were tested for gunpowder residue (GSR) and found to be negative; astoundingly, law enforcement never tested the gloves and later tossed them into a plastic evidence bag along with a glove found in the victim's car.

² This information is consistent with the expert testimony concerning GSR, of which Mercer was found to have one of the three elements--lead-comprising GSR. It is certainly plausible that, had Mercer fired a weapon early on the day of the murder, that a few particles might still be on his skin several hours later.

- * That Kevin Mercer drove the Sgt. Davis' vehicle after Thompson shot him;
- * That Thompson drove Mercer's vehicle to the hotel parking lot;
- * That Thompson shot the victim behind the ear;
- * That, Mercer was taken out of the victim's vehicle first, which gave Thompson the opportunity to hide the gun under the driver's seat;
- * That Thompson had the bullets that went to the gun used in the killing.

When viewed in light of the minimal evidence offered by the state in support of its position that Kevin Mercer was the shooter, the new evidence creates a strong inference of Thompson's guilt as a triggerman. Finally, and this point cannot be overstated, this new evidence bears directly on the issue of Marcus Thompson's culpability for the murder of Sgt. Davis, and is therefore material to the issue of Kevin Mercer's innocence.

B. The new evidence has been discovered since trial and could not have been discovered prior to the trial by the exercise of due diligence.

The recent discovery of new evidence establishing Marcus Thompson's guilt for the murder of Sgt. Davis was not a result of lack of due diligence on the part of trial counsel. Prior to Kevin Mercer's trial during April 10-22, 2006, Marcus Thompson was out on bond, committing drug and driving offenses, seemingly without fear of repercussion. In fact, it was only due to Thompson's inconsistent statements to law enforcement, which led the state to his bond revocation on May 1, 2006, that Thompson made his admissions to his cellmate Kevin Fuller. The key to the new evidence was Thompson's statements against interest, and those statements were not available until after the conclusion of Kevin Mercer's trial.

C. The new evidence is not merely cumulative or impeaching.

The new evidence which Kevin Mercer seeks to present at a new trial is neither impeaching nor cumulative. At trial, due to his Fifth Amendment Right, the defense was unable to examine Marcus Thompson; had no way to introduce his vacillating statements on the facts surrounding the murder; and, finally, had no witness who could offer what Kevin Fuller has brought forth. The new evidence generated by Kevin Fuller's statements is truly new. Thompson's admissions to Fuller answer several critical questions that could not have been addressed at trial. Why would Kevin Mercer have only one of the three components of GSR a mere eighteen minutes after the shooting if he had actually fired a .357? How did Kevin Mercer's vehicle end up at the Economy Inn? Why did certain witnesses report hearing two car doors slam? Why did Marcus Thompson have two pairs of knit gloves in his pocket during the month of May? For these, and potentially other, reasons, the newly discovered evidence in this case is not merely impeaching or cumulative.

V. CONCLUSION

For all of the foregoing reasons, Kevin Mercer respectfully requests that this Court hold in abeyance his pending direct appeal, remand his case back to the Circuit Court for an evidentiary hearing on the newly discovered evidence to determine whether a new trial should be granted. A failure to do so may result in the execution of an innocent man, a miscarriage of justice sufficient to undermine any confidence in the state's judicial processes. Such a result does not comport with the high standards of justice required by the precedents of this Court, and of the entire judicial system of the United States.

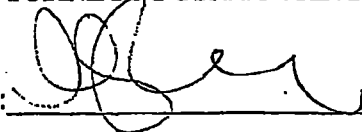
Respectfully submitted,

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201
(803) 765-2796.

Cameron B. Littlejohn, Jr.
1720 Main Street, Ste. 202
Columbia, S.C. 29201
(803) 799-1888.

Joseph L. Savitz, Esquire
1205 Pendleton Street, Rm. 306
Columbia, S.C. 29201
(803) 734-1330.

ATTORNEYS FOR MOVANT.

By: 

This 30th day of May, 2006.

State of South Carolina,
Applicant

03-GS-32-409

V.

Certificate of Service

State of South Carolina,
Defendant-Appellant

I hereby certify by my signature below that a copy of Applicant's Motion for Remand and Hearing on Motion for New Trial Based on After-Discovered Evidence, by first-class mail on today's date:

Attorney General Henry McMaster
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

Honorable Donald V. Myers, Solicitor
Lexington County Solicitor's Office
205 E. Main Street
Lexington, S.C. 29072

Served By: 

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, S.C. 29201.
(803) 765-2796

This 30th day of May, 2006.

State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit

COUNTIES
EDGEFIELD / LEXINGTON
McCORMICK / SALUDA
FAXES: (803) 785-8431 or (803) 785-8255



LEXINGTON COUNTY JUDICIAL CENTER
205 E. MAIN ST. • THIRD FLOOR
LEXINGTON, SOUTH CAROLINA 29072.
TELEPHONE: (803) 785-8352

DONALD V. MYERS
Solicitor

May 23, 2006

Via Fax – Original by Mail

Cam Littlejohn, Esquire
1720 Main Street
Suite 202
Columbia, SC 29201

Re: *State v. Kevin Mercer*

Dear Cam,

Enclosed, please find additional discovery stamped C1001 to 0008 provided to our office and law enforcement by Kevin Fuller on the above referenced case. I received the enclosed letter from Mr. Fuller after Marcus Thompson's bond was revoked by the Honorable Edward B. Cottingham, Sr. on May 1st, 2006.

Sincerely,

Donald V. Myers
Solicitor
11th Judicial Circuit

.cc Lisa Kimbrough, Esquire

State v. Mercer - Remand New Trial Motion
Attachment A

2896

5/23/06 TUE 13:59 FAX 803359 FAX 803359

Office of The Solicitor

Kevin Fuller
CCDC
PO. Box 2019
Lexington, SC 29071

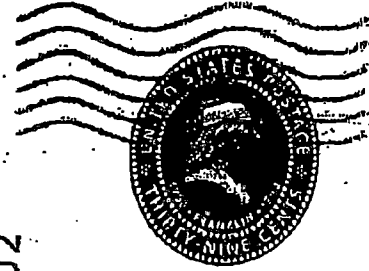
Clerk of Court

COLUMBIA SC 292

04 MAY 2006 PM 1 T

S/O "DONNIE MYERS"

Lexington County Judicial Center
205 E. MAIN ST
Lexington, SC 29072



MAY 23 2006 0002

29072+3557 C010



State v. Mercer - Remand New Trial Motion
Attachment B

7897

THIS ENVELOPE IS RECYCLABLE AND MADE
WITH 30% POST CONSUMER CONTENT.

RECEIVED
ON 5/23/06
MAY 23 2006

MAY 23 2006* 0003

2888

MAY 2006

DEAR DENNE MYERS

My NAME is Kevin Fuller. I'm locked up with MARCUS ANTONIO Thompson who helped Kevin Mercer in the murder. We stay in the same room and several times at night he brags about killing Tracy Davis and Kevin getting the blame. He said Kevin smacked the door open on the truck and he shot Tracy in the head then Kevin drove Tracy's truck down the road to the other hotel while Marcus Thompson drove Kevin's car behind him. He said he give the gun to Kevin and then they left and got on the highway and got caught. He bragged about how the police found gun residue on Kevin's hand and laughed because he said Kevin was practice shooting earlier. He said when ~~he~~ he got caught they found bullets and some gloves on him and they checked his hands to see if he fired the gun and then checked the gloves and found nothing he said he was smarter than the police because of CSI, he said he had the gloves on inside out when he shot Kevin Mercer. I will tell this to his face because he should pay for what he done. I'll give you a week to let me know what you want me to do, then I'll write the News and Kevin's Lawyer because something needs to be done. I will do what ever you say to do let me know or let my lawyer "Matthew Buccannon" know.

Thank you,
Kevin Fuller

MAY 23 2006 0001



Lexington County Sheriff's Department



MAY 23, 2006* 0004

VOLUNTARY STATEMENT

DOB: [REDACTED]

SSN: [REDACTED]

(Not Under Arrest)

I, KEVIN FULLER, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to DET MEFFORD. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am 37 years of age, and I live at 521 GIBSON RD, LEX SC 29072.

On-Weekday the 3rd A couple days after Marcus Tappan moved into E-Dorm Room-7th we went to the hospital and came back bragging about being fucked up on pain pills. He started stating he was a lucky nigger because Lexington County was stupid. I was reading the newspaper and a guy named Kevin Mercer was on there because of murder. Marcus took the paper and said "This here nigger is dying for me". He said his self and Kevin followed a guy into Raine Tree Apartment. At that time Marcus put his gloves on inside out because he knew from watching CSI that a gun would leave powder marks. After the guy parked Kevin Mercer pull open the guys door to his trunk and the guy was on the phone and he started to get out to defend his self. Lots when Marcus said he shot him behind the ear and he fell beside the truck Marcus kicked his phone. Kevin jumped in the guys 1998th Explorer Expedition or Escalade truck Marcus jumped in Kevin's car and they left and went back to where Kevin was staying then Marcus jumped in the truck with Kevin and they got on the highway and not to far down the road and got pulled over. The cop asked the driver "Kevin" to get out the car and he did. Marcus said it took the cop ten to twenty minutes to tell him to get out the car before he got out the truck he put the gun under Kevin's seat. He brags about how Kevin and him self were shooting the gun earlier that day and how he took that man's truck to ride and jump in "ATL". He continuesly brags about shooting Tracy Davis. And how Lexington County didn't check the inside of the gloves or didn't put two nuts together because he had the bullets on him that went to the gun.

I have read each page of this statement consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained here in are true and correct.

Dated at 521 GIBSON RDthis 9th day of MAY 20 06WITNESS: DET MEFFORD

WITNESS: _____

Signature of person giving voluntary statement.

STATEMENT

Page 2 of 2 pages.

MAY 23, 2006 0005

Q: MEFFORD

A: FULLER

Q: DID YOU KNOW ANYTHING ABOUT KEVIN MERCER OR HIS CASE PRIOR TO THOMPSON TELLING YOU?

A: NO

Q: DID I OR ANYONE ELSE PROVIDE YOU WITH INFORMATION ON KEVIN MERCER OR HIS CASE, OTHER THAN THOMPSON?

A: NO

Q: DID I OR ANYONE PROMISE YOU ANYTHING IN EXCHANGE FOR THIS STATEMENT OR INFORMATION GIVEN TO YOU BY THOMPSON?

A: NO

Q: DID I PROVIDE OR CONFIRM ANY DETAILS OF THE CASE PERTAINING TO THIS STATEMENT?

A: NO

Q: DID ~~ANYONE~~ ^{WE} OR ANYONE CONTACT YOU PRIOR TO THOMPSON BRING PLACER IN YOUR CELL?

A: NO

Q: WHEN THOMPSON PROVIDED YOU WITH THIS INFORMATION, WHAT DID YOU DO?

A: I SENT A REQUEST TO THE JAIL AND A LETTER TO DONNIE MYERS FOR SOMEONE TO COME TALK TO ME ABOUT WHAT MARCUS WAS SAYING TO ME ABOUT SOME MURDER.

Q: IS THIS ENTIRELY IN THE FIRST RESPONSE TO YOUR LETTER OR REQUEST?

A: YES KLF /// END OF STATEMENT /// KLF

KLF

Sworn to before me this 9th day of MAY 2006.

Notary Public of South Carolina

LC80 173, Revised 11/04

Signature of person giving statement

MR DONNIE MYERS,

My NAME is Kevin Fuller. I wrote you letting you know about Marcus Thompson telling me he killed MR DAVIS. The Investigator came and talked to me and got a statement. I informed him that I didn't want my self put in the paper or have to testifie while I'm here. I will help any way I can though because this guy is bragging about how he killed this guy. I don't know Nothing about the guy that got killed but if you would let his family know I will help any way I can. I do ask MR Donnie Myers that you talk to Shannon Heath about my two COV charges or over ride them your self. My Girl Friend Cheryl Price put these charges on me in hopes to get me help not jail. She never signed the warrants and she asked for me to go to Morris Village. I'm bypoker and she wants me home but to get help. You can call her at work or home she writes me all the time and asks if theres something she can do. Could you get me some help if my family pays for it and some probation. Please look over it and let Shannon Heath know. Either way God wants me to help put away the guy who killed MR DAVIS and I'm there if you need me sir.

MAY 23.2006 0006

Thanks,
Kevin C. Fuller

Cheryl Price WK: 256-2453 781043

Home: 503-955-4536

After 5:00

THIS ENVELOPE IS RECYCLABLE AND MADE
WITH 30% POST CONSUMER CONTENT.

letting you know about
this. The Investigator
informed him that I
to testify while I'm here.
my is bragging about how
out the guy that got killed
any way I can. I do ask
about my two CDU
if Cheryl Price put
oil. She never lived
village. I'm bipolar
kill her at work or
as something she
says for it and
is Heath know
my who killed

RECEIVED MAY 23 2006
ON MAY 23 2006
MAY 23 2006

MAY 23 2006 * 0007

Fuller

903
Levin Miller

24 FDC
D.P.: Box 2019
Livingston St. 29071

448

205. E. MAIN ST
Lexington, St. 29072

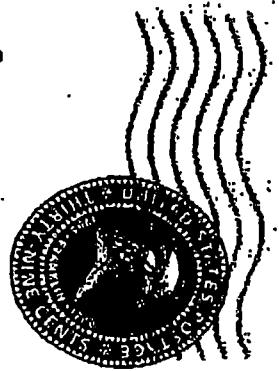
1 Clerk of Court
S/O Solicitors Office
Mr. Donnie Myers

COLLEBIA SC 292

— Clerk of Court - 1911

28072+3837 CO10

MAY 23, 2006* 0008



State v. Mercer - Remand New Trial Motion
Attachment I

IN THE SUPREME COURT
STATE OF SOUTH CAROLINA

Appeal from Lexington County
06-GS-32-553

RECEIVED

JUN 13 2006

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

Respondent,

V.

KEVIN J. MERCER,

Appellant

**RESPONDENTS RETURN TO MOTION FOR REMAND
AND HEARING ON MOTION FOR NEW TRIAL
BASED UPON AFTER-DISCOVERED EVIDENCE**

The Respondent, State of South Carolina, by and through its below-signed counsel, hereby makes a Return to the Motion for Remand and Hearing on Motion for New Trial Based Upon After-Discovered Evidence. For the reasons set forth below, Respondent submits that the pending appeal should be held in abeyance to allow a remand to the Court of General Sessions and particularly trial judge, the Honorable John C. Few, to address whether the after-discovered evidence of Kevin Fuller satisfies the elements of "after-discovered evidence" set out in *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979).

I.

The Appellant, Kevin J. Mercer, was indicted for murder, armed robbery, and possession of a firearm while in the commission of a felony, § 16-23-490 during the February 2003 term of

the Court of General Session for Lexington County. 2003-GS-32-409. From April 17-22, 2006, he was tried before a jury and the Honorable John C. Few. He was convicted of his charge. After a separate sentencing hearing where statutory aggravating factors of murder committed while in the commission of armed robbery was found, he was sentenced to death on April 22, 2006.

On April 24, 2006, a notice of appeal was made to this Court. On May 22, 2006 his appellate attorney, the South Carolina Division of Appellate Defense, ordered the transcripts of the trial. At this time, upon information and belief, the transcripts are not prepared or available for either party.

On or about May 31, 2006, the Appellant, through his trial appellate counsel, made a motion to remand and hearing on a motion for new trial. Within the pleading, the Appellant essentially contends that on May 23, 2006, the Appellant received evidence through the Eleventh Circuit Solicitor's Office that Kevin Fuller, a detainee, had received information that Marcus Thompson had confessed to killing Sgt. Tracey Lamar Davis.

Mercer contends this information satisfies the elements of "newly discovered evidence" inasmuch as information was first brought to either parties' attention after the trial (and after the notice of appeal) was filed. He contends that this information was consistent with the defense theory at trial that Thompson killed Sgt. Davis and inconsistent with the State's theory that Mercer was the triggerman. The Appellant makes various other assertions concerning the entirety of the trial and potential impact this information has upon the case in support of his motion. However, without a copy of the transcript to review the entirety of the record, below-signed counsel can neither effectively nor ethically address these concerns, having not

participated at the trial. Nevertheless, addressing those factual claims are not necessary at this preliminary stage of the appeal.

