VOLUME SEVEN OF NINE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Lexington County

James R. Barber, III, Circuit Court Judge

KEVIN MERCER,

PETITIONER/RESPONDENT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPENDIX

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VOLUME SEVEN
PAGES 3001-3500

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INDEX

INDEX i

RECORD ON APPEAL 1

FINAL BRIEF OF APPELLANT 2947

FINAL BRIEF OF RESPONDENT 3006

FINAL REPLY BRIEF OF APPELLANT 3088

SOUTH CAROLINA SUPREME COURT OPINION NO. 26582 3097

PETITION FOR REHEARING 3118

ORDER DENYING PETITION FOR REHEARING 3122

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA 3124

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA 3178

UNITED STATES SUPREME COURT LETTER DENYING THE PETITION FOR WRIT OF CERTIORARI 3206

INITIAL APPLICATION FOR POST-CONVICTION RELIEF 3207

FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF 3213

RETURN TO AMENDED APPLICATION FOR POST-CONVICTION RELIEF 3217

SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF 3248

THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF 3253

RETURN TO THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF 3259

POST-CONVICTION RELIEF HEARING TRANSCRIPT 3309

APPLICANT'S POST-CONVICTION RELIEF EXHIBITS 1-18 3870

RESPONDENT'S POST-CONVICTION RELIEF EXHIBITS 1-13 4105

MOTION TO AMEND THE PLEADINGS PURSUANT TO RULE 15 4204

APPLICANT'S POST-HEARING BRIEF IN SUPPORT OF HIS MENTAL RETARDATION CLAIMS 4208

RESPONDENT'S MEMORANDUM OF LAW RE: TREATMENT OF MENTAL RETARDATION CLAIMS IN POST-CONVICTION RELIEF 4238

ORDER GRANTING POST-CONVICTION RELIEF 4249

APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT 4328

RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT 4333

RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO ALTER OR AMEND 4343

ORDER DENYING MOTIONS TO AMEND 4352

that law enforcement focused solely on appellant and chose to ignore pursuing any evidence which might prove the contrary.

Evidence during a criminal trial is often admitted that leads defense counsel to argue the police focused solely on the defendant, and stopped investigating available leads because they arrogantly thought they had the right man, or they did not care if they had the right man. Here, the state incredibly did not even test Marcus Thompson's gloves for gunshot residue even though appellant's hands were negative for gunshot residue. R. 1512 – 1534; R. 1535 – 1537.

The judge here reasoned that because the state chose not to call Thompson as a witness that evidence of bias and the failure to investigate Thompson could not come before the jury. However, Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) held that the outright exclusion of the defendant's evidence of third-party guilt denied the defendant a fair trial, abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).

In this case the solicitor arrogantly maintained he would treat Thompson however his office desired, and that what appellant wished to show regarding the state's failure to investigate co-defendant Thompson and the state's treatment of him was not relevant. Again, the definition of relevant evidence is broad. Rule 401, SCRE. As in Holmes v. South Carolina, the state's position in this case was that its theory of the defendant's guilt controlled the admission of defense evidence.

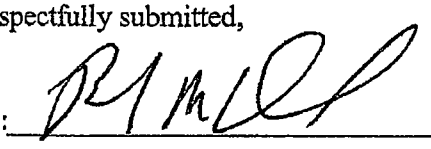
Appellant recognizes that a defense that the police decided they had the right man, and stopped working on the case is a judgment call defense. Regardless, appellant was prevented from having the evidentiary predicate to present that defense.

After the solicitor successfully excluded evidence about the charges against Thompson being much less, and the evidence of Thompson's release on bond, the solicitor told the jurors in closing not to worry about Thompson -- that Thompson would be tried in the same manner as appellant. It strongly implied that Thompson was not being treated any differently than appellant when he was being treated differently, and when he in the short passage of time was allowed to plead guilty. This violated the essential demands of fairness, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,

By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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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

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon S. Creighton, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 26th day of June, 2008.