Rule 29 of the South Carolina Rules of Criminal Procedure sets out the following:

Rule 29(b)

A motion for new trial based on after discovered evidence must be made within a reasonable period of time after the discovery of the evidence, provided however, that the motion for a new trial based on after discovered evidence made not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion...

Therefore, the limited purpose of this motion before the court is whether leave of the court and suspension of the appeal is appropriate at this time.

Respondent submits the equities are in favor of suspending the appeal and allowing leave to file the motion in Lexington County. First, the appeal is within the preliminary stages of the transcript being ordered. Thus, the appellate issues have not been presented to the court at this time. Second, after consulting with the Solicitor's Office, it has been confirmed that the evidence relied upon specifically within the Appellant's motion, attachments A, B, C, D, E was brought to the defense attention after the trial and after the notice of appeal. Without addressing the merits of the substance of the information within, Respondent concedes that it is "new" and the request is being made "within a reasonable period of time after the discovery..."

Respondent, State of South Carolina, therefore asserts that the appeal be suspended to allow Mercer to make a motion for a new trial based upon after-discovered evidence.

Respondent requests, consistent with the practice in prior cases, that the leave of remand be made with a directive that the matter be heard by the original trial judge, the Honorable John C. Few,

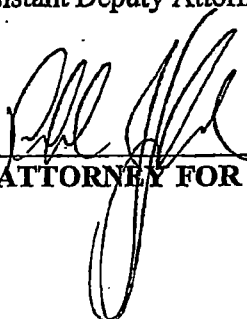
who, a trial judge, is vested with the judicial knowledge of the impact the evidence could have upon the jury under the test of *State v. Caskey, supra*.

Respondent does not concede at this time that Mercer is entitled to a new trial.

Respondent merely assert that at this preliminary stage of an appeal, the economies favor holding a hearing on the potential merits of his claim now,¹ rather than waiting for the completion of the direct appeal.

Respectfully submitted,

DONALD J. ZELENKA
Assistant Deputy Attorney General

By: 

ATTORNEY FOR RESPONDENT

Post Office Box 11549
Columbia, SC 29211

June 13, 2006

¹ The test for a new trial based upon after discovered evidence requires the movant to prove the evidence:

1. is such as would probably change the result if a new trial was held;
2. had been discovered since the trial;
3. could not, by exercise of due diligence be discovered before trial;
4. is material to the issue of guilt or innocence; and
5. is not merely cumulative or impeaching.

State v. Caskey, supra. Respondent, at this time, is only conceding the existence of element (2) ("had been discovered since the trial").

CERTIFICATE OF SERVICE

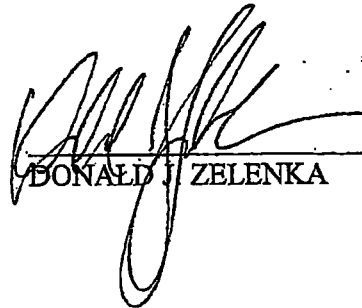
I, Donald J. Zelenka, hereby certify that I have served the *Respondents Return to Motion for Remand Hearing on Motion for New Trial Based Upon After-Discovered Evidence* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Melissa J. Kimbrough, Esquire
1720 Main Street, Ste. 106
Columbia, South Carolina 29201

Cameron B. Littlejohn, Jr., Esquire
1720 Main Street, Ste. 202
Columbia, South Carolina 29201

Joseph L. Savitz, III
Chief Attorney
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211

This 13th day of June, 2006.


DONALD J. ZELENKA

Deputy Chief Attorney for Capital Appeals Robert M. Duden

Page Two

July 3, 2007

cc: Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

STATE OF SOUTH CAROLINA,

vs.

KEVIN J. MERCER,

Defendant.

2006 SEP 26 P 1:55

BETH A. CABRIGG
CLERK OF COURT
LEXINGTON, SC

2003-GS-32-0409

ORDER

I. INTRODUCTION

This case is before the Court on remand from the Supreme Court of South Carolina for a hearing and ruling on the Defendant's Motion for a New Trial Based on After-Discovered Evidence. The Defendant contends that the new evidence requires a new trial in both the guilt and sentencing phases. For the reasons set forth below, the motion is DENIED.

II. KEY FACTS

On May 16, 2002, Mercer and Marcus Thompson went to Raintree Apartments in Lexington County to steal a vehicle. Sergeant Tracy Davis was selected as the victim because he was driving a Lincoln Navigator. During the course of the robbery, Sergeant Davis was shot and killed. Sergeant Davis' roommate Clifton Magwood was present in their apartment when the robbery occurred and was able to see through his window that Sergeant Davis was being robbed. By proving the time of the 911 call made by Magwood, the State was able to prove conclusively the time of the crime, including the murder.¹ Responding to a bolo² based on Magwood's description of Sergeant Davis'

¹ Magwood testified he heard the gunshots while he was on the phone with 911. The 911 tape was played for the jury, and it has the sound of gunshots on it.

² A "bolo" is a notice given by dispatchers to patrolling officers to "be on the lookout" for a certain vehicle.

ORIGINAL

Navigator, an officer with the Lexington County Sheriff's Office stopped Sergeant Davis'

Navigator on I-20 westbound only minutes after the murder. Mercer was driving, and Thompson was in the passenger seat. The murder weapon was discovered under Mercer's seat. The distance between the scene of the murder and the location of the arrest was such that Mercer and Thompson had to have come almost directly from the scene when they were arrested.³

III. PROCEDURAL HISTORY

Both Mercer and Thompson were initially charged with murder. However, the State eventually decided it had been Mercer who killed Sergeant Davis. The State served notice of its intention to seek the death penalty against Mercer, and the case was tried beginning April 10, 2006. At the conclusion of the guilt phase, the jury found Mercer guilty of murder and armed robbery. The jury had been charged without objection that they could convict Mercer of murder even though he might not have been the actual shooter, under the doctrine of "the hand of one is the hand of all." In the sentencing phase, however, the jury was specifically charged that it may not recommend the death penalty for Mercer unless it found that the State had proven beyond a reasonable doubt that Mercer had actually fired the shot that killed Sergeant Davis. On April 22, 2006, the jury returned with a verdict recommending the death penalty, and Mercer was accordingly sentenced to death on that date.

After the Mercer trial, the State dismissed the murder indictment against Thompson and allowed him to plead guilty to accessory before the fact of armed robbery,

³ There was evidence at the trial, which is confirmed by evidence offered in the hearing of this motion, that Mercer and Thompson met briefly at the Economy Inn just after the murder in order to both get into the Lincoln Navigator. From there, they proceeded directly to I-20 and headed West.

2 

and accessory after the fact of murder and armed robbery. Thompson plead guilty to those charges on June 20, 2006 and was sentenced to 28 years.

Thompson was not called to testify by either the State or the Defendant in either phase of Mercer's trial. In early May of 2006, while Thompson was housed in the Lexington County Detention Center before his guilty plea to these charges, he allegedly confessed to his cell-mate Kevin Fuller that Thompson was the one who had shot Sergeant Davis. Fuller wrote to the Solicitor and reported the statement that Thompson had allegedly made. The Solicitor promptly disclosed this statement to counsel for the Defendant, who then made a motion in the Supreme Court to have the case remanded for the purpose of allowing the Circuit Court to hear the motion for a new trial. The Supreme Court granted the motion to remand. This Court heard the motion on August 9, 2006.

IV. APPLICABLE LAW

In order to prevail on a motion for a new trial based on after-discovered evidence, Mercer must show that the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999) (citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)). See also *Johnson v. Catoe*, 345 S.C. 389, 548 S.E.2d 587 (2001).

V. PROBABLE RESULT OF A NEW TRIAL

The Defendant argues that the only disputed element is the first, whether the after-discovered evidence "would probably change the result if a new trial were granted." The State did not contest this argument, and I agree. The other four elements are clearly met. Therefore, the focus of the Court will be on whether or not the result of the trial would "probably" be different if a new trial is granted.

VI. THE "AFTER-DISCOVERED" EVIDENCE

In order to determine if the Defendant has met its burden of proof in this motion, it is necessary to determine what the "after-discovered evidence" is. The fact that Thompson was a participant in the crime and had first-hand knowledge of what happened was known to both the State and the Defendant from the time the crime was committed. Both sides talked to Thompson before the trial, and both parties knew what his statements had been. From information readily available to both parties well in advance of trial, both the State and the Defendant were able to make intelligent predictions about what Thompson's testimony would be if he were called to testify at trial. Neither chose to call him to testify. The only thing the parties know now that they did not know at the time of trial was that Fuller alleges Thompson made a statement to Fuller after the Mercer trial about who had pulled the trigger, and the circumstances surrounding that alleged statement. However, as discussed in detail at the hearing of this motion, Fuller's statement about what Thompson allegedly said becomes admissible only after Marcus Thompson has testified. It is not admissible by itself. Therefore, even though the only evidence not known to the parties at the time of the trial is the alleged statement by Thompson to Fuller and Fuller's subsequent testimony, the determination of whether a

new trial should be granted must be made after considering all of the evidence offered at the hearing of the motion, including the testimony of Thompson.⁴ For this reason, the "after-discovered evidence" is all evidence related to the testimony and credibility of Thompson and Fuller, which is all evidence offered at the hearing of this motion.

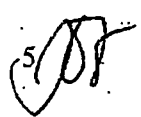
VII. GUILT PHASE

In my opinion, the State proved beyond any doubt in Mercer's trial that Mercer and Thompson planned and participated in the armed robbery of Sergeant Davis' vehicle, and that the murder was committed as a natural consequence of that armed robbery. They both drove to Raintree Apartments in Mercer's vehicle, and were caught with the robbery and murder weapon in Sergeant Davis' Navigator almost immediately after the crime. At the conclusion of the guilt phase, the Defendant did not object to charging the jury that Mercer could be guilty under the doctrine of "the hand of one is the hand of all." The "after-discovered evidence" supports, rather than undermines, the jury's verdict finding Mercer guilty on the charges of murder and armed robbery. The only seriously disputable fact in this entire case is whether or not Mercer pulled the trigger and fired the shot that killed Sergeant Davis. I find there is no likelihood whatsoever that the result of the guilt phase would be any different if this new evidence were presented at a new trial. For that reason, the motion for a new guilt phase trial is DENIED.

VIII. SENTENCING PHASE

There are two primary questions that must be considered in determining whether the new evidence would probably change the result of a new sentencing phase. The first concerns the likelihood the jury in a new trial would believe the alleged statement by Thompson actually occurred. The second concerns the likelihood the jury would believe

⁴ Both the State and the Defendant agreed with this at the hearing.

5 

what Thompson allegedly told Fuller, if they found Thompson made the statement. I will discuss each in turn.

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However, I will start off by stating that neither Fuller nor Thompson has any real credibility about them. As was demonstrated at the trial and the hearing on the new-trial motion, they are both convicted felons who have given statements that conflicted with each other not only in their details but in their substance. Thompson's alleged jailhouse confession must be balanced against the alleged jailhouse confession made by Mercer, as testified to at the trial by Terry Brown, another convicted felon with very little credibility. In summary, the starting point of this analysis is that none of the witnesses whose testimony relates to this "after-discovered evidence" is particularly credible.

I would also like to note that it is clear that some conversation occurred in that jail cell in which Thompson discussed the charges against him and the specific facts of the case. In addition to Fuller's testimony about these conversations, the third cellmate Timothy "Rocky" Johnston described these conversations, and Thompson himself acknowledged that he had discussed this with his cellmates.

The evidence on the question of whether Thompson actually made the statement that he was the one who killed Sergeant Davis is the testimony of Thompson, the testimony of Fuller, and the testimony of Johnston. Starting with Fuller, I have already pointed out that he is not a believable person. Further, his statements and his testimony are full of major inconsistencies and contradictions. He admitted that he lied on several occasions both in connection to this case and otherwise. For example, he lied to the prison system the last time he was in prison, stating that he was a Muslim, so he could get better food. In his testimony in this case, he told markedly different stories about when

ER

Thompson first told him it was Thompson who shot Sergeant Davis. He also told completely different stories as to what Thompson told him about how the gun was given to Mercer after Thompson supposedly used it to kill Sergeant Davis. 3

The State elicited evidence both on cross-examination of Fuller and through the testimony of Johnston that Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis. Though Fuller testified he did not want help from the Solicitor's office regarding his pending charges, he wrote in a letter to Solicitor Myers "I do ask . . . that you talk to [assistant Solicitor] Shannon Heath about my two CDV charges, or over look them yourself." He wrote later in the same letter "Could you get me some help . . . and some probation?" State's Exhibit 4. According to Johnston, Thompson actually stated he intended to fabricate this story in order to get help on his current charges. Fuller has a significant history of lying to help himself, and there is strong evidence he did so again in this case. 4

Fuller was adamant in his testimony at the hearing that Johnston heard Thompson discussing the murder, including Thompson stating he had fired the shot. However, when Johnston testified, he denied having heard many of the things that Fuller said Johnston would corroborate. For example, Fuller said Thompson bragged in Johnston's presence about his role in Sergeant Davis' murder even before he specifically admitted having been the triggerman. Johnston denied this, stating that the conversations with Thompson were more along the lines of Thompson telling them what his situation was so that they could help him decide what to do when it came time to plead guilty or go to trial. 5

Finally, there are several known facts that are inconsistent with Fuller's account of what Thompson told him. Fuller wrote in his statement and testified at the hearing that

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Thompson told him Sergeant Davis fell against the Navigator after he was shot, and that there was a blood smear on the side of the Navigator. There was no blood smear on the Navigator a few minutes later when Mercer and Thompson were stopped. There is also inconsistency as to where Sergeant Davis was shot, but that inconsistency is not as significant.

I carefully observed Fuller's demeanor and listened to his testimony. In my view, the inconsistencies in his own stories, the differences between his version and that of Thompson and Johnston, and the inconsistency of Fuller's story with known facts did not result from mistake or failure of recollection, but rather from intentional, calculated misrepresentations. I believe Fuller fabricated the story about Thompson admitting to shooting Sergeant Davis. I believe Fuller purposefully made different statements about this at different times when Fuller's view of what version of the story suited Fuller's interests best had changed. Finally, apart from the factors listed above, Fuller simply left me with the clear impression he was not telling the truth. Fuller's testimony has very little credibility.

Turning to Thompson, he also is not a believable person, but slightly more so than Fuller. Thompson also has given statements that were contradictory to his testimony here in many important details. For example, he has given statements that Mercer told him to go to the Economy Inn while Mercer robbed Sergeant Davis, and that he went to the Economy Inn on his own. He has given statements that he put the gun under Mercer's seat, and statements that Mercer did it. There are others. Thompson has little credibility.

It must also be recognized that at one point in time at least, Thompson had a significant motive to lie about his involvement in the shooting. Law enforcement had



bought into the idea that Meroer was the shooter, and it certainly was not in Thompson's best interests to convince them otherwise. This motive not to claim he was the shooter still existed at the time of the alleged statements to Fuller, but had largely disappeared by the time of the hearing. While Thompson still had some motive at the time of the hearing to keep people from knowing he might have done this, he no longer faced prosecution for the shooting. The Solicitor conceded on the record that Thompson's plea prevented his prosecution for murder under the double jeopardy clause. Finally, Thompson's testimony in the hearing before me did not have significant inconsistencies and contradictions like Fuller's did. When balancing the credibility of Fuller and Thompson, the testimony of Thompson has more credibility.

Timothy "Rocky" Johnston was the third cellmate when the Thompson statements were supposedly made. Although Johnston does not have much credibility on paper, he is the one witness in this whole analysis of jailhouse confessions who does not have anything to gain from his testimony. I observed him to be straightforward. His testimony was believable. Johnston testified that Thompson never admitted to shooting Sergeant Davis. He testified that all Thompson discussed with them was the general nature of the case in order to get help deciding whether or not to plead guilty.

The question before me, however, is not whether I believe Fuller or Thompson or Johnston. Rather, the question before me concerns the likelihood that the jury would believe them. Therefore, on the question of whether Thompson actually made the statements, I find that there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis.



The second question concerns the likelihood the jury would believe what Thompson allegedly told Fuller, if they found Thompson made the statement. Much of the reason I believe there is very little likelihood the jury would believe this statement is discussed above. In addition, even though Thompson has limited credibility and undoubtedly would be effectively cross-examined by defense counsel at a retrial, Thompson's testimony that Mercer pulled the trigger is more credible evidence than Thompson's jailhouse confession, assuming he made one. On cross-examination by Solicitor Myers in the hearing on this motion, Thompson calmly and convincingly went through the entire sequence of events in a straightforward manner without any hesitation. He stated Mercer, not Thompson, had shot Sergeant Davis. In a new trial, both Thompson's testimony and his alleged confession to Fuller would be before the jury. In my opinion, the jury would be much more likely to believe Thompson's testimony than to believe what he allegedly said in his statement to Fuller. I find there is very little likelihood the jury would believe Thompson's statement to Fuller over his in-court testimony that Mercer pulled the trigger.

One of the factors I considered important is whether the Defense would be better off from a strategic standpoint in a new trial with the "after-discovered evidence" than they were in the original trial with the arguments that were made available by the State's decision not to call Thompson as a witness. In both phases of the trial, defense counsel wisely and effectively argued directly and implicitly that the jury should consider strongly the lack of testimony and evidence from Thompson. Counsel wisely and effectively suggested that the State's failure to call Thompson as a witness left the jury to speculate as to who pulled the trigger, creating reasonable doubt. Further, not having the

testimony of Thompson before the jury, defense counsel was able to argue much more effectively that the State's failure to test Thompson's gloves for gunshot residue also left the jury to speculate as to who pulled the trigger. By having the testimony of Thompson before the jury, the defense would have been seriously hampered in its ability to make these effective arguments. Thompson's testimony that Mercer did pull the trigger would have helped the State considerably, even though Thompson has limited credibility. This is true not only because Thompson testified that Mercer shot Sergeant Davis, but just as importantly because Thompson testified that he had worn the same gloves earlier in the day when he and Mercer went target shooting. This testimony would have completely taken away the argument defense counsel used so effectively that the State's failure to test the gloves for gunshot residue created reasonable doubt as to the identity of the shooter. With Thompson's testimony, it is clear there would have been gunshot residue on the gloves even if Thompson did not shoot Sergeant Davis.⁵ In my view, the strategic advantage of being able to make these arguments significantly outweighs the advantage of having largely incredible evidence available that Mercer did not shoot Sergeant Davis.

Taking all of this into consideration, and considering all the evidence before me, I find that there is essentially no chance the "after-discovered" evidence would change the outcome if a new trial were granted. In making this ruling, I considered all the testimony and evidence in the trial and the motion hearing. I did not focus just on the testimony of the individual witnesses in the motion hearing. For this reason, the motion for a new sentencing phase trial is DENIED.

⁵ The defense moved the Court after the remand to order funding to have the gloves tested. Thompson's testimony that he fired the gun earlier in the day while wearing the gloves makes the results of that testing essentially meaningless. The decision not to test the gloves before trial was a strategic one on the part of the defense. After Thompson's testimony, however, there is no reason to fund those tests.

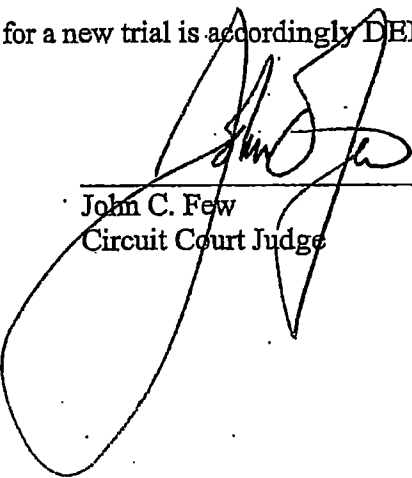
IX. OTHER LAW

The Defendant has argued the applicability of *Holmes v. South Carolina*, ___ U.S. ___, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). In *Holmes*, the United States Supreme Court reversed the Supreme Court of South Carolina's ruling that evidence of third-party guilt was not admissible in *Holmes*' trial. In this case, however, there is no dispute that the new evidence is admissible. Thus, *Holmes* is not helpful in deciding the Defendant's motion.

X. CONCLUSION

For the reasons set forth above, the "after-discovered evidence" does not undermine this Court's confidence in the verdict in either phase of the trial. I find there is no reasonable probability the "after-discovered" evidence would change the outcome if a new trial were granted. The motion for a new trial is accordingly DENIED.

IT IS SO ORDERED.



John C. Few
Circuit Court Judge

Greenville, South Carolina

September 25, 2006

The Supreme Court of South Carolina

The State,

Respondent,

v.

Kevin Mercer,

Appellant.

Beth A. Carrigg
Clerk of Court
Lexington, SC

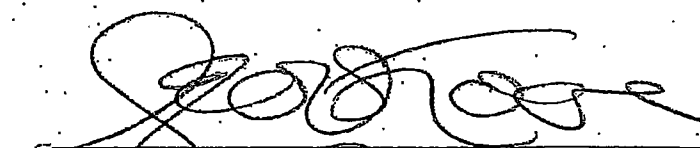
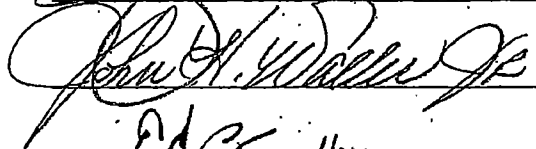
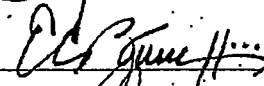
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ORDER

Appellant moves this Court to hold his appeal in abeyance and remand the case to the circuit court for a hearing on appellant's motion for a new trial based on after-discovered evidence. The State concedes that the appeal should be held in abeyance to allow for a remand to address appellant's motion for a new trial. Appellant's motion to hold the appeal in abeyance and remand the case to the circuit court for a hearing on the motion for a new trial based on after-discovered evidence is granted. This appeal is hereby held in abeyance and the case remanded to the Honorable John C. Few, who shall hold an evidentiary hearing on appellant's motion within thirty (30) days of the date of this order and issue an order deciding the motion within sixty (60) days of the date of this order.

IT IS SO ORDERED.


C.I.

J.

J.

J.

Moore, J., not participating

Columbia, South Carolina

July 10, 2006

STATE OF SOUTH CAROLINA	)	
COUNTY OF LEXINGTON	)	COURT OF GENERAL SESSIONS
THE STATE,	)	03-GS-32-409
vs.	)	
KEVIN J. MERCER;	)	JURY INSTRUCTIONS ON
	)	AGGRAVATING AND
Defendant.	)	MITIGATING CIRCUMSTANCES

In determining whether to recommend that the Defendant Kevin J. Mercer be sentenced to Life in Prison, or to the Death Penalty, you may consider only the following aggravating circumstance:

The murder was committed while in the commission of robbery while armed with a deadly weapon.

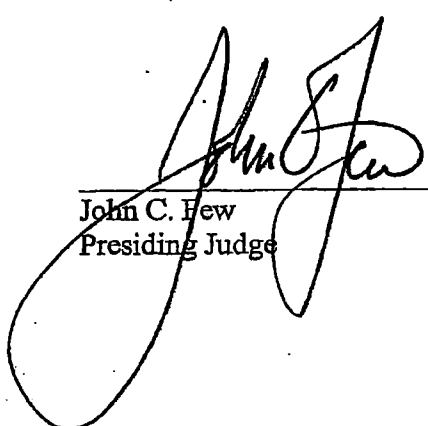
You may also consider the following statutory mitigating circumstances:

The murder was committed while the defendant was under the influence of mental or emotional disturbance.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The age or mentality of the defendant at the time of the crime.

You may also consider any non-statutory mitigating circumstances.


 John C. Few
 Presiding Judge

April 22, 2006

**REPORT OF THE TRIAL JUDGE
IN THE COURT OF GENERAL SESSIONS
LEXINGTON COUNTY, SOUTH CAROLINA**

THE STATE

VS

Kevin Jermaine Mercer

Case No. 2003-GS-32-409

A. DATA CONCERNING THE DEFENDANT

1. Name Mercer Kevin Jermaine
2. Date of Birth [REDACTED]
Month Day Year
3. Social Security Number [REDACTED] [] Unknown
4. Sex: Male [x] 5. Race: White []
Female [] Black [x]
Other []
6. Education - Highest Grade Completed:
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
(Circle One) (College)
7. Do you have an opinion as to the Defendant's intelligence level?
Yes [x] No []
If so, is it
a. Below Average [x]
b. Average []
c. Above Average []

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8. Was a psychiatric evaluation performed? Yes [x] No []
- a. If performed, by whom? Donna Culley Ph. D.; Frieson, M.D.
- b. If performed, is defendant
1. Able to distinguish right from wrong? Yes [X] No []
 2. Able to cooperate intelligently in his own defense? Yes [X] No []
- c. If performed, were character or behavior disorders found? Yes [X] No []
(If yes, please elaborate)
Antisocial Personality Disorder

9. Does the Defendant have a record of prior convictions?
Yes [X] No []

- a. If so, either attach hereto a record manifesting such prior convictions(s) or list the offenses(s), the date(s) of such offense(s) and the sentence(s) imposed:

<u>Offense</u>	<u>Date of Offense</u>	<u>Sentence imposed</u>

1. See attached criminal history

2.

3.

4.

5.

6.

10. Was the defendant a resident or non-resident of the county in which the trial was held?

Resident [X]

Non-Resident []

B. DATA CONCERNING PRE-TRIAL MATTERS

1. The defendant was arrested on May 17, 2002
2. Was a preliminary hearing requested? Yes [X] No []
3. Was a preliminary hearing conducted? Yes [X] No []
4. The defendant was indicted at the February 10, 2003 term of the Court of General Sessions for Lexington County, South Carolina.
5. List each charge alleged in the indictment.
 - a. Murder
 - b. Arm Robbery
 - c. Possession of a firearm during Com. Violent Crime
 - d. Criminal Conspiracy
 - e.
 - f.
6. The defendant was arraigned on February 12, 2004.
 - a. If not arraigned, did the defendant waive arraignment?

Yes [] No []
7. Was the defendant provided with a true copy of the whole indictment at least three days prior to his trial thereupon?

Yes [X] No []

 - a. If not, did the defendant waive this right to a three day sight of the indictment?

Yes [] No []
8. Did the solicitor notify the defendant at least thirty days before trial that the State would seek imposition of the death penalty upon the defendant?

Yes ☒ No ☐

9. Did the solicitor make known to the defendant in writing prior to trial the evidence in aggravation of punishment thereafter introduced by the State during the trial or during the sentencing proceeding?

Yes ☒ No ☐

10. Did the defendant move for a change of venue.

Yes ☐ No ☒

- a. If so, was the venue changed?

Yes ☐ No ☐

- (1) If so, designate County. _____

C. DATA CONCERNING THE TRIAL

1. The defendant was brought to trial in the Court of General Sessions for Lexington County, South Carolina on April 17, 2006, during the April, 2006 term of that Court.

2. How did the defendant plead? Guilty ☐
Not Guilty ☒

3. List each offense of which the defendant was convicted and each offense of which the defendant was acquitted:

- a. The offense(s) of which the defendant was convicted:

1. Murder
2. Arm Robbery
3. Possession of a firearm during Com. Violent Crime
- 4.
- 5.

- b. The offense(s) of which the defendant was acquitted:

1. Criminal Conspiracy was *not* pressed
- 2.
- 3.
- 4.

- 5.
4. On what date and at what time did the conviction(s) occur?
 April 22, 2006, at _____ o'clock ____ M.

D. DATA RELATING TO SENTENCING PROCEEDING

1. Before whom was the defendant's sentencing proceeding conducted?
 the trial jury ☒ the trial judge ☐
 a new jury ☐ a new trial judge ☐
- a. If conducted before the trial jury,
1. On what date and at what time was the sentencing proceeding held?
 ____ April 22, 2006, at _____ o'clock ____ M.
- a. If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty-four hour waiting period?
- Yes ☐ No ☐
- b. If conducted before the trial judge or a new trial judge,
1. And if the defendant was convicted by a jury,
- a. Did the defendant and the State waive having the trial jury recommend sentence
 Yes ☐ No ☒
 If not, was the sentencing proceeding conducted by the trial judge because the case, due to nonprejudicial error, had been remanded to the trial court for resentencing based upon the record and argument of counsel?
 Yes ☐ No ☒
- b. On what date and what time was the sentencing proceeding held?
 _____, 200__ at _____ o'clock ____.

If such proceeding was conducted less than twenty four hours after the defendant's conviction, did the defendant waive the twenty four hour waiting period.

Yes []

No []

And if the defendant was convicted upon a plea of guilty, on what date was the sentencing proceeding held?

_____, 199__

c. If conducted before a new jury,

1. On what date was the sentencing proceeding held?

_____, 199__

2. Was such a proceeding conducted by the same judge who presided over the defendant's trial.

Yes []

No []

2. Which of following statutory aggravating circumstances were instructed, if the sentencing proceeding was conducted before a jury, and which of those circumstances were found irrespective of whether or not that proceeding was conducted before a jury or a trial judge?

(A) Murder was committed while in the Instructed Found
commission of

1. Criminal sexual conduct, [] []
_____ degree,

2. Kidnapping [] []

3. Burglary, _____ degree [] []

4. Robbery while armed with

	a deadly weapon.	☒	☒
5.	Larceny with use of a deadly weapon.	☐	☐
6.	Killing by poison	☐	☐
7.	Physical torture	☐	☐
B.	Murder was committed by a person with a prior record of conviction for murder.	☐	☐
C.	The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	☐	☐
D.	The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.	☐	☐
E.	the murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.	☐	☐
F.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	☐	☐
G.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	☐	☐

H. Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

[]

[]

I. The murder of a child eleven years of age or under.

[]

[]

3. Was (were) the aggravating circumstance(s) found supported by the evidence?

Yes [X]

No []

4. Was there evidence of mitigating circumstances found supported by the evidence?

Yes [X]

No []

5. If so, which of the following mitigating circumstances was in evidence?

[] 1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

[X] 2. The murder was committed while the defendant was under the influence of mental or emotional disturbance.

[] 3. The victim was a participant in the defendant's conduct or consented to the act.

[] 4. The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

[] 5. The defendant acted under duress or under the domination of another person.

[X] 6. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

☒ 7. The age or mentality of the defendant at the time of the crime(s).

☐ 8. the defendant was provoked by the victim into committing murder.

☐ 9. the defendant was below the age of eighteen at the time of the crime(s).

☐ 10. Other. Please explain if 10 is checked.

6. If tried with a jury, was the jury instructed to consider the circumstances in number 5 as mitigating circumstances?

Yes ☒ No ☐

7. Was the jury provided in writing for its deliberation the statutory instructions as to aggravating and mitigating circumstances?

Yes ☒ No ☐

8. As a trial judge, did you, prior to imposing the sentence of death upon the defendant, find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion or any other arbitrary factor?

Yes ☒ No ☐

E. DATA RELATING TO OFFENSE(S)

1. Was there evidence that the defendant, at the time the offense(s) was (were) committed, was

a. Under the influence of alcohol? Yes ☐ No ☒

- b. Under the influence of narcotics
or other dangerous drugs?

Yes [] No [X]

2. Was (were) any weapon(s) used in the commission of the crime of murder?

Yes [X]

No []

- a. If so, check each weapon used

1. Poison []
2. Pistol [X]
3. Rifle []
4. Shotgun []
5. Blunt instrument []
Describe

-
6. Sharp instrument []
Describe

-
7. Motor vehicle []
8. Other []
Describe
-

3. Cause of death. Gunshot wound to head.
-

4. County in which the body was found. Lexington

5. County in which the murder occurred if different from county in which the body was found. _____

F. DATA RELATING TO VICTIM

1. What was the victim's age? 35

2. Was the victim related by blood or marriage to the defendant?

Yes ☐No ☒

a. If so, what was the relationship? _____

3. Was the victim the same race as the defendant? Yes ☒ No ☐4. Was the victim the same sex as the defendant? Yes ☒ No ☐5. Was the victim physically harmed or tortured? Yes ☒ No ☐

If yes, state nature of harm or extent of torture.

Gunshot wound to head _____

G. DATA CONCERNING DEFENSE COUNSEL

1. Who was (were) the defendant's attorney(s) and what was (were) his (their) mailing address(es)?

NameMailing Address

a. Cam Littlejohn 1720 Main St. Suite 202 Columbia, SC 29201

b. Melissa Kimbrough 1811 Pickens Street Columbia, SC 29201

c. _____

d. _____

2. Did the defendant retain his own counsel or did the court appoint defense counsel?

Retained by Defendant

☐

Appointed by Court

☒

- a. Specify for each such counsel, the date retained or appointed; the number of years as a licensed attorney and the number of years of actual felony trial experience.

felony	Date retained	Years experience	Years
	<u>Name or appointed as attorney</u>	<u>trial experience</u>	
1.	Cam Littlejohn	January 2004	30 yrs 8 mos
2.	Melissa Kimbrough	January 2006	9 yrs
3.			