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SUBSCRIBED AND SWORN TO before me
this 26th day of June, 2008.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
John C. Few, Circuit Court Judge

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v.

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES v

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

A. State's evidence in the guilt phase 4

B. The defense's guilt phase case 6

C. The State's reply case 6

D. The State's penalty phase case 7

E. Defense penalty phase case 10

ARGUMENT 16

I. THERE IS NO NEED FOR A REMAND FOR RECONSIDERATION OF THE MOTION FOR A NEW TRIAL BASED ON THE TRIAL COURT'S REFUSAL TO PROVIDE FUNDS FOR GSR TESTING OF THE GLOVES FOUND ON MARCUS, WHERE THE ISSUE ARGUED NOW IS NOT PRESERVED, AND WHERE IN ANY EVENT THE JUDGE ASSUMED FOR PURPOSES OF HIS ANALYSIS THAT GSR WOULD BE FOUND ON THE GLOVES. 16

A. Events below 16

B. The constitutional issue was not preserved below, and Appellant does not raise the statutory issue on direct appeal. 19

C. There could be no error because the trial court assumed for purposes of the new trial hearing that there was gunshot residue on Thompson's gloves. 20

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING DR. STEEDMAN'S TESTIMONY ABOUT AN ALLEGED ABNORMALITY FOUND ON A "SPECT SCAN", WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED, AND WAS ALSO JUSTIFIED BY RULE 403, SCRE. REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INTRODUCED FROM APPELLANT'S THREE OTHER EXPERT WITNESSES. 22

A. Events at trial 22

B. Since Appellant failed to appeal both bases for the court's ruling, the issue is not preserved; indeed, Appellant waived his right to challenge this issue by his consent to the mutual discovery arrangement. 28

C. The judge correctly excluded the evidence under Rule 403, SCRE. 30

D. Any error in limiting Dr. Steedman on his conclusion as to the "spect scans" was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses. . 32

III. THE TRIAL COURT DID NOT ERR IN LIMITING DR. STEEDMAN TO ISSUES OF NEUROLOGY AND NOT PSYCHIATRY, WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED; REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INRTODUCED FROM APPELLANT'S THREE OTHER EXPERT WITNESSES. 34

A. Events at trial 34

B. Since the judge limited Dr. Steedman to neurology only and not psychiatry based on a discovery violation and not on any concern about Dr. Steedman's qualifications, and Appellant consented to that mutual discovery, then his issue is not preserved, not properly presented on appeal, and waived by his consent. 38

C. Any error in limiting Dr. Steedman to neurological issues only was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses. 40

IV. THE TRIAL COURT DID NOT ERR IN EXCLUDING JUROR KYZER, GIVEN THE JUROR'S HESITATION, HIS VACILLATING AND CONFLICTING ANSWERS, AND THE JUDGE'S EXPRESS RESOLUTION OF CREDIBILITY AND DEMEANOR ISSUES; REGARDLESS, ANY ERROR WAS HARMLESS AS JUROR KYZER COULD ONLY HAVE BEEN AN ALTERNATE AND NO ALTERNATES WERE USED DURING TRIAL. 42

A. Events at trial 42

B. General Rules 45

C. The trial court is entitled to and indeed is in the best position to judge the credibility and demeanor of the juror in deciding whether he is qualified, regardless of how his answers appear in the cold record. 46

D. Here, there was ample support in the record for the judge's excusal for cause, given Juror Kyzer's hesitation, his vacillating and conflicting answers, and the judge's express resolution of credibility and demeanor issues. 49

E. Any error is harmless since at best Kyzer could have been the second alternate, and no alternates were used in the case. 51

V. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE, WHERE THE COURT IS TASKED WITH ADJUDGING THE CREDIBILITY OF SUCH EVIDENCE, AND THE RECORD PROVIDES AMPLE SUPPORT FOR THE TRIAL COURT'S DETERMINATIONS IN THAT REGARD. 52

A. Events at trial 52

B. The trial court must consider the credibility of the evidence when assessing a motion for a new trial, and that determination is entitled to deference on appeal. 57

C. The judge correctly concluded that Fuller's testimony could have no effect on the guilt phase. 59

D. The judge's credibility findings have ample support in the record and are sufficient to affirm the guilt and penalty phases. 60

VI. THE TRIAL COURT CORRECTLY REFUSED TO ALLOW THE DEFENSE TO CALL THE NONTESTIFYING CODEFENDANT'S ATTORNEY TO TESTIFY ABOUT WITH WHAT THE PROSECUTOR CHARGED THE CODEFENDANT; SUCH EVIDENCE GOING TO THE PROSECUTOR'S BELIEF ABOUT THE CASE WAS NOT ONLY IRRELEVANT BUT CONFUSING AND WASTEFUL UNDER RULE 403, AND ALSO NOT PERMISSIBLE UNDER THIS COURT'S THIRD PARTY GUILT RULES. 63

A. Events at trial 63

B. The trial court properly concluded that any inquiry into the prosecutor's belief about the case was not relevant and would lead to confusion and waste of time; moreover, the judge also properly concluded that the prosecutor's charging decisions would not be permissible under our third party guilt rules. 65

C. Any error was harmless. 69

CONCLUSION 71

TABLE OF AUTHORITIES

Cases

Adams v. Texas, 448 U.S. 38 (1980) 45

Ake v. Oklahoma, 470 U.S. 68 (1985) 17, 19

Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) 29

Andrews v. Collins, 810 F. Supp. 759, 769 (E.D. Tex. 1992) 47

Brigman v. State, 64 P.3d 152 (Ak. Ct. App. 2003) 67

Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001) 57, 58

Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976) 30, 65

Morgan v. Illinois, 504 U.S. 719, 729-30 (1992) 46

People v. Bount, 840 N.E.2d 762 (Ill. Ct. App. 2005) 67

State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) 30, 39

State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982) 29

State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) 48

State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999) 46, 48

State v. Deese, 266 S.C. 534, 225 S.E.2d 175, 176 (1976) 58

State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) 19, 39

State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) 48

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) 20

State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) 44, 48

State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) 48, 51

State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) 68

State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001) 30, 65

State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) 51

State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) 65

State v. LaBounty, 716 A.2d 1 (Vt. 1998) 31

State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999) 59

State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) 48

State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922) 39

State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) 58

State v. McCrary, 242 S.C. 506, 131 S.E.2d 687 (1963) 39

State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965) 59

State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1999) 58

State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) 29, 32, 33, 40, 41, 66, 70

State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981) 21

State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967) 58

State v. Platt, 281 S.C. 1, 313 S.E.2d 619 (1984) 44

State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) 58

State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) 29

State v. Riddle, 314 S.C. 1, 443 S.E.2d 557 (1994) 48

State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) ... 30, 39

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 46

State v. Simpson, 325 S.C. 17, 479 S.E.2d 57 (1996) 48

State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) 57

State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984) 44

State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) 66

State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) 49

State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) 58

State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) 21

Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996) 21

Tison v. Arizona, 481 U.S. 137, 158 (1987) 60

United States ex. rel. Santiago v. Roth, No. 91 C 3303, 1991 W.L. 278309 (N.D. Ill. 1991) (unpublished) 67

United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989) 58

United States v. Roberts, 262 F.3d 286 (4th Cir. 2001) 58

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007) 47, 49

Wainwright v. Witt, 469 U.S. 412 (1985) 42, 45-47, 49, 50

Williams v. Taylor, 120 S.Ct. 1495, 1522 (2000) 47

Statutes

S.C. Code Ann. § 16-3-26(C) (Rev. 2003) 20

Rules

Rule 5, SCRCrimP 29; 33; 41

Rule 208, SCACR 29, 39

Rule 401, SCRE 30

Rule 403, SCACR 28-30; 65; 72

Rule 407, SCACR 68

Rule 608, SCRE 65

Rule 705, SCRE 23; 29

STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

During the February 2003 term, the Lexington County Grand Jury issued a three-count indictment of Appellant, Kevin J. Mercer, for murder, armed robbery, and possession of a weapon during a violent crime (03-GS-32-0409). The state gave notice of intent to seek the death penalty, and served its Notice of Evidence in Aggravation.