4.

3. Identify by name each attorney who, at the time of his appointment, was employed by the Public Defender's Office.

4. Did each counsel serve throughout the trial?

Yes [X]

No []

- a. If not, explain in detail.

H. GENERAL CONSIDERATIONS.

1. Was race raised by the defense as an issue in the trial? Yes [] No [X]
2. Did race otherwise appear as an issue in the trial? Yes [] No [X]
3. Were members of the defendant's race represented on the petit jury? Yes [] No [X]
4. Were members of the defendant's race represented on the jury venire? Yes [X] No []
5. Was there any evidence that members of the Defendant's race were systematically excluded from the jury? Yes [] No [X]
6. Was the jury instructed to exclude race as an issue? Yes [] No [X]
7. Was there extensive publicity in the community concerning this case? Yes [] No [X]
8. Was the jury instructed to disregard such publicity? Yes [X] No []
9. Was the jury sequestered? Yes [] No [X]
10. Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when recommending sentence? Yes [] No [X]
11. Your general comments concerning the appropriateness of the sentence imposed in this case.

12. If the defendant is a female, is she currently pregnant? Yes [] No []

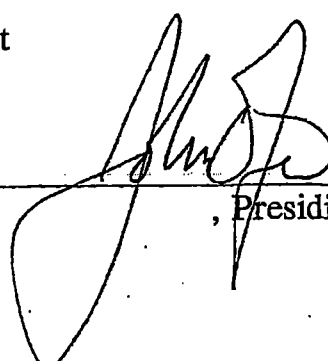
- a. If so, the anticipated delivery date is _____
13. This report was submitted to the defendant's counsel for such comments as he (they) desired to make concerning the factual accuracy of the report and
- a. His (their) comments are incorporated []
- b. he (they) stated he (they) had no comments []
- c. He has (they have) not responded []

I. CHRONOLOGY OF CASE

<u>Days</u>		<u>Elapsed</u>
1.	Date of offense May 16, 2002	0
2.	Date of arrest May 17, 2002	1
3.	Date trial began April 17, 2006	1657
4.	Date sentence imposed April 22, 2006	1662
5.	Date post trial motions ruled on Pending	
6.	Date trial judge's report completed 8/21/06	
7.	*Date received by Supreme Court	
8.	*Date sentence review completed	
9.	*Total elapsed Days	

*To be completed by Supreme Court

Date: 8/21/06


_____, Presiding Judge

DATE MAY 17, 2002 PLACE L.C.S.D. TIME STARTED 0049 M.

the undersigned, MARCUS A. THOMPSON, am 21 years of age, my date and place of birth being the [REDACTED], at COLA, SC. My present address is 3935 Broad River Rd. Cola, SC!

Before answering any questions or making any statements, DETECTIVE S.R. FRIED, a person who identified himself as a DETECTIVE w/ L.C.S.D.

DULY WARNED AND ADVISED ME:

MT (1) ~~that~~ I have the right to remain silent and not make any statement at all.

MT (2) ~~that~~ any statement I do make can be used against me in court.

MT (3) ~~that~~ I have the right to have an attorney present at any time during questioning.

MT (4) ~~that~~ if I cannot afford an attorney, I can apply to the court to have one appointed at no cost to me.

MT (5) ~~that~~ if I decide to talk to an officer without an attorney present, I may stop at any time and request an attorney be present for further questioning.

UNDERSTANDING THESE RIGHTS, I MAKE THE FOLLOWING STATEMENT:

I HAVE KNOWN KEVIN MERCER SINCE HE GOT HER FROM PHOENIX. WE ARE REAL, REAL CLOSE FRIENDS. TONIGHT, KEVIN PICKED ME UP FROM MY HOUSE ON BROAD RIVER RD. WHEN HE PICKED ME UP, KEVIN SAID WE WERE GOING TO "DIP" TO ATLANTA. KEVIN WAS DRIVING HIS GRAY CUTLASS OR OLDSMOBILE. WE DROVE TO WILLOW CREEK APARTMENTS. KEVIN TOLD ME HE WAS GOING TO CHECK OUT WILLOW CREEK. WHEN WE RODE THROUGH THE PARKING LOT AND GOT BACK TO THE ENTRANCE, KEVIN WAS SAYING, "I GOT TO GET A BETTER CAR". AT MY HOUSE, KEVIN HAD GIVEN ME A WHITE PLASTIC BAG w/ BULLETS IN IT. HE TOLD ME TO HAVE IT. I KNEW KEVIN HAD A GUN BECAUSE HE ALWAYS HAS A GUN AND HE GAVE ME THE BULLETS. KEVIN TOLD ME TO DRIVE HIS CAR TO THE ECONOMY IN. HE TOLD ME TO WAIT FOR HIM AT THE ECONOMY.

Witness

Carlynn [Signature]

Notary Public

Jeffrey T. Die

My Commission expires 06/25/2007

OCT 11 02
MARCUS THOMPSON 03
 Person giving Statement
 Date 17 MAY 2002

MARCUS A. THOMPSON

2940

DATE _____ PLACE _____ TIME STARTED _____ M.

I, the undersigned, _____, am _____ years of age, my date and place of birth being the _____ day of _____, 19____, at _____.

My present address is _____.

Before answering any questions or making any statements, _____, a person who identified himself as a _____,

DULY WARNED AND ADVISED ME:

1. That I have the right to remain silent and not make any statement at all.
2. That any statement I do make can be used against me in court.
3. That I have the right to have an attorney present at any time during questioning.
4. That if I cannot afford an attorney, I can apply to the court to have one appointed at no cost to me.
5. That if I decide to talk to an officer without an attorney present, I may stop at any time and request an attorney be present for further questioning.

UNDERSTANDING THESE RIGHTS, I MAKE THE FOLLOWING STATEMENT:

WHILE HE GOT ANOTHER CAR. I DROVE STRAIGHT TO THE HOTEL, WHATEVER TOOK PLACE AT THE APARTMENTS, I DIDN'T SEE BECAUSE I HAD DRIVEN TO THE HOTEL. ABOUT 15 MINUTES LATER, KEVIN DROVE UP IN A WHITE NAVIGATOR. I GOT OUT OF KEVIN'S CAR AND OPENED THE PASSENGER DOOR TO THE NAVIGATOR. THERE WAS A PISTOL ON THE SEAT. I HAD GLOVES IN MY POCKET. I PUT THEM ON, PICKED UP THE PISTOL AND GOT INTO THE SEAT. I GAVE THE PISTOL TO KEVIN AND HE PUT IT ON UNOOL THE DRIVERS SEAT. I DON'T KNOW IF HE HAD HIS GLOVES ON OR NOT. I SAID, "HOW YOU GOT THIS?, WHAT YOU DID?" "MAN, HAD TO GET THIS NIGGER'S SHIT, HE HAD A NICE

Witness

Carlynn

Notary Public

Scotty R. Dine

My Commission expires 06/25/2007

OCT. 11. 02

033

MARCUS THOMPSON
Person giving Statement

17 MAY 2002

Date

DATE _____ PLACE _____ TIME STARTED _____ M.

I, the undersigned, _____, am _____ years of age, my date and place of birth being the _____ day of _____, 19____, at _____.

My present address is _____.

Before answering any questions or making any statements, _____,

a person who identified himself as a _____,

DULY WARNED AND ADVISED ME:

1. That I have the right to remain silent and not make any statement at all.
2. That any statement I do make can be used against me in court.
3. That I have the right to have an attorney present at any time during questioning.
4. That if I cannot afford an attorney, I can apply to the court to have one appointed at no cost to me.
5. That if I decide to talk to an officer without an attorney present, I may stop at any time and request an attorney be present for further questioning.

UNDERSTANDING THESE RIGHTS, I MAKE THE FOLLOWING STATEMENT:

WHIP, BUT I HAD TO GET HIM." HE SAID, "I SHOT THE NIGGER IN HIS HEAD." HE SAID, "LETS GO TO ATLANTA." WHILE WE WERE ON THE INTERSTATE, WE GOT PULLED OVER BY THE POLICE. I WAS IN THE PASSENGER SEAT.

Q: WHEN DID KEVIN MOVE TO TOWN?

A: "A GOOD LONG TIME AGO, WHILE I WAS IN SCHOOL.

Q: WHAT WAS HE GOING TO CHECK OUT AT WILLOW CREEK?

WE JUST RODE THROUGH. I THOUGHT HE KNEW SOMEONE THERE. HE DIDN'T SAY HE WAS GOING TO CHECK OUT WILLOW CREEK, WE JUST RODE

Witness

Notary Public

My Commission expires

06/25/2007

Person giving Statement

17 MAY 2002

Date OCT. 11.02

034

MARCUS A. THOMPSON

DATE _____ PLACE _____ TIME STARTED _____ M.

I, the undersigned, _____, am _____ years of age, my date and place of birth being the _____ day of _____, 19____, at _____.

My present address is _____.

Before answering any questions or making any statements, _____,

a person who identified himself as a _____,

DULY WARNED AND ADVISED ME:

1. That I have the right to remain silent and not make any statement at all.
2. That any statement I do make can be used against me in court.
3. That I have the right to have an attorney present at any time during questioning.
4. That if I cannot afford an attorney, I can apply to the court to have one appointed at no cost to me.
5. That if I decide to talk to an officer without an attorney present, I may stop at any time and request an attorney be present for further questioning.

UNDERSTANDING THESE RIGHTS, I MAKE THE FOLLOWING STATEMENT:

THROUGH WILLOW CREEK.

I JUST GOT BACK INTO TOWN ON APRIL 30, 2001.
I HAD BEEN IN JOB CORP SINCE NOVEMBER
4, 2001. I WAS IN MORGANFIELD KY. HWY 6
EAST. 42437

SINCE I GOT BACK FROM JOB CORP, TODAY IS
THE SECOND TIME I HAVE BEEN WITH KEVIN.
KEVIN TOLD ME ON MONDAY HE WAS HAVING
TROUBLE WITH HIS WIFE. HE TALKED ABOUT
TAKING A TRIP TO ATLANTA.

END OF STATEMENT/MT

Witness

Carly J. Miller

Notary Public

Scott B. DyerMy Commission expires 04/25/2007

OCT. 11, 02

035

MARCUS A. THOMPSON
Person giving StatementDate 17 MAY, 2007

2943
2796

AGENCY I.D. SC0320000	LEXINGTON COUNTY SHERIFF'S OFFICE INVESTIGATIVE REPORT	CASE NUMBER 0235910
☐ ORIGINAL REPORT	☒ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS
☐ STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL DISCOVERED PROPERTY
		PAGE 1 OF 3 PAGES

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒	
NAME: Davis, Tracey	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY - STATE - ZIP:	AGE:
INCIDENT TYPE: Murder	
ORIGINAL SUSPECT:	
NAME: #1: Mercer, Kevin	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY - STATE - ZIP:	AGE:

RECOVERED PROPERTY DOLLAR AMOUNT: \$

CANCEL NCIC ENTRY: YES NO

Suspect# 2: Thompson, Marcus

MAR 24 2006 01 69

031506.

At 1430Hrs. at the Lexington County Judicial Center R/o along with 11th Circuit Solicitor D. Myers and Deputy Solicitor Rick Hubbard met with Marcus Thompson and his attorney Dave Farrell. The meeting was in reference to the upcoming trial of State v. Kevin Mercer for the murder of Tracey Davis on 051602. Thompson is also charged in this case. This meeting was voluntary on the part of Thomson and his attorney. Thompson is not in custody at the time of the meeting.

Prior to the meeting Thompson and his Attorney were given an opportunity privacy to speak with each other out of our presence.

At the beginning of the meeting, Attorney Farrell advised R/o, Solicitor Myers, and Deputy Solicitor Hubbard in the presence of Thompson that he had advised his client of the potential risks involved in this meeting and that his client understood and wished to cooperate.

Solicitor Myers began the meeting by advising Thompson that the most important thing he could do was to be truthful in this meeting. He also advised him that the worst thing he could do was to lie. Solicitor Meyers asked several preliminary background questions not directly related to the incident on 051602. Thompson provided information concerning his relationship to Mercer. He indicated that his older brother introduced him to Mercer. He could not provide an exact date of when he met Mercer, however indicated he had known Mercer and his family for a long period of time prior to the incident. He stated that Mercer attended Columbia High and he attended A.C. Flor. Solicitor Myers asked about his education and employment background. He indicated he did not complete high school and worked at several fast food restaurants and did maintenance until leaving for Job Corp 2000/2001 (he was unsure of exact year). He indicated that he contacted Job Corp and was accepted and sent to Morganville, Kentucky. He indicated he lived with his father for several years in the Bluff Rd. area, however he moved in with his mother to avoid getting into trouble in the area in which his father lived. He states that after that he got his own apartment off of

SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE	☐ ARRESTED UNDER 10	☐ EXCLEAR UNDER 10
YES ☒	NO ☐	YES ☒	NO ☐	☐ UNFOUNDED	☐ ARRESTED 10 AND OVER	☐ EXCLEAR 10 AND OVER
				☐ ADMINIST. CLOSED		
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/WITNESS LACKS COOPERATION 4. ☐ EXTRADITION DENIED 5. ☐ JUVENILE, NO ARREST						
REPORTING OFFICER Melford, Roy	DATE 031606	UNIT NUMBER 303	APPROVING OFFICER		DATE	UNIT NUMBER
REPORTING OFFICER	DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER

2944
2797

AGENCY I.D. SC0320000	LEWIS & CLARK COUNTY SHERIFF'S OFFICE INVESTIGATIVE REPORT	CASE NUMBER 0235910
☐ ORIGINAL REPORT	☒ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIM
☐ STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY
PAGE 2 OF 3 PAGES		

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒	
NAME: Davis, Tracey	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY - STATE - ZIP:	AGE:
INCIDENT TYPE: MURDER	
ORIGINAL SUSPECT:	
NAME: #1: Mercer, Kevin	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY - STATE - ZIP:	AGE:

RECOVERED PROPERTY DOLLAR AMOUNT: \$ _____

CANCEL NCIC ENTRY: YES _____ NO _____

MAR 24, 2006 - 0170

Broad River Rd. Then just prior to leaving for Kentucky he states that he moved back into his mother's house on Broad River Rd. near SLED. He states that he spent approx. six months in Kentucky studying the trades of painting, roofing, tile, masonry, and electrical. He returned home and moved back in with his mother a few weeks prior to the incident.

Solicitor Myers then asked Thompson to explain what happened on the night of the incident. Thompson indicated that he was sleeping when Mercer came to the door at his mother's house. Thompson states he had been at a girlfriend's house all day and the previous night and was tired. He states it was dark outside when Mercer came to the door, however he does not know the time. He states that Mercer wanted him to put with him for a while and he agree. He states that Mercer was driving his gray car. He states that they went club hopping around the Two Notch Rd. and then the Broad River Rd. areas. He states that Mercer drove to a gas station on St. Andrews Rd. near Willow Creek Apartments and got gas. He states that while at the gas station Mercer asked him to drive and he agreed. He states that Mercer told him to turn into the Willow Creek Apartments. He states he thought Mercer was going to visit a friend. He states that when he turned in Mercer grabbed a pistol from the front floorboard of the passenger side and jumped out of the car and took off running. Solicitor Myers asked what Mercer said prior to getting out and Thompson indicated that Mercer did not say anything. Thompson denied knowledge of the pistol being in the floor of the car. Solicitor Myers asked Thompson how he did not see the pistol considering the fact that he was sitting on the passenger side prior to that. Thompson's explanation was that it was dark. Thompson states that he then drove to the Econo Inn and Mercer arrived just after him driving the "truck". He states he jumped in and Mercer drove off. Solicitor Myers asked when Mercer spoke about going to Atlanta. Thompson denied that Mercer mentioned Atlanta until after they were on the interstate after he picked him up in the "truck". Solicitor Myers asked Thompson if he had a copy of his statement that he provided on the night of the incident and he stated "yes I have a copy". Thompson then stated that he did not write the statement himself and denies saying several of the things indicated in the statement concerning knowledge of the pistol prior to the incident, Mercer's intent to steal a car, Mercer's mention of Atlanta prior to the incident, and the arranged meeting at the Econo Inn. Thompson was asked by Solicitor Myers why he went to the Econo Inn and how Mercer knew to meet him there. He indicated that he knew Mercer had stayed at that motel before and that he was going to park the car there and call his

SUBJECT IDENTIFIED YES ☒ NO ☐	SUBJECT LOCATED YES ☒ NO ☐	☐ ACTIVE ☐ UNFOUNDED ☐ ADMINIST. CLOSER	☐ ARRESTED UNDER 18 ☒ ARRESTED 18 AND OVER	☐ EXCLEAR UNDER 18 ☐ EXCLEAR 18 AND OVER ☐ EXTRADITION DENIED & LAWSUITS NO AC
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/WITNESS DECLINED COOPERATION 4. ☐ EXTRADITION DENIED & LAWSUITS NO AC				
REPORTING OFFICER Mefford, Roy	DATE 031606	UNIT NUMBER 303	APPROVING OFFICER _____	DATE _____
REPORTING OFFICER	DATE	UNIT NUMBER	APPROVING OFFICER	DATE

2798²⁹⁴⁵

AGENCY ID: SCO 320000	LEAVINSON COUNTY SHERIFF'S OFFICE	CASE NUMBER 0235910
INVESTIGATIVE REPORT		
☐ ORIGINAL REPORT	☒ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS
☐ STATUS CHANGE	☐ ADD TANGIBLE OFFENSES	☐ ADDITIONAL RECOVERED PROPERTY
		PAGE 3 OF 3 PAGES.