The trial judge in the original case was the Honorable John C. Few. Appellant was represented at the trial level by Cameron B. Littlejohn, Jr., and Melissa Kimbrough; Solicitor Donald V. Meyers and Assistant Solicitors Rick Hubbard, Shawn Graham, and Marlon Moses prosecuted the case for the state.

Jury selection took place from April 10th through April 13th, 2006. Trial began before Judge Few and a jury on April 17th, 2006, and on April 19th, 2006, Appellant's jury convicted him of all charges. **{R. 1708-09}.**

Appellant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on January 27th, 1997. Judge Few submitted the following aggravating factor to the jury:

> Murder was committed while in the commission of robbery while armed with a deadly weapon.

The following mitigating factors were submitted to the jury:

> (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
>
> (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
>
> (3) The age or mentality of the Defendant at the time of the crime.

On April 22nd, 2006, Appellant's jury found the aggravating factor and recommended

a sentence of death. **{R. 2431-34}**. Judge Few then sentenced Appellant to death for murder, thirty (30) years for armed robbery consecutive to the sentence Appellant was serving for ABIK, and five (5) years consecutive for possession of a weapon. **{R. 2434-35}**.

STATEMENT OF FACTS

Appellant was convicted and sentenced for murdering a highly decorated soldier in the parking lot of the soldier's Columbia-area apartment complex, in the process of stealing the soldier's SUV.

A. State's evidence in the guilt phase

On May 16th, 2002, the night he was murdered, Army Sgt. Tracy Davis attended a softball game with his roommate, Clifton Magwood, who was also a sergeant and recruiter like Tracy. After the game, Tracy drove himself home in his white Lincoln Navigator. Meanwhile, Clifton had already arrived back at their apartment and lay down at about 11 p.m. to watch a movie. Suddenly, he heard a commotion outside and Tracy's voice saying, "I'll give it to you". Clifton looked out the window to see Tracy being robbed a heavy set broad shouldered black male about 5'11 to 6' tall, wearing a dark outfit and dark hat. This man had what looked to be a gun in his hand. **{R. 1316-29; 1334-38; 1346}**.

Clifton immediately called 911 and ran upstairs to Tracy's room to look for a pistol. Clifton could not find any bullets for the gun, and as he was coming back downstairs -- still on the phone with 911 -- he heard a gunshot. Clifton ran outside in time to see Tracy's Navigator speeding away and Tracy lying in the brush with a gunshot wound to the back of his head. Officers and EMS responded to the scene, but there was nothing they could do. Clifton gave them a description of Tracy's white Navigator with a Masonic symbol on the rear. **{R. 1299-1301; 1308-09; 1329-30; 1340-45; 1353; 1359-62; 1576-80}**.

Meanwhile, Lexington County Sheriff's Deputy Stazer was out on I-20 when he received the BOLO on Tracy's SUV. At about 11:46 p.m., he saw a white Navigator with

a Masonic emblem traveling westbound. Stazer pulled the SUV, and approached its two male occupants from the passenger side. After Stazer asked for a driver's license, proof of insurance, and registration, the driver asked if he did anything wrong. Stazer told him to produce the requested documents, but after looking around in the cabin, the driver could only find a yellow Pulliam Ford receipt. The driver claimed the SUV belonged to his brother, but dispatch advised Stazer that the name on the receipt matched the victim's. Deputy Stazer's stop then became a felony one. **{R. 1313; 1379-89}.**