ORIGINAL COMPLAINANT ☐ OR VICTIM ☒	
NAME: Davis, Tracey	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY-STATE-ZIP:	AGE:
INCIDENT TYPE: MURDER	
ORIGINAL SUSPECT:	
NAME: #1: Mercer, Kevin	DATE OF BIRTH:
STREET ADDRESS:	RACE: SEX:
CITY-STATE-ZIP:	AGE:

RECOVERED PROPERTY DOLLAR AMOUNT: \$ _____

CANCEL NCIC ENTRY: YES _____ NO _____

brother to come get him. He states that before he could get the windows up and the doors locked Mercer arrived in the "truck". Thompson did not have an answer for how Mercer knew he would be there. He was asked about the fact that there were several bullets found in his pocket belonging to the gun recovered in the stolen vehicle. He states that when he got into the "truck" with Mercer, the bag of bullets was in the front seat and he put the bag in his pocket to move it out of his way.

At that time Attorney Farrell stopped the meeting and requested to speak to his client in private and they left the room. Due to the obvious inconsistent statements made by Thompson during this meeting Solicitor Myers ended the meeting.

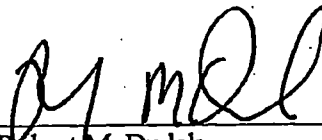
MAR 24 2006* 0171

SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE	☐ ARRESTED UNDER 18	☐ EX-CLEAR UNDER 18
YES ☒	NO ☐	YES ☒	NO ☐	☐ UNFOUNDED	☒ ARRESTED 18 AND OVER	☐ EX-CLEAR 18 AND OVER
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ VICTIM/WITNESS DECLINES COOPERATION 4. ☐ EXTRADITION COMPLETED 5. ☐ OTHER: NO ARREST						
REPORTING OFFICER Mefford, Roy	DATE 03-16-06	UNIT NUMBER 303	APPROVING OFFICER		DATE	UNIT NUMBER
REPORTING OFFICER	DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 4th, 2008



Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeals

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT.

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1.

The court erred by refusing to authorize funds so that an expert could analyze Thompson's gloves, which were found on him minutes after the murder, for gunshot residue. If Thompson's gloves were positive for gunshot residue, where it was known appellant's hands did not test positive for the existence of gunshot residue, there was a stronger likelihood the outcome of the guilt or penalty phase would have been different during a future trial. Further, this testing was necessary to an informed resolution of the new trial motion given the after-discovered evidence of Thompson's confession 4

2.

The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE..... 11

3.

The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences. Dr. Steedman was qualified by his experience as a neurologist to give this opinion, he was board certified in psychiatry, and the state's

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4.

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5.

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying appellant funding to test the gloves found on co-defendant Thompson minutes after the murder for gunshot residue, since this was critical corroborating evidence of appellant's defense that Thompson was the shooter, and the court's denial of expert funds denied appellant the right to an informed new trial motion resolution, and it also denied the indigent appellant the opportunity to present a meaningful, complete defense in the future?

2.

Whether the court erred by excluding the expert neurological opinion of Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty stage mitigation, and the court erred by excluding it under Rule 403, SCRE?

3.

Whether the court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause poor judgment, paranoia, and other negative consequences, since Dr. Steedman was qualified by his experience as a neurologist to give this opinion and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion?

4.

Whether the court committed reversible error by disqualifying Juror Kyzer since Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under Wainwright v. Witt, 469 U.S. 412 (1985)?

5.

Whether the court erred by denying appellant's motion for new trial based on after-discovered evidence where Kevin Fuller, co-defendant Marcus Thompson's cellmate, testified Thompson bragged about having killed the decedent, and also bragged that appellant would go to his death for Thompson's crime since appellant established that the outcome of the trial probably would have been different with this after-discovered evidence?

6.

Whether the court erred by excluding testimony co-defendant Thompson was not charged with murder, that he was only charged with being an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson, and the court erroneously excluded this evidence as inadmissible evidence of "third-party guilt?"

STATEMENT OF THE CASE

Appellant was indicted at the February, 2003 term of the Lexington County grand jury for the offenses of murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. R. 2729 - 2736. Co-defendant Marcus Thompson, whom appellant maintained was the triggerman, was later allowed to plead guilty to being an accessory after the fact and armed robbery.¹ He received a twenty-six year sentence.²

Appellant's case came on for trial on April 17, 2006 before the Honorable John Few, and a jury.³ Cameron B. Littlejohn, Jr. and Melissa J. Kimbrough represented appellant. Donald V. Myers, S. Rick Hubbard, III, D. Shawn Graham, and Marion Moses were the solicitors. R. 1. At the conclusion of the guilt phase of the trial the jury found appellant guilty of these three offenses. R. 1709, ll. 1 - 9.

A penalty phase trial was then held. At the conclusion of the penalty phase the jury recommended that appellant be sentenced to death. R. 2431, ll. 7 - 20. Judge Few then imposed the death sentence. R. 2435, ll. 7 - 15.

This appeal follows.

¹ Appellant and Thompson were not tried together.

² See South Carolina Department of Corrections website.

³ The criminal conspiracy indictment which alleged appellant conspired with Thompson was *not prossed*.

See Report of the trial judge at 4. R. p. 2778

ARGUMENT

1.

The court erred by denying appellant funding so that an expert could test the gloves found on co-defendant Thompson minutes after the murder for gunshot residue. This was critical corroborating evidence of appellant's defense that Thompson was the shooter, and the court's denial of funding denied appellant an informed resolution to the new trial motion, and it also denied appellant the right to a present a meaningful and complete defense during a future trial.

Introduction – a review of the evidence

The state maintained at trial that appellant shot and killed the decedent while stealing his automobile on May 16, 2002. Appellant and Marcus Thompson were stopped in the decedent's automobile on the interstate about seventeen minutes after the shooting was reported. Thompson had gloves in his pocket – and this was on May 16, 2002 – as well as .357 caliber bullets. Appellant was driving the vehicle, and a gun was found underneath the driver's seat. The issue would later become whether Thompson placed the gun there after appellant was removed from the automobile by the police, and before the police removed Thompson. R. 1284, l. 4 – 1286, l. 4; R. 1298, l. 1 – 1313, l. 25; Motion for a new trial hearing. R. 2629, l. 18 – 2630, l. 20; R. 2671, l. 1 – 2672, l. 25 R. 2737 - 2747.

As will be seen infra, the state fought all efforts to show the jury that it failed to investigate co-defendant Thompson as being the triggerman, and that it gave him special treatment. For example, even through the motion for a new trial hearing, the state never had Thompson's gloves tested for gunshot residue. The results on appellant's hands were not positive for the existence of gunshot residue. R. 1519, l. 24 – 1529, l. 12.

Appellant was also denied funding to test Thompson's gloves for gunshot residue, even though the state's failure to test Thompson's gloves for gunshot residue should intuitively seem inexcusable. The state also successfully excluded testimony from Thompson's attorney, David Farrell, that Thompson was only charged as an accessory after the fact and that Thompson had been released on bond.⁴ R. 1593, l. 16 – 1598, l. 19. See Issue six infra.

The assistant solicitor had offered during the February 23, 2006 pre-trial hearing that he understood “no promises have been made to the co-defendant or any other witness in this case.” The assistant solicitor agreed if a promise had been made or was made in the future that it would be disclosed to the defense. The solicitor then said no promises had been made to Thompson, and a discussion of how Thompson was released on bond followed. R. 2603, l. 19 - 2606, l. 24.

The judge noted at the end of the pre-trial hearing that Thompson had a \$50,000.00 bond “order signed by Judge Jeffcoat, and that appears to be the bond that he posted . . . You can look at it yourselves and make whatever other inquiry you want . . .” R. 2636, l. 20 - 2637, l. 1.

After appellant was convicted and sentenced to death on April 22, 2006, Solicitor Myers received a letter from inmate Kevin Fuller on May 23, 2006 stating that he was “locked up with Marcus Antonio Thompson.” The letter stated that “several times at night he [Thompson] brags about killing Tracey Davis and Kevin [appellant] getting the blame.”

⁴ That would have been the extent of Farrell's testimony. The defense was not going to inquire into any statements or potential attorney-client matters between Farrell and Thompson. It was purely the difference in the procedural posture of Thompson's case.

See Attachment D to Motion for a New Trial. R. 2751. On May 23, 2006 Solicitor Myers forwarded this letter to defense counsel Cameron Littlejohn. See Attachment A to Motion for a New Trial. R. 2748.

On May 9, 2006 Fuller gave the Lexington County Sherriff's Department a statement. See Attachment E to Motion for a New Trial. R.2752. In this statement Fuller told the police that co-defendant Thompson was taken to the hospital while in jail, and that he "came back bragging about being fucked up on pain pills. He started stating he was a lucky nigger because Lexington County was stupid." Fuller said Thompson also said "this here nigger (referring to the newspaper) is dying for me." R. 2752

Fuller also told the police that Thompson told him he shot the decedent in the head and that "he constantly brags about shooting Tracey Davis. And how Lexington County didn't check the inside of the gloves or didn't put two and two together because he had the bullets on him that went to the gun." R.2752.

In a question and answer session with the police Fuller said he did not know anything about appellant or the case prior to Thompson talking to him. Fuller said he had not been promised anything in return for his statement. He also stated upon receiving Thompson's confession he sent a request to the jail for Solicitor Myers or someone to come and talk with him "about what Marcus was saying to me about some murders." See Attachment F to Motion for a New Trial. R. 2753.

Thompson bragged about fooling the police, turning the gloves inside out, and the television show, CSI, informing him how to get away with the murder. See Attachment to Motion for a New Trial. R. 2748 - 2756. This Court then granted appellant's motion to Suspend the Appeal and Remand for a Hearing on the Motion for a New Trial based on this

after-discovered evidence. See Motion for a New Trial and this Court's order. R. 2737 – 2756; R. 2775.

Motion for a new trial hearing

At the motion for a new trial hearing Kevin Fuller testified that Thompson bragged about killing the decedent, and he also bragged about appellant getting the death penalty for his murder. R. 2627, l. 3 – 2637, l. 5. Thompson denied making these statements to Fuller, and defense counsel argued: "Thompson had the gloves. The gloves have never been tested. I'm not going to go through all this; I know the Court remembers all that. But Marcus Thompson had seventeen .357 bullets in his pocket . . . If a jury in another trial believed what Kevin Fuller said Marcus Thompson told him, that could make the hugest difference in this case. We thought there was a real reasonable doubt [during the trial, but] obviously the jury didn't agree with us." R. 2715, l. 7 – 2719, l. 11.

Counsel added, "certainly the presence of gunshot shot residue on those gloves would corroborate his story." R. 2723, l. 8 – 2724, l. 10. The assistant solicitor responded, "if there's G.S.R. on those gloves, it's from the earlier shooting [Thompson allegedly claimed occurred] . . . Those gloves will prove nothing about this murder . . ." R. 2724, l. 11 – 2725, l. 7. Defense counsel responded that "[i]f this is a search for the truth, I think that full information about all the physical evidence is an absolute requirement." Counsel questioned why the state was opposed to testing Thompson's gloves." R. 2725, ll. 9-21.

The judge then ruled that he did not think the existence or nonexistence of gunshot residue would have any impact on the believability of what Fuller testified Thompson said to him. The judge stated he did not see any reason for the state to pay to have the gloves

tested, and that for purposes of "my analysis here . . . I'm going to assume that there is gunshot residue on those gloves." R. 2726, ll. 2-19.

In his order the trial judge noted the defense motion that the court provide funds to have Thompson's gloves tested. However, the judge reasoned that "Thompson's testimony that he fired the gun earlier in the day while wearing the gloves makes the results of that testing essentially meaningless." Order at p. 11, n. 5. R. 2773.

Discussion

In Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), the Court noted that it had long recognized that when the state brings its judicial power against an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This principle is grounded in the Fourteenth Amendment's due process guarantee of fundamental fairness and it is derived from the belief that justice cannot be equal where, simply because the defendant is indigent, he is denied the opportunity to meaningfully participate in a judicial proceeding where his liberty or life is at stake. Ake v. Oklahoma, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092 - 1093 (1985).

The Court also wrote in Ake v. Oklahoma that it had long focused on the basic tools an indigent defendant must be supplied by the state when an adversarial criminal proceeding is brought against him. See Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437 (1974); Britt v. North Carolina, 404 U.S. 226, 227, 92 S.Ct. 431, 433 (1971).

The Court in Ake v. Oklahoma held that when a defendant demonstrated to the trial judge that his sanity at the time of the offense was a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who

will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. See also Panetti v. Quarterman, ___ U.S. ___, 127 S.Ct. 2842 (2007) (habeas application was not barred as successive where the state court failed to provide the defendant the procedures he was entitled to under the Constitution, *citing* funding also).

Here, appellant's guilt phase defense was that he was not the triggerman, and that Thompson, the man with the gloves and bullets in his pocket, was the triggerman. R. 1671, l. 13 – 1688, l. 11. Who the jury believed actually shot the decedent obviously still had penalty phase ramifications if appellant was still convicted after the jury heard this newly discovered Kevin Fuller evidence.

Respectfully, the trial judge's decision to deny appellant funding to hire an expert to test the gloves worn by co-defendant Thompson was arbitrary, unreasonable, and an abuse of discretion. The solicitor's suggested reasoning to the trial judge that because Thompson said he was shooting the gun earlier that day anyway that made the gunshot residue test irrelevant was fatally flawed. The jury did not have to believe – and probably would not have believed – Thompson's explanation that he was shooting a gun earlier in the day with gloves on during the month of May anyway. Further, although the judge said he would assume that Thompson's gloves tested positive for gunshot residue, his assumption, respectfully, was made in terms of this fatally flawed analysis. Moreover, a jury would not assume that Thompson's gloves tested positive for gunshot residue.

The denial of funding to test the gloves was fundamentally unfair, and appellant should be granted a new trial as argued in remaining five issues, or, in the alternative,

based on this issue, this Court should remand with an order that the indigent appellant be provided expert funding to test Thompson's gloves. See Ake v. Oklahoma, supra; S.C. Code §16-3-26 (C)(1).

2.

The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Steedman's opinion that the abnormality might affect appellant's behavior was very probative of his penalty phase mitigation, and the court erred by excluding this evidence under Rule 403, SCRE.

Relevant Facts

Dr. John Steedman received a doctorate in biology from University of London. He graduated from the Medical University of South Carolina in 1992. He underwent residency training in both neurology and psychiatry specialties over a six-year period. He was board certified in neurology and board certified in psychiatry. R. 2263, l. 18 – 2264, l. 14. Dr. Steedman was qualified as an expert in neurology without objection. R. 2265, ll. 14 – 24.

Dr. Steedman then explained that a spect scan was a way of “looking at the function of somebody's brain in terms of how much blood is running through the cortex . . . so it's mainly a question of showing differences from one side to the other or from front to back, side to side.” R. 2266, ll. 8 – 19. Dr. Steedman testified that a spect scan is read by a radiologist looking to see if it shows abnormalities. R. 2266, l. 20 – 2267, l. 10.