Stazer ordered the occupants from the car at gunpoint, and as the passenger got out, a baggie of fourteen .357 bullets and one black knit glove fell from the pants leg. Underneath the driver's seat, Stazer found a .357 revolver. The driver proved to be Appellant, who was wearing a dark jean outfit. The passenger proved to be Marcus Thompson, who was a good bit smaller and more slender than Appellant. Thompson was wearing a dark shirt over a white one, with the white shirt was clearly visible at the neck. Late, three more gloves were found in Thompson's pants after they were logged into the evidence room. **{R. 1390-95; 1403-07; 1412-16; 1451}.**

The revolver found underneath Appellant's seat had one fired casing and five unfired cartidges. This gun was conclusively matched to the bullet to the back of the head that killed Tracy. **{R. 1469-78; 1568}.**

The State also called Appellant's cellmate in pre-trial lockup, who testified that Appellant bragged about committing the murder. Appellant told the cellmate that a guy had come to him looking for a SUV, or a truck, and Appellant told him he knew where one was. They went to the apartment complex, and when Tracy arrived in the Navigator they

approached him and demanded his keys. Appellant said he made Tracy get on his knees, and as Appellant and Thompson jumped in the SUV, Appellant turned and shot Tracy in the back of the head. Appellant related that he and Marcus were heading to Atlanta for "Freak Neak", which is a weekend long party for college and high school kids -- but they did not make it because they got a flat tire and the cops pulled them. **{R. 1544-48}.**

Appellant was tested for GSR at approximately 1:30 a.m. Two rounded lead particles were found on the back of his left palm, which is consistent with but not conclusive of the presence of GSR. **{R. 1420; 1454-64; 1486; 1501-21}.** On his booking form, Appellant was listed as being left handed. **{R. 1540}.**

B. The defense's guilt phase case

The defense first called an officer to testify police searched a car belonging to Appellant found at an Economy Inn near I-20. **{R. 1585-87}.** Next, the defense called a private forensic expert to testify that he would expect higher levels of GSR on someone who fired a .357 revolver. The expert testified that a GSR transfer was possible if an officer touched his weapon and then cuffed a suspect, but admitted on cross that such a transfer was highly unlikely. **{R. 1611-26}.** An evidence custodian testified that police logged in a pair of gloves found in pants belonging to Thompson. **{1629-30}.** Appellant called his mother, who claimed he was right handed. **{R. 1637-38}.**

C. The State's reply case

Deputy Stazer testified in reply that he had not fired his weapon since qualification in May of 2001, that he cleaned his gun right after, that he never fired his gun from that time until the incident but cleaned his gun regularly, and that he cleaned his cuffs after his

cuffs after every arrest with a sanitizing spray. **{R. 1640-43}**.

D. The State's penalty phase case

In the penalty phase, the State began by introducing Appellant's fairly extensive record of driving violations and suspensions. **{R. 1735-43}**. Next, the State called a former Richland officer who caught Appellant engaging in auto tampering. **{R. 1745-47}**. Another Richland officer described responding to a civil disturbance, and then pulling over a car that matched the description given. Appellant was inside, along with five ounces of marijuana and a .38 revolver – leading to his conviction for possession of marijuana with intent to distribute. **{R. 1748-52}**. A third Richland officer testified about Appellant's convictions for second degree burglary and strong arm robbery in 2001. **{R. 1753-55}**. The victim of that crime testified Appellant was part of a group of men that broke into her house while her grandchildren were there, pulled her out of the bath, and demanded money while holding a shotgun to her head. **{R. 1757-58}**. Yet another Richland officer testified about pulling a car Appellant was driving over in 2001, only to find a pistol after Appellant reached down for it between his legs. The officer was so concerned he purposefully left his fingerprints on the trunk of Appellant's car in case something happened. Appellant thought the whole thing was funny, laughing throughout his arrest. **{R. 1776-85}**. The backup officer also testified as to this event. **{R. 1789-91}**.