Dr. Steedman did a “routine neurological exam” on appellant. R. 2267, ll. 1 – 20. Dr. Steedman also read reports on appellant's educational and other testing. R. 2267, ll. 21 – 25. Dr. Steedman said appellant told him he graduated from high school and that he

had done well.⁵ "He seemed quite naive about what he should describe to me. It was as if he was wanting to present himself as a fully functioning member of the society that he's used to which is obviously a high-drug-using society. So in that sense he was unusual. In other senses, he was not unusual." R. 2268, ll. 4 – 17.

Dr. Steedman described appellant as having a significant learning disorder. However, appellant did not qualify as being mentally retarded.⁶ R. 2270, l. 3 – 2272, l. 14.

Dr. Steedman testified that "in Mr. Mercer's case we have evidence of somebody whose brain functioning was not normal to begin with in these subtle ways in terms of a learning disability, and we are going to discuss a little of this -- the spect scan functional study as well." R. 2273, l. 20 – 2274, l. 6.

Dr. Steedman testified he had read appellant's spect scan himself, and he also read the radiologist's report. Dr. Steedman noted the radiologist wrote that there was a "questionable abnormality involving the left subfrontal cortex best seen in coronal view on the camera console. *Significance is questionable.* And in particular I do not believe this is an adequate etiology for dementia or other severe abnormality." R. 2274, ll. 13 – 21. (emphasis added).

⁵ Appellant, in fact, had been in special education classes, moved often to another school, had a very low I.Q. and was ultimately placed on Social Security Disability (SSI). R. 2144, l. 3 - 2148, l. 25.

⁶ The trial judge also wrote in his report that appellant had "below average" intelligence. The lowest selection of the three choices. See Trial judge's report at 1. R. 2778.

At this point the solicitor stated he had no objection to entering the report into evidence, but the judge sent the jury out of the courtroom instead. R. 2274, l. 13 – 2275, l. 16.

The assistant solicitor then again complained he did not have adequate notice to prepare for this testimony. R. 2276, l. 20 – 2277, l. 14. The judge then stated he thought the report from spect scan showed it was “pretty much normal.” Dr. Steedman disagreed: “it said there was a questionable abnormality.” R. 2277, l. 17 – 2278, l. 6.

Dr. Steedman then informed the judge that the radiologist was saying there was a possibility it was abnormal. Dr. Steedman told the judge his opinion was different: “I’m going to say I do think they are *definitely abnormal* and abnormal in a particular region that he describes.” R. 2278, l. 9 – 2279, l. 9. (emphasis added). The judge then asked defense counsel when they learned of Dr. Steedman’s opinion that there were definitely some abnormalities present. Defense counsel Kimbrough answered “shortly after the spect scan.” R. 2279, ll. 3 – 11.

Assistant Solicitor Graham then brought up his complaint “we have with [experts] not writing report.” R. 2279, l. 17 – 2280, l. 8. The solicitor then claimed he only learned there was an abnormality shown in the spect scan “this morning.” Defense counsel immediately challenged him: “I don’t know about that. We had a conversation about what our experts - - who our experts were and what their opinions were.” R. 2280, ll. 9 – 16. Assistant Solicitor Graham agreed that he had a conversation with defense counsel about Dr. Steedman’s testimony. R. 2280, l. 23 – 2282, l. 3.

Defense Counsel offered she was not attempting to admit the spect scans themselves. The judge then asked Dr. Steedman if he was going to offer an opinion that

the abnormalities might translate into an effect on the behavior of appellant. Dr. Steedman answered that he was indeed going to testify in that manner. R. 2282, ll. 6 – 15.

The judge then observed that he was concerned about the potential prejudice of Dr. Steedman's testimony based on the state "not having had a chance to view the scans and have their own expert review these scans is potentially significant and so that's the way I'm thinking through this problem." R. 2284, ll. 17 – 25. The judge said he saw little probative value to this testimony but significant prejudice to the state. R. 2285, ll. 1 – 8.

Defense counsel stated: "[A]s soon as we got this report, we gave it to them." Counsel argued the state had had the ability to be sufficiently prepared. R. 2285, l. 9 – 2286, l. 3.

The judge then ruled:

I can evaluate that under Rule 403. I can also evaluate that as to whether or not there is prejudice to the state in the late disclosure of the substance of that opinion, and under either analysis I find - - I'm going to exclude it. It does not change the fact that this witness can testify about the - - about his conclusions, but he can't - and he cannot testify *about the opinion that there is a specific abnormality that he finds in the reading of those scans.*

R. 2286, ll. 14 – 22. (emphasis added).

After the judge ruled Dr. Steedman could not testify that there was a specific abnormality, the judge stated, "there's not any suggestion or allegation that anybody has done anything improper or anybody has done anything that is deceitful." The judge again stated he saw the prejudice to the state if the state was not allowed to have an expert to

challenge Dr. Steedman's opinion. The judge reiterated that he would not allow Dr. Steedman to testify there was "a specific abnormality." R. 2287, l. 8 – 2288, l. 21. The judge said "so the only thing that you can't say is *that you have come in behind the radiologist and looked at it and you think it is definite.*" R. 2292, ll. 21 – 23. (emphasis added).

In the presence of the jury Dr. Steedman was only allowed to testify that the report said there was a "questionable abnormality." "In other words, he is saying that this could be something that's there or it could be a nonspecific finding of the study that involves this area, the left front of the brain." R. 2295, ll. 6 – 17.

Discussion

The judge charged the jury that it consider the statutory mitigating circumstances that the murder was committed while the defendant was under influence of a mental or emotional disturbance; that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and the age or mentality of the defendant at the time of the crime. R. 2416, l. 9 – 2417, l. 1. See, also, S.C. Code § 16-3-20(c)(b)(2)(6) & (7). The excluded evidence was probative of the jury's consideration of each of these three mitigating circumstances.

Rule 702, SCRE provides that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

Rule 703, SCRE, provides that facts and data, if of the type reasonably relied upon by experts in a particular field in forming opinions or inferences can be the basis of

the expert's opinion testimony. Further, the underlying facts or data themselves need not be admissible in evidence to form the basis for the opinion.

Dr. Steedman read the radiologist's report of a "questionable abnormality," and he also personally viewed the spect scans and came to the conclusion that appellant suffered from a specific abnormality that might have an affect on appellant's behavior. Dr. Steedman's opinion that appellant suffered from a specific brain abnormality was relevant evidence in mitigation. It not only went to the statutory mitigating circumstances charged by the judge, it also could be considered by the jury as a non-statutory mitigating circumstance or supply the "any other reason" not to sentence appellant to death. S.C. Code § 16-3-20(c)(b)(2)(6) & (7)

The definition of relevant evidence has always been broad during the penalty phase of a death penalty case. It includes the "bad character" or other bad acts of the defendant for the prosecution, and matters particular or peculiar to the defendant's mental or emotional capabilities or his upbringing for the defense.

It is elementary that the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime. Penry v. Lynaugh, 492 U.S. 302, 338, 109 S.Ct. 2934 (1989)⁷; McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227 (1990); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978). The sentencer has the authority to determine the weight to be given to relevant mitigating evidence. A court may not cause the relevant mitigating evidence to be given no weight by excluding the evidence from the jury's consideration. Eddings v. Oklahoma, 455 U.S. 104, 113, 115, 102 S.Ct. 869, 876,

877 (1982). See, also, Hitchcock v. Dugger, 481 U.S. 393, 398, 399, 107 S.Ct. 1821, 1824 – 1825 (1987); Skipper v. South Carolina, 476 U.S. 1, 4– 5, 106 S.Ct. 1669, 1670, 1671 (1986); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985).

Evidence appellant suffered from a specific brain abnormality was clearly relevant, and it was helpful to appellant's penalty phase defense. Any evidence the defense can present to the jury showing the defendant has an abnormality or deficiency is highly probative of the jury's consideration of the correct sentence because it tends to explain why the defendant is unusual, or why his behavior was different.

Respectfully, the judge's Rule 403, SCRE, analysis finding the probative value of this evidence substantially outweighed by its unduly prejudicial effect unfairly focused on the solicitor's complaint of prejudice because Dr. Steeman's testimony was compelling.

The definition of relevant evidence is defined as "evidence having any tendency to make the existence of any fact that it is the consequences to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

The trial judge erred by excluding Dr. Steedman's relevant mitigation testimony that in his opinion appellant suffered from a specific brain abnormality. Eddings v. Oklahoma, 455 U.S. 104, 113, 115, 102 S.Ct. 869, 876, 877 (1982); Hitchcock v. Dugger, 481 U.S. 393, 398, 399, 107 S.Ct. 1821, 1824 – 1825 (1987); Skipper v. South Carolina,

⁷ Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002).

476 U.S. 1, 4- 5, 106 S.Ct. 1669, 1670, 1671 (1986). Appellant should be granted a new sentencing proceeding.

3.

The court erred by excluding the expert testimony of Dr. John Steedman that disorders such as post-traumatic stress disorder and brain impairments can cause negative consequences such as poor judgment and paranoia. Dr. Steedman was qualified by his experience as a neurologist to give this opinion -- he was also board certified in psychiatry -- and the state's objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

Relevant Facts

After Dr. Steedman was precluded from opining that appellant had a specific brain abnormality, the following occurred: *

Q. Dr. Steedman, based on your experience, have you had an occasion to deal with patients in your practice who have a combination of both mental illness and neurological impairment?

A. Yes, very frequently.

Q. As a result of those encounters with those types of patients, have you been able to identify or are you able to identify what the combined effect of having mental illness and brain impairment might be or is?

Mr. Graham: Objection, Your Honor.

The Court: Well, she's not asking -- it's another yes or no question. She's not asking it with relation to the defendant, so just in general . . . yes, sir.

Mr. Graham: He was not qualified -- he was only qualified as a neurologist, Your Honor, and that was done for a reason and she's trying to ---

The Court: Right.

Mr. Graham: - - - Qualified him in another area.

The Court: Is this something that is - - that you do within the area of expertise as a neurologist?

The Witness: Yes, it is, very frequently, and that's way - - can I follow up on that question?

The Court: Explain that. Yes sir.

The Witness: We are, of course, talking - *-both in neurology and psychiatry, we're talking about the same organ of the body which is the brain. I very frequently see people that are brain-damaged. I also very frequently have patients that present me and I have to decide whether it is a psychiatric problem for which they need to then receive treatment from somebody who practices psychiatry more regularly than I do, and I have to make these decisions all the time. So I get presentations of people that may have a purely psychiatric problem. They may have a purely neurological problem. They may have both. And I have to make decisions about what's best for the treatment of that patient, how to best help them.*

R. p. 2299, l. 6 - 2300, l. 17. (emphasis added).

At this point the judge sent the jury out of the courtroom. R. 2300, ll. 21 - 25.

The defense then proffered Dr. Steedman's testimony. Dr. Steedman was asked in his work with patients who have a mental disorder such as post-traumatic disorder and brain impairments "what are the types of behavioral systems or abnormalities that you might - - find?" Dr. Steedman answered:

I mean, I think the types of abnormalities that you might find are a cumulative effect on poor judgment, depression, anxiety, thought disorders, paranoid. Those are all things that - - And I'm not sure, you know, that the state is going to say that this is - - these are - - this is in the psychiatric realm. These things are all there. They come from the brain. This is probably why I studied both because I wanted expertise in both areas so that I could help patients better.

So the systems that one might see are in the psychiatric realm, the behavioral affect, and in the field of achievement of working in gainful employment and indeed problems – *problems of conforming one's behavior to living in society*. Those are the sorts of things that I would say.

R. 2301, l. 14 – 2302, l. 22. (emphasis added).

Sensing the problem with the ruling the judge had already made on the limits of Dr. Steedman's opinions, defense counsel sought to admit as much of Dr. Steadman's testimony as possible under the circumstances. The following occurred:

Ms. Kimbrough: Your Honor, would it be appropriate, just so we don't cross over the line between neurology and psychiatry, for Dr. Steedman to say that he would expect to find problems in the psychiatric realm which is not what he's here to talk about as well as certain neurological behavioral consequences?

The Witness: Well, but the behavioral consequences I believe would be probably in the psychiatric realm. We could address just poor - - poor employment functioning and that sort of thing, poor school functioning.

The Court: I sustain the objection. This is - - this is - - as I - - - Tell me if I'm mistaken, but the initial purpose of having Dr. Steedman examine the defendant was to take his expertise and add it to the range of information that the psychiatrist would use to explain the psychiatric condition that the defendant had and how that might affect his behavior.

Ms. Kimbrough: Yes, Your Honor.

The Court: And so Dr. Schwartz-Watts has done that.

Ms. Kimbrough: She has.

R. 2301, l. 14 – 2302, l. 22. (emphasis added).

The judge repeated that he sustained the state's objection, and the judge said "he can talk about neurology all he wants to . . ." The judge ruled if any of Dr. Steedman's opinions were different from Dr. Watts's then that was prejudicial to the state "in having learned late that he is a psychiatrist." R. 2302, l. 21 - 2304, l. 3.

The judge conversely reasoned that if Dr. Steedman's opinions were the same as Dr. Watts's there was no prejudice to the state but that there was no reason for the defense to offer them and for the court "spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - spinning our wheels." R. 2302, l. 21 - 2304, l. 3.

Defense counsel attempted to explain why the defense needed both expert's testimony: "Dr. Steedman's testimony would dove-tail with Dr. Schwartz-Watts but that it is not a mere image. She is not a neurologist." The judge countered: "*We're talking specifically now about whether or not he can go beyond that area into the realm of psychiatry, and the answer is no, all right.*" R. 2304, l. 4 - 2306, l. 4. (emphasis added).

After a short break, the judge told Dr. Steedman: "I am not suggesting that you're not qualified as a psychiatrist." However, he told the attorneys: "I am confining his testimony to neurology, and that shouldn't come as a surprise to anybody. It just so happens that you've got a neurologist who has expertise in psychiatry. It's perfectly natural that you would seek to elicit opinions within that area, but I'm not going to allow it for the reasons I've stated." R. 2304, l. 4 - 2306, l. 4.

Within these strict confines Dr. Steedman was allowed to testify in the presence of the jury that the radiologist found a "questionable abnormality" in appellant's brain. The solicitor asked if this "questionable abnormality" caused appellant to "attack an

inmate in the jail with shanks.”⁸ Dr. Steedman answered that the abnormality may have been a contributory factor to poor judgment. R. 2307, l. 16 – 2310, l. 14.

Discussion

Dr. Steedman was a neurologist and he was also board certified in psychiatry. He was a very well qualified witness.

His testimony that disorders such as post-traumatic stress disorder and brain impairments have negative consequences including poor judgment and paranoia was critical to appellant’s case in mitigation. This was a most difficult case where the jury surely would want to have an understanding of what may have affected appellant’s behavior. Poor judgment and paranoia caused by appellant’s abnormalities that were beyond his control were therefore critical matters in mitigation that appellant had the right to have the jury consider, and understand.

As stated, the judge charged the statutory mitigating circumstances contained in S.C. Code §16-3-20(c)(b)(2)(6)&(7). All three of these mitigating circumstances were directly impacted by Dr. Steedman’s testimony that was excluded from the jury’s consideration.

Rule 702, SCRE, provides that expert testimony such as Dr. Steedman’s was admissible. The line the trial judge drew between what Dr. Steedman could say as a neurologist, and what constituted psychiatric testimony, and what was too prejudicial to the state, was, respectfully, an erroneous one. Dr. Steedman clearly testified these matters were within his qualifications, his training, and his practice with patients.

⁸ This was a sarcastic reference to a fight appellant had with another inmate while confined prior to trial at the Lexington County Detention Center. R. 2001, l. 1 – 2035, l. 25.

Further, the judge's reasoning that if Dr. Steedman's testimony contradicted that of Dr. Watts' it should not be allowed was erroneous. The very important point is the jury could believe Dr. Steedman and not Dr. Watts or vice versa. Moreover, the judge's ruling that if Dr. Steedman's testimony corroborated Dr. Watt's testimony it was unnecessary, and a waste of time to listen to was fatally flawed for the same reason. The jury obviously could, and often does, credit one expert's testimony while discounting or discarding that of another expert. The court may not, as stated above, exclude mitigating evidence from the sentencer's consideration. Eddings v. Oklahoma, Hitchcock v. Dugger, *supra*.