The next group of witnesses testified to Appellant's misbehavior and disciplinary infractions while in the Richland County Detention Center. **{R. 1761-75}**. A Richland records custodian testified as to the dates of Appellant's four stints in their jail. **{R. 1793-94}**.

Various members of probation offices testified to Appellant's violation of his probation conditions and positive tests for cocaine and marijuana, to the point that his probation was revoked and he received three years and six months. **{R. 1795-1813}.**

What followed was a slew of witnesses from the Lexington County Detention Center as to Appellant's disciplinary issues to the point that even LCDC eventually sent Appellant to SCDC for safekeeping prior to trial. This list of offenses included: (1) placing a green leafy substance in his mouth and swallowing it during a surprise shakedown **{R. 1821-23}**, (2) tapping a window to display his erect penis to a female staff member **{R. 1824-29}**, (3) overturning a food cart and dumping 30 gallons of tea because he had been put in confinement allegedly without an explanation **{R. 1830-35}**, (4) refusing direct orders to stay in his cell when on confinement **{R. 1837-40}**, (5) stealing medications from the nurse's cart **{R. 1841-44}**, (6) ingesting pills and then telling officers he was going to die for what he had done anyway **{R. 1855-57}**, (7) refusing a direct order to go back in his cell after recreation time had ended **{R. 1865-67}**, (8) removing bolts from a bunk and slamming it into the wall to create a six inch hole as part of an escape plan **{R. 1869-79}**, (9) hiding a razor wrapped in toilet paper in a light fixture **{R. 1881-83}**, (10) creating a disturbance in his cell after which a shank was discovered within **{R. 1895-97}**, (11) violating mail rules **{R. 1899-1904}**,(12) inciting a fight and possessing a weapon **{R. 1887-92}**; (13) possessing contraband for which he was sentenced to 60 days disciplinary detention **{R. 1985}**; (14) slipping a note to a female officer as she passed his cell in which he propositioned her and offered to be her "secret friend" and "personal slave" **{R. 1987-1992}**; and (15) being the only occupant in a cell where officers noticed the light fixture

cover was broken, and a two to three inch piece of plastic was missing that could be used as a weapon **{R. 1993-99}**. When he returned from SCDC's safekeeper status, Appellant had to be permanently segregated for officer safety, due to all his infractions. He also had to be placed in full restraints for 72 hours because there was nothing else the officers could do with Appellant. **{R. 1999-2000}**.

Finally, the State presented LCDC officers who testified about an incident in which Appellant's roommate approached guards and told them there was a fight in the recreation yard. When officers went to check it out, they saw the roommate run in from the yard towards the bathroom, with Appellant in hot pursuit, holding something in his hand and amidst cries of "he's got a shank!" The two inmates fought in the bathroom, and as they refused to comply with instructions to stop, other fights broke out among the inmates watching. In addition to various jailhouse infractions, Appellant was convicted for this incident of assault and battery with intent to kill ("ABIK"), for which he received twelve years, and carrying a weapon by an inmate, for which he received five years. The roommate had facial lacerations from the fight, and testified Appellant was attacking him with two shanks made from toothbrush handles and razor blades. **{R. 2004-36}**. The roommate also noted that Appellant told him one night that he did not shoot the officer who pulled him because it was the "cop's lucky day". **{R. 2038-39}**.

The State called an officer to testify as to a Wal-Mart receipt and items Appellant purchased shortly before the crime, including a dark hat and visor, as well as to introduce photographs of the victim at the crime scene. **{R. 2043-52}**. The pathologist more clearly described the wound that killed Tracy. **{R. 2053-66}**.

The State concluded with some victim impact witnesses, who testified about Tracy's military career; his deep relationship with his daughter Tay and his mother; his strong friendship with his fellow soldiers and their families; his meticulous devotion to his military duties and responsibilities; his military career, which was on the "fast track"; his posthumous promotion to Master Sergeant, for which he had been selected shortly before his murder; the naming of the award for leadership at the recruiter instruction school after Tracy; his involvement and good works in the community with the Masonic Order; and his efforts in starting up a youth mentoring program – the center of which was named for Tracy in his honor. **{R. 2067-2133}**.

E. Defense penalty phase case

The defense began with psychiatrist Dr. Donna Schwartz-Watts. She testified: (1) Appellant had a long history of asthma, but also a large number of somatic complaints for such a young man, which may be manifestations of anxiety **{R. 2145-47}**; (2) Appellant changed schools a lot, had terrible grades, a diagnosed learning disability, and a low IQ with poor verbal skills **{R. 2146-48}**; (3) Appellant had a diagnosis of oppositional defiant disorder as a child, meaning he had problems with authority, and also had mixed developmental delay disorder **{R. 2149-51}**; (4) while Appellant was not very forthcoming during their interviews and more concerned with his somatic problems rather than the big picture of what he was facing, Appellant did say he witnessed as a child his father assault his mother, and violence in the area he grew up **{R. 2152-54}**; (5) Appellant claimed a substance abuse history, including cocaine, marijuana, alcohol, huffing freon, and hallucinogens like angel dust, and his drug use increased after his grandmother died a year

prior to the murder of Tracy **{R. 2154-55}**; (6) she ordered neuropsychological testing on Appellant given his drug history and involvement in a car wreck, but could not complete the testing as Appellant's effort was too variable **{R. 2155-56}**; (7) his mother used Dexatrim in the first two months of her pregnancy **{R. 2158-59}**; (8) his mother would come home and find marks on Appellant's arms and was concerned he was being abused by his father, and Appellant told another psychologist that he had been sexually abused **{R. 2158-59}**; (9) one his sister hit him hard with a frying pan **{R. 2160}**; (10) Appellant's mother really helped him with school and he was able to graduate 180th of a class of 181 despite his learning disability, but his lack of success there meant school was not a safe haven from chaos at home **{R. 2160-2162}**; (11) there is a family history of depression, anxiety, and substance abuse **{R. 2162-63}**; (12) Appellant's wife said he frequently awoke with nightmares, which is a symptom of post-traumatic stress disorder (PTSD) **{R. 2163-65}**; (13) Appellant had diagnoses of PTSD, substance abuse, a reading disorder, and a personality disorder with antisocial traits **{R. 2165-68; 2187}**; and (13) that all of these things contributed to Appellant's "horrible judgment" **{R. 2168-69}**.

The defense next called Dr. Marti Loring, a clinical social worker who was qualified as an expert on PTSD, trauma, and abuse. **{R. 2193}** Dr. Loring generally described the symptoms and characteristics of PTSD and testified: (1) Appellant has PTSD **{R. 2195}**; (2) Appellant's father would drink, come home, and beat Appellant's mother, during which Appellant would try to protect her **{R. 2203}**; (3) Appellant got severe beatings that were longer than his other brother, because for a time Appellant's father thought Appellant was someone else's biological son **{R. 2203-06}**; (4) Appellant's mother would beat him as well

{R. 2204-06}; (5) part of his childhood was spent in squalid conditions in a Philadelphia home with holes, pigeons, and cats **{R. 2206}**; (6) the family had to leave Philadelphia for its safety after Appellant's older brother identified some thugs who robbed him **{R. 2207}**; (7) he has difficulty concentrating and had trouble in school despite his efforts, given his reading disability **{R. 2207-08; 2213}**; (8) he started to decline after a number of family deaths in 2001 **{R. 2210; 2217-18}**; (9) he was raped when he was young by an uncle **{R. 2213}**; (10) he had an imaginary friend named Pyro **{R. 2214}**; he had untreated depression and anxiety that led to substance abuse **{R. 2215-16}**; and (11) his antisocial traits were in large measure learned from the difficult environment in which he was raised **{R. 2218-19}**. As Dr. Schwartz-Watts had done, Dr. Loring agreed there was no connection between Appellant's PTSD and the murder of Tracey Davis. **{R. 2223}**.