In South Carolina, one juror being convinced by Dr. Steedman's excluded opinions on appellant's disorders and abnormalities could have prevented a death sentence. Given the overlap between neurology and psychiatry there was not any satisfactory reason to exclude Dr. Steedman's opinion. Cf. State v. Coney, 845 So.2d 120, 131 – 132 (Fla. 2003); Ledford v. Moskowitz, 742 SW.2d 645 (Tenn. App. 1987) (neurologist testimony created material issue of fact on standard of acceptable psychiatric practice in communities similar to those in which the psychiatrist worked, precluding summary judgment). That was true before even considering Dr. Steedman was board certified in psychiatry anyway.

The state's objections to Dr. Steedman's qualifications or testimony went to the weight and not the admissibility of the evidence. See Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004); State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001). Nonetheless, Dr. Steedman did have the education, the training, and the occupational skill of treating patients to give the opinions the trial judge excluded.

The judge's emphasis in his Rule 403, SCRE analysis on prejudice to the state in his rulings on Dr. Steedman's expert testimony, and his reasoning that if Dr. Steedman testimony contradicted the later testimony of Dr. Watts that it was not admissible, and if it was corroborating evidence of Dr. Watt's testimony it was not necessary was error for the reasons explained above. Appellant should be granted a new penalty phase trial.

4.

Juror Kyzer was a *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985) qualified juror. The court committed reversible error by excluding this qualified juror.

Juror Kyzer told the judge he could find appellant guilty or not guilty and that he understood the concept of aggravating and mitigating circumstances. R. 933, l. 4 – 934, l. 21. Kyzer said he was between the second and third types of jurors. R. 935, ll. 8 – 12.

Kyzer at first said he was not sure he could vote for the death penalty or sign a death penalty verdict form. R. 936, l. 7 – 937, l. 23. However, on cross-examination Kyzer quickly said he could consider the death penalty and it would depend on the severity of the case. R. 939, l. 6 – 940, l. 13.

On re-examination by the judge he was asked what in general was the source of his “feelings about the death penalty.” Kyzer responded that it would be hard to pass judgment on someone else but he knew “we’ve all got to live by the law.” R. 941, l. 12 – 942, l. 2.

The judge then asked Kyzer about his religious beliefs and how they affected his views on the death penalty. Kyzer answered that in his family they were brought up “an eye for an eye and a tooth for a tooth, but, you know, the laws have changed since whenever I was a kid and it’s just hard to say. You know, I guess, you know, if I had to, I could put my name on the line, you know. I wouldn’t feel comfortable doing it, but if I had to, I would.” R. 942, ll. 3 – 16. The following then occurred between the judge and Kyzer:

Q. Well, I’m going to ask you one more question and then - - and then I’m going to let the - - then I’ll turn it back over to the solicitor and any of the other

lawyers who want to ask any questions. But - - but there's never going to be a situation in which you have to do it. It would always be a question of whether you - - whether you chose to do it. And - - and so I guess the first question is: If you were a juror in the penalty phase of the trial, would you - - and that's after the defendant has been convicted of murder, if he is convicted. Would you automatically impose a life sentence or would you consider all of the evidence that might be offered in the way of aggravating the crime and also all the evidence that might be offered in way of mitigating the crime and would you be able to consider imposing the death penalty?

A. Yes, sir.

Q. You think you could consider it?

A. I'd consider it, yeah.

Q. All right. And then the question would be: having - - if you decided that the death penalty was appropriate, would you be able to put your name on that line?

A. Yes, sir.

The Court: All right. Let me ask you to step out in the hall just one second, and then we'll get you back in here.

R. 942, l. 17 - 943, l. 16.

The judge then told the solicitor that maybe he should not have interrupted the solicitor's questioning of Kyzer. The judge then allowed the solicitor to continue to question Kyzer. R. 943, l. 18 - 944, l. 3.

During questioning by the solicitor Kyzer was asked if he could sign his name to the death penalty verdict form sentencing someone to death or if his feelings would interfere with that ability. Kyzer responded that his feelings would interfere with "it

some.” R. 945, ll. 2 – 9. On re-cross examination by defense counsel, Kyzer said he would consider both options - - the death penalty or life imprisonment. R. 947, ll. 4 – 6. Kyzer again said he could sign his name to the death penalty form with the other jurors. R. 947, ll. 17 – 22.

Defense counsel Littlejohn argued that Kyzer was a qualified juror. “He has indicated he would consider both the types of sentences if we got to that stage. I think he hesitated because it would be hard for him to sign that death verdict, but he indicated in the bottom line that he could sign it if he thought it was the appropriate thing to do, and by virtue of those answers that does qualify him in this case.” The solicitor argued that Kyzer was not qualified under the Wainwright standard. The solicitor claimed Kyzer had said he would not sign the verdict sentencing form, and that “considering the death penalty” was not the Wainwright v. Witt test. R. 948, l. 14 – 949, l. 25.

After hearing from the solicitor, the judge ruled Kyzer was not a qualified juror. He stated that “every time he got ready to answer a question, he took a deep breath and had what I consider to be a very troubled look on his face.” Defense counsel took exception to Kyzer being disqualified for cause. R. 950, l. 1 – 951, l. 18.

Discussion

The United States Supreme Court recently revisited Wainwright v. Witt in Uttecht v. Brown, 511 U.S. ___, 127 S.Ct. 2218 (2007). In that five to four decision, the majority noted its deference to the trial court, especially in a federal habeas corpus case which requires the ruling on the federal issue to involve an unreasonable application of federal law if the decision is “objectively unreasonable” and not simply erroneous or incorrect. Benge v. Johnson, 474 F.3d 241 (6th Cir. 2007).

This is a direct appeal to this Court as the highest court of this State. The deference the Supreme Court in the habeas case of Uttecht v. Brown felt obligated to apply is not equally applicable here.

Further, in Uttecht v. Brown, the Court considered defendant Brown's failure to object to Juror Z's excusal. The fact that Brown's counsel did not feel sufficiently moved to object or take exception to Juror Z's excusal seemed telling to the majority about the defense's true position at trial.

The Court wrote that under Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 1844 (1985) the judgment whether a venireman is biased is often based upon determination of demeanor and creditability which are entitled to deference even on direct appeal, but particularly in federal habeas. The Court noted that some jurors may have difficulty articulating their views and that others may wish to hide their true feelings. Uttecht v. Brown, 127 S.Ct. at 2222-2223. The United State Supreme Court wrote of its precedents, including Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987), which held that the wrongful exclusion of even a single juror for cause was reversible error:

These precedents establish at least four principles of relevance here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Witherspoon, 391 U.S. at 521, 88 S.Ct. 1770. Second, the state has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Witt, 469 U.S. at 416, 105 S.Ct. 844. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424, 105 S.Ct. 844. Fourth, in determining whether the removal of a potential juror would

vindicate the state's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing court. *Id.*, at 424 – 434, 105 S. Ct. 844.

The court concluded by holding that “capital defendants have the right to be sentenced by an impartial jury. The State may not infringe on this right by eliminating from the venire those who scruples against the death penalty would not substantially impair the performance of their duties. Uttecht v. Brown, 127 S.Ct. at 2831.

As stated, the Court in Uttecht emphasized that the defense did not object to Juror Z's removal. The court said that the state's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z after observing his demeanor supported the conclusion that removing Juror Z was appropriate under the Witherspoon-Witt rule. Uttecht v. Brown, 127 S.Ct. at 2229. The majority noted that the defense may have failed to object because Juror Z did seem substantially impaired. The majority also noted defense counsel may have been glad that Juror Z was disqualified.

The situation here is very different. The defense strongly objected to the judge excusing Juror Kyzer where Kyzer said he could impose the death penalty and that he could sign the death verdict form sentencing appellant to death. Juror Kyzer was a qualified juror, and any “hesitation” to attempt to articulate his views – given the totality of his *voir dire* – was insufficient to remove him for cause. The state was not entitled to a jury tilted very heavily towards death.

The solicitor successfully urged that “considering” the death penalty was a semantic disqualification, even though Kyzer said he could impose the death penalty and sign the death verdict form. If the Supreme Court's conclusion that capital defendants

are entitled to an impartial jury is to have force, this Court should hold that the excusal of Juror Kyzer, a qualified juror, was reversible error. The trial judge pointedly asked appellant "if you decided that the death penalty was appropriate, would you be able to put your name on that line?" Juror Kyzer answered: "Yes, sir." R. 943, ll. 10 - 13. The state could have used a peremptory challenge to remove Kyzer, but Kyzer was erroneously excused for cause in this case. See Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987). Appellant should be granted a new trial.

5.

The court erred by refusing to grant appellant a new trial based on after-discovered evidence where co-defendant Marcus Thompson's cellmate, Kevin Fuller, testified that Thompson bragged to him that he was the one who killed the decedent, and bragged that appellant received the death penalty for his crime. Fuller's testimony probably would have changed the result of the trial. This is especially true in regard to the penalty phase since appellant only had to convince one juror not to vote for the death penalty to change the result of the penalty phase.

Relevant Facts

As stated, the state maintained that appellant, and not Thompson, shot and killed the decedent while stealing his automobile. R. 1284, l. 4 – 1286, l. 4. Appellant will not repeat the background evidence contained in issue one. Suffice it to say that the state fought all efforts to show that it failed to investigate co-defendant Marcus Thompson as being the triggerman, and to show that Thompson was receiving favorable treatment.

Prior to the motion hearing testimony the defense agreed that Thompson's statement to Fuller admitting that he shot and killed the decedent would be admissible as a prior inconsistent statement. R. 2600, ll. 10 – 16. See Rule 613 (b), SCRE. Defense counsel also argued Thompson's statements to Fuller would be admissible as a statement against penal interest in his absence. R. 2598, ll. 3 – 13. See Rule 804, (b)(3), SCRE.

It was agreed that to prevail on a motion for a new trial based on after-discovered evidence appellant had to show that the after-discovered evidence:

- (1) Is such that it would probably change the result if a new trial were granted;

- (2) Has been discovered since the trial;
- (3) Could not in the exercise of due diligence have been discovered prior to the trial;
- (4) Is material;
- (5) Is not merely cumulative or impeaching.

See State v. Spann, 334 S.C. 618, 619 – 620, 513 S.E.2d 98, 99 (1999); Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854, 855 (1983); State v. Caskey, 273 S.C. 325, 256 S.E.2d 737, 739 (1979).

Defense counsel correctly argued that there was really only one of the five elements in dispute and that was whether the after-discovered evidence would probably change the result if a new trial were granted. R. 2589, l. 17 – 2590, l. 15. Counsel also argued that the United States Supreme Court's decision in Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006), on third party guilt, which was decided after appellant's trial would be applicable if a new trial were granted since appellant's case was still pending on direct appeal at the time Holmes v. South Carolina was decided. R. 2591, l. 16 – 2592, l. 17.

Kevin Fuller testified he had pending charges of two counts of criminal domestic violence of a high and aggravated nature and a criminal domestic violence third offense. He was represented by Jimmy Rogers on those charges, and Rogers was in the courtroom for the hearing. R.2627, l. 8 – 2628, l. 5.

Fuller testified that he became roommates with Marcus Thompson on the "F.Pod Room Seven in the Lexington County Detention Center." R. 2628, ll. 15 – 24. Fuller testified that Thompson at one point went to the hospital to have "some gallstones

removed, and then all of a sudden he come back. And when he come back, he turned around and we got to talking again and we kind of bonded." R. 2628, l. 21 - 2629, l. 3.

Fuller testified:

[W]ell, he told me him and Kevin Mercer was looking for a ride so they can go to Atlanta and party down and that they'd been out all day shooting some kind of gun and that he turned around and said that they found a guy with some kind of Escalade or Navigator and that they pulled in behind him in Kevin Mercer's car and that Kevin Mercer jumped out and opened the door and the guy - - they thought he had a gun on him, but he had a cell phone in his hand and Marcus Thompson shot the guy behind his ear. Then he kept bragging about, you know, well, you - - hell, you can kill anybody as long as you watch C.S.I., and he said that I guess whoever does the tests on murders or whatever didn't check the inside of the gloves and that he was bragging about how Lexington County had let him get bond and that how - - I ain't going to exactly say it but how a black man was going to pay for his crime because of his ignorance.

Then he stated that they pulled - - I guess when they stole the man's stuff they went and parked Kevin Mercer's car at a hotel room somewhere, sir. And then they turned around and was driving that big truck, whatever kind of truck it was - I'm not sure, sir - but they was driving a truck and that Kevin Mercer was driving the truck and they got pulled over. And the officer told Kevin Mercer to step out of the vehicle and as Kevin Mercer stepped out of the vehicle, Marcus Thompson took the gun and placed it over on Kevin Mercer's side.

Q. Okay.

A. And that's exactly what he told me.

R. 2629, l. 18 - 2630, l. 20.

Fuller said "Marcus Thompson was very open about the murder," even talking in front of another inmate, Timothy Johnston. R. 2630, l. 25 - 2631, l. 6. Fuller said that

Thompson bragged about killing the decedent and he also bragged about "how Kevin Mercer was going to get the death penalty . . . and he wasn't." R. 2631, ll. 3 – 19.

Fuller further testified that Thompson called appellant "an idiot," and that Thompson bragged about fooling the police by turning his gloves inside out to hide gunshot residue.⁹ R. 2634, ll. 2 – 17. Fuller testified that the details of the crime that he learned came from Marcus Thompson. R. 2635, l. 23 – 2636, l. 2. Fuller said he did not come forward with Thompson's omission to gain any advantage and he said that he planned on pleading guilty to the charges against him and that he knew he was going to prison. R. 2637, ll. 1 – 5.

On cross-examination Fuller admitted he originally asked for help in getting probation, but he stated that after the process he had now been through he did not expect any consideration: "I'm already nervous to start with because everybody at the detention center is talking about it. As a matter of fact this morning, guess who was sitting beside me? Marcus Thompson. So that's how good of a job their doing. And, yeah, I'm nervous and I really don't want to be here." R. 2657, l. 15 – 2671, l. 6.

Fuller also stated that Thompson told him he stuck the murder weapon underneath appellant's seat when appellant was removed from the car after the police stopped them on the interstate: "That way it looked like that Kevin had the gun on him." R. 2672, ll. 2 – 17.

Marcus Thompson testified and predictably denied confessing to Fuller. Thompson stated that he pled guilty to accessory after the fact of murder and armed

⁹ As stated, the police never tested Thompson's gloves, and the trial judge denied appellant funding for an independent gunshot residue analysis on the glove.

robbery and accessory before the fact of armed robbery. R. 2603, ll. 12 – 14; R. 2605, ll. 13 – 24; R. 2606, l. 20 – 2607, l. 24. Thompson said he did not tell Fuller “anything about the events of May 16, 2002, in the murder of Sergeant Tracey Davis.” R. 2607, ll. 21 – 24.

Thompson testified that he told the police he was there [at the apartment complex where the decedent was shot] before and after the shooting. He said he “met up” with appellant after the murder and he claimed he had no idea what appellant was going to do when he dropped him off at the apartment complex. R. 2591, l. 1 – 2611, l. 7.

Thompson claimed he waited for appellant at the Economy Inn because that was what appellant told him to do. He said the next time he saw appellant he was driving the decedent’s Lincoln Navigator. Thompson admitted he had gloves on his hands, and he claimed the reason was “because I didn’t want my fingerprints on the glove - - I mean on the gun.” R. 2611, l. 4 – 2612, l. 9.

Thompson said after appellant picked him up at the Economy Inn they got on Interstate 20 going towards Atlanta. Thompson maintained the bag of bullets found in his pocket when the police stopped them were given to him by appellant. R. 2612, l. 6 – 2613, l. 24.

On cross-examination Thompson admitted he knew Fuller was in jail on “two criminal domestic violence charges.” Thompson stated that Fuller talked about wanting to get out of jail and Thompson acknowledged he, Thompson, was allowed out of jail on bond after the murder, but his bond was later revoked. R. 2615, l. 6 – 2616, l. 6.

Thompson also acknowledged he went to the hospital while in jail to have some kidney stones removed. This was at the same time he was a cellmate with Fuller. R.

2616, l. 3 – 2617, l. 19. Thompson admitted that he lied to the police, and that he lied specifically about the bullets. R. 2621, l. 5 – 2624, l. 6. The following occurred between appellant and defense counsel Littlejohn:

Q. And, Mr. Thompson, in regard to your signed sworn statement that you gave on May 17, 2002, when you were interviewed by Solicitor Myers, you, in fact, told him that many of the things in that other statement were not true.

A. Yes.

R. 2624, ll. 3 – 6.

The state then called Timothy Johnston, Jr. as a witness. Johnston testified he had been cellmates with Kevin Fuller and then Thompson also became their cellmate. Johnston stated Thompson talked to him about the charges but he denied Thompson bragged about the crime to him. R. 2689, l. 7 – 2690, l. 3.

Johnston said Thompson told him he was charged with murder and that he had never been in prison before this case. R. 2690, ll. 2 – 25. Johnston stated Thompson was asking them “what he thought was going to happen to him and what he needed to do.” R. 2691, ll. 4 – 7.

Johnston said to the best of his memory “he said that . . . the story of what happened” was that Thompson dropped appellant off at the Raintree Apartment Complex and that “the guy got killed.” Johnston remembered something about “the guy’s girlfriend was on the telephone and heard everything go down and heard . . . two car doors shut, and that’s why they’re trying to say he was on the site also, but out of what he told me, he wasn’t.” R. 2691, ll. 11 – 22. The following occurred between the solicitor and Johnston:

Q. Now, did he have another occasion to talk about this?

A. Yes, sir, one other time. He told me the story again, but Kevin was asleep that night when he told it. It was late. I mean, it was like probably one or two o'clock in the morning. We was up. He seemed kind of worried about it, and he told me the story again, but the only thing that didn't match on that story was the first time he told me the story he said that he met Kevin back at the motel. He was driving the car he dropped Kevin off with to begin with. Second time he said that he was in the truck itself that [was] stolen.

Q. When they got stopped?

A. Right. And I asked him about it, but he didn't he didn't really comment on it. I mean, he just left it at that.

Q. So that didn't make sense to you.

A. Right. That's one of those things that didn't match with what he told me.

R. 2693, ll. 6 - 24.

Johnston stated there were no newspapers in their cell, and they never discussed what was in the newspaper. All of Johnston's information came from Thompson. R. 2694, ll. 9 - 11.

Johnston also said that Kevin Fuller asked him if what Thompson was telling them in jail could be used to his advantage. Johnston said he told appellant he was not sure and that "you'd probably be discredited because you are locked up with charges and they'd probably look at you and think you were trying to get your charges dropped. That's exactly what I told him." R. 2697, l. 18 - 2698, l. 2.

On cross-examination Johnston admitted he had a pending first degree burglary charge for which he could receive a life sentence. R. 2701, l. 17 – 2702, l. 9. He acknowledged the Lexington County Solicitor's Office was prosecuting him but he stated, "I don't have anything to worry about on them [the pending charges]."¹⁰ R. 2701, l. 17 – 2709, l. 11.

On cross-examination Johnston acknowledged Thompson told him at one point that he "met up with Kevin Mercer and they got arrested down the road." R. 2704, ll. 20 – 25. However, Johnston also recalled "the first time he told me the story he said he showed up at the motel. He pulled up in the car and Kevin pulled up in the truck, and the police pulled up." R. 2705, ll. 1 – 11.

Arguments of counsel

Defense counsel argued that Fuller's testimony had strong implications for both the guilt and sentencing phases. He also argued that if the jury credited Fuller's testimony regarding Thompson being the shooter that appellant was ineligible for the death penalty. Counsel also noted that under Holmes v. South Carolina, which appellant would have the benefit of at a new trial, appellant could be acquitted of murder, or the outcome of the sentencing hearing would be different. R. 2711, l. 6 – 2712, l. 21.

Counsel noted that Marcus Thompson had gloves on, and that the gloves had never been tested. Thompson also had bullets in his pockets. There was not any gunshot residue found on appellant and Fuller's testimony could have the "hugest difference" at a

¹⁰ As of the writing of this initial brief, the Department of Corrections Inmate Search only has Timothy Mark Johnston, Jr., serving a three year sentence for Criminal Domestic Violence of a High and Aggravated nature out of Richland County. This Court can take judicial notice of that fact.

new trial. R. 2714, l. 8 – 2716, l. 20. As seen, defense counsel also moved that the judge authorize expert funds to test Thompson's gloves for gunshot residue.

The solicitor then argued that the gloves would not prove anything about the murder and that "if there is GSR on those gloves, it's from the earlier shooting, at least from the earlier shooting." R. 2724, l. 11 – 2725, l. 7. Defense counsel responded that the state should want the gloves tested if they wanted to prove Fuller "was just making this up." R. 2725, ll. 9 – 21.

The judge ruled that he did not see any reason to have the state pay for the gunshot residue testing on the gloves, and he said for purposes of "my analysis here, I'm just going to assume that there is gunshot residue on those gloves." R. 2726, ll. 2 – 21.

The Order – Guilt phase

The trial judge issued an order dated September 25, 2006 denying the motion for a new trial based on after-discovered evidence.

The judge reasoned that Fuller's testimony about what Thompson told him in jail would only become admissible after Marcus Thompson had testified. Order at page 4 and 5. R. 2766 – 2767. The judge found the only seriously disputable fact in this case was whether or not "Mercer pulled the trigger and fired the shot that killed Sergeant Davis." The judge found there was no likelihood the result of the guilt phase would be any different if the new evidence were presented. The judge therefore denied the motion as to the guilt phase. R. 2591.

The order – penalty stage

As to the penalty phase the judge wrote that neither co-defendant Thompson nor Fuller had any real credibility. Order at page 5. R.2767. The order also stated the "the

state elicited evidence on both cross-examination of Fuller and through the testimony of Johnston that Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis.”¹¹ Order at page 7. R. 2769.

The judge stated that he believed “Fuller fabricated a story about Thompson admitting to shooting Sergeant Davis.” Order at page 8. R. 2770. The judge wrote that Thompson made statements “that were contradictory to his testimony hearing in many important details.” Order at page 8. R. 2770.

The judge also wrote that “the solicitor conceded on the record that Thompson’s plea agreement prevented his prosecution for murder under the double jeopardy clause,” and the judge apparently reasoned that lessened Thompson’s motive to lie about not having confessed to the murder to Fuller. Order at page 9. R. 2771.

The judge then reasoned that Thompson’s testimony, even with his “limited creditability,” would help the state and hurt the defense during a new trial. The judge ruled he found there was “essentially no chance” the after-discovered evidence would change the outcome of a sentencing trial. The judge therefore denied the motion as to the sentencing phase also. Finally, the judge ruled that there is no dispute that the new evidence would be admissible at a new trial and therefore Holmes v. South Carolina was not helpful to deciding the motion for a new trial. Order at page 12. R. 2774.

Discussion

¹¹ As seen above, Johnston actually testified Fuller asked him if he thought he could get assistance with his charges by revealing what Thompson was telling them. Fuller did not say anything about fabricating testimony to get assistance.

This Court in other contexts has noted the extreme difficulty in doing a harmless error analysis regarding the penalty phase of a death penalty trial since a single juror can cause the case to end in a sentence of life imprisonment. See State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). Importantly, it must be remembered that the judge's credibility findings regarding Fuller are based upon at least one very important false premise: That Fuller told Johnston that he wanted to *fabricate a story* regarding what Thompson told him to get assistance with his own charges. Here, again, is Johnston's actual testimony:

Kevin asked me if *out of what Marcus told us could he use it to his advantage* to have his charges dismissed or possibly get probation rather than go to prison. I told him I wasn't sure. I said, "*you'd probably be discredited* because you're locked up with charges and they'd probably look at you and think you was trying to get your charges dropped." That's exactly what I told him.

R. 2697, l. 21 – 2698, l. 2. (emphasis added).

The evidence here clearly has been discovered since the trial and it could not have been discovered with the exercise of due diligence. Fuller's testimony was material to the issue of who was the triggerman, and extremely important therefore to the sentencing phase also. The testimony is not merely cumulative or impeaching.

In short, as was essentially undisputed, the only element in the State v. Caskey analysis at issue was whether the newly discovered evidence would probably change the result if a new trial were granted. That "result" means the guilt phase, the penalty phase, or both.

If Thompson testified, and the judge found the solicitor conceded Thompson was protected by the double jeopardy clause, the statements to Fuller would be admissible as

a prior inconsistent statement under Rule 613, SCRE. That prior inconsistent statement was also substantive evidence when the declarant testifies at trial and is subject to cross-examination. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990).

If Thompson could make himself unavailable then his admissions to Fuller would be admissible as a statement against penal interest under Rule 804(b)(3). This Court has noted that out-of-court statements against penal interest, made by an unavailable declarant, are admissible in both civil and criminal trials. See State v. Anders, 331 S.C. 474, 503 S.E.2d 443 (1998).

At a new trial, appellant clearly would intend to show that there was a strong reasonable that appellant shot the decedent since Thompson was bragging about killing the decedent, and appellant getting the death penalty for his crime to Fuller. Further, as stated, a positive gunshot residue result on Thompson's gloves made that reasonable doubt even stronger. Holmes v. South Carolina, *supra*.

If Thompson, rather than appellant, shot the decedent and appellant's mental state was not one of reckless indifference for human life, then he was ineligible for the death penalty. See Tison v. Arizona, 425 U.S. 137, 107 S.Ct. 1676 (1987).

Further, if Thompson's role as a triggerman was substituted for that of appellant then appellant would be guilty of being an accessory after the fact and guilty of armed robbery if he participated in the crime. The judge's finding that "the after discovered evidence supports," rather than undermines the jury's verdict finding appellant guilty on the charges of murder and armed robbery" was incorrect. Appellant respectfully fails to

see what evidence or logic, respectfully, supports the judge's conclusion, given the after-discovered evidence was Thompson's confession to Fuller. See Order at page 5. R. 2767.

Appellant also challenges the suggestion that Johnston was even slightly a neutral witness. Johnston was facing a Lexington County charge of first degree burglary, and a life sentence. Johnston also had other charges still pending. Johnston had every reason to fear the Lexington solicitor's office. He had every reason to curry favor in a major case -- this case -- with the solicitor. His confident attitude in "not being worried" about the possibility of a life sentence is also interesting given his present status of only being incarcerated on a Richland County minor charge. R. 115, l. 17 -- 118, l. 2.

The judge also noted Thompson's lack of credibility, and it should hardly be doubted that Thompson still had every motive to lie at the hearing on the motion for a new trial. The fact of a legal argument that Thompson was protected by the double jeopardy against a future murder prosecution because he pled guilty to being an accessory after the fact must have been -- common sense dictates -- of little comfort to Thompson when he testified.

All of this together with the judge's critical erroneous conclusion that the testimony showed Fuller asked Johnston if he thought he could "benefit from fabricating a story about Thompson shooting Sergeant Davis," shows the judge abused his discretion in his written order. See Order at p. 7. R. 2769.

Further, appellant did not test positive on the gunshot residue test. A positive result on the gloves Thompson was wearing therefore would strongly incriminate Thompson. The judge's reasoning that a positive gunshot residue result on the gloves

would be meaningless because Thompson's "story" was that he was shooting the gun earlier in the day misses the point as discussed above.

Finally, as to the penalty phase, the judge reasoned that neither Thompson nor Fuller had any real credibility. However, as stated, the judge then implicitly found that the jury would believe Thompson over Fuller even though Thompson had an extremely powerful motive to lie to the police when he initially denied being the triggerman in this case, and when he testified at the post trial hearing. While appellant understands there was no mandate that the jury reconsider residual doubts as to guilt during the sentencing phase, and that residual doubt is not a mitigating factor, the fact remains that any single juror could cause the penalty phase to end in a life rather than death sentence. See State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000); Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320 (1988); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994).

The jury deliberated from 4:12 p.m. until 6:50 p.m. during the penalty phase of appellant's trial without Fuller's testimony that Thompson confessed that he and not appellant was the triggerman. Deliberations during the penalty phase in this state do not tend to be lengthy since the jury hears the majority of the evidence during the guilt phase before the defendant is convicted.

The judge, under the unusual facts of this case, abused his discretion by finding that the after-discovered evidence, Thompson's bragging confession to Fuller, would probably not change the result of the guilt or penalty phase trial.

6.

The court erred by excluding the testimony of David Farrell that co-defendant Thompson was charged as only an accessory after the fact and that he was released on bond since this evidence was relevant to appellant's defense that the state failed to investigate Thompson, and ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible third-party guilt evidence.

Relevant Facts

In his closing argument during the guilt phase the assistant solicitor told the jury that appellant and not Thompson killed the decedent, and he anticipated that the defense would argue that Thompson was the actual killer: "[T]he first thing they're going to say, 'Where was this Thompson? Where is he? Why didn't the State call him?' Well, ladies and gentleman, he's not on trial today. *But soon enough there will be 12 people just like you sitting in these same chairs, and there will be a judge robed in black, just like Judge Few, but over in that chair, instead of Kevin Mercer, it going to be Marcus Thompson, that will be his day in court.* That jury will be sworn to deal with his case." R. 1659, l. 19 – 1660, l. 1. (emphasis added). Yet within months of that representation the solicitor *allowed Thompson to plead guilty.* R. 2603, ll. 5-14.

Prior to David Farrell, the attorney for Marcus Thompson, being called as a witness earlier during the trial, the solicitor objected to his testimony. The solicitor contended the defense was trying to put in irrelevant and arbitrary evidence "before the jury before we could object." R. 1593, l. 16 – 1594, l. 2.

Defense counsel Littlejohn argued the state's opinion had been that "nothing about Marcus Thompson has anything to do with this case, but we certainly think it's

relevant the way that Marcus Thompson has been treated from the standpoint of the investigation and the manner in which he's been prosecuted. We do not intend on asking Mr. Farrell anything about a statement made by Mr. Thompson or anything like that."

The judge observed that if Thompson testified then how the prosecution treated him would be relevant "to things like bias and motive." The judge stated that since the state had chosen "to treat his case differently, the fact of having [made] that choice is not relevant - - of having made that choice is not relevant." R. 1594, l. 16 - 1595, l. 2.

Defense counsel Littlejohn countered that the solicitor's office had totally ignored "Marcus Thompson's role in the crime that occurred, and the fact Marcus Thompson was originally charged and then his charges were reduced to other charges and then he was allowed out on bond . . . and the state has done nothing about his bond even though he's gotten in trouble since then and the fact that he is judge - - they've just totally focused on Marcus - I mean, excuse me - on Kevin Mercer and just ignored Marcus Thompson." R. 1595, ll. 6 - 13.

The judge stated that the defense was articulating a third party guilt argument but that unless the evidence would exonerate appellant, it was not admissible. The judge cited "the hand of one is the hand of all" in support of his position. R. 1595, l. 14 - 1596, l. 16.

Defense counsel argued again that the state had failed to investigate Marcus Thompson and that "their theory all along has not been the hand of one is the hand of all or that two defendants were involved in the shooting. Their theory is Kevin Mercer was the sole gunman, and that's how they've treated this case." R. 1596, ll. 15 - 24.

The solicitor responded: "We can treat Marcus Thompson however we want to. That has nothing to do with the guilt or innocence on Kevin Mercer when Marcus Thompson is not a witness for us, not a part of the state's case or anything else." R. 1596, ll. 15 – 24.

The judge then stated that he understood the defense wanted to show that Thompson was only charged as an accessory after the fact and not for murder or armed robbery. Defense counsel Littlejohn confirmed that was correct, and counsel added the defense wanted to show Thompson was even released on bond. R. 1596, l. 25 – 1597, l. 8.

The judge sustained the objection. Defense counsel Littlejohn then offered to proffer the testimony. The judge responded that as he understood the proffer it would be that Thompson was charged with being an accessory after the fact, he was released on bond and he may have violated the conditions of that bond and the state had not moved to have the bond revoked. Defense counsel Littlejohn confirmed that was a summary of the testimony. R. 1597, l. 11 – 1598, l. 11.

Discussion

Juries are charged in every criminal case that a reasonable doubt can arise from a lack of evidence. The failure to investigate leads, test evidence, and ignoring an obvious suspect is therefore relevant. Here, appellant merely wanted to show that the police failed to investigate co-defendant Thompson and gave him preferential treatment in the way he was charged, and released on bond.¹² This was relevant to appellant's defense

¹² Appellant has limited the proffer to only that that is uncontested since the solicitor challenged the statement that the state at that time had not moved to have Thompson's bond revoked.