The defense had earlier called Dr. Alexander Morton, a psychopharmacologist, who described Appellant's self-reported use of alcohol, marijuana, cocaine, and other drugs such as hallucinogens. Dr. Morton opined this drug use caused psychiatric problems, and stated: (1) a drug such as cocaine so stimulates the brain that it becomes a basic need; (2) Appellant would use drugs to diminish the constant anxiety and other symptoms of PTSD; (3) Appellant first used marijuana at age nine and then moved on to various legal substances as well as hard drugs; and (4) symptoms that could have resulted from Appellant's PTSD and substance abuse include increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. **{R. 1906-48}**. On cross, Morton noted that he was a pharmacist and could not diagnose, that Appellant reported far more drug use to the defense experts than he earlier did during his state ordered

evaluations, that Appellant reported drug use only that morning and not the evening of the crime, and that while people off drugs should get better, Appellant's ABIK took place after he had been in the system two years. **{R. 1948-49; 1961-67; 1972-74}.**

The defense called former warden James Aiken, who testified that SCDC's security was so infallible that it could safely manage someone with the disruptive behavior patterns of Appellant. Aiken did not believe Appellant would be a predatory type of prisoner, even though Appellant had attacked another inmate and cut his face with a weapon – because a predator would have cut the inmate's throat, and extreme force was not required to regain control. **{R. 2234-40}.** Aiken stated that SCDC had all the equipment, training, and personnel needed to control Appellant in the setting. **{R. 2241}.** Even though under this Court's precedent the State cannot cross on the adequacy of SCDC's security measures despite Aiken's testimony as to their infallibility, Aiken then detailed with specificity the security measures available to deal with a number of potential problems in prison, and opined Appellant could be safely contained without any unusual risk to staff, other inmates, or the community (which of course, can only relate to the *general* adequacy of SCDC's security measures to prevent escape attempts). **{R. 2242-43}.** Finally, over the solicitor's adamant objection that it related to inmates other than Appellant, Aiken testified that inmates typically cannot keep up with disruptive behavior in prison because they eventually "burn out" as they get older. **{R. 2245-48}.**

Neurologist Dr. John Steedman was the next witness for the defense. Dr. Steedman examined Appellant in the jail, and found: (1) that he had a reflex disparity when tapping his biceps and triceps that indicated some sort of interruption in the pathways of

the brain **{R. 2268-70}**; (2) his IQ testing, while not qualifying as mentally retarded, was in the range of a learning disorder **{R. 2270-72}**; (3) he received supplemental security income at a young age due to this disability **{R. 2271-72}**; (4) his drug use would affect his judgment and lower his functioning **{R. 2273}**; (5) there was a questionable abnormality on a "spect scan" of the subfrontal cortex, but that the radiologist thought the significance was questionable and not indicative of a severe abnormality **{R. 2274; 2294-96}**; (6) Appellant had a disability in terms of his functioning, as well as anxiety disorders and PTSD **{R. 2297-98}**; and (7) there was a cumulative effect on Appellant of the brain dysfunction, PTSD, and substance abuse **{R. 2298}**. On cross, Dr. Steedman admitted Appellant's MRI was normal, and that the "questionable abnormality was not the proximate cause of the murder, but could be a contributing factor to poor judgment". **{R. 2308-09}**.

Retired high school coach Charles Mancuso coached Appellant in football during high school. He stated Appellant was easily influenced by peers, and they had to keep things simple since he was in special needs classes. However, Appellant was a hard worker and "outstanding student". **{R. 2313-16}**.

Next was Appellant's younger sister, who stated that her brother was always there for her, that her father had anger problems, and that the family moved south to escape bad conditions. **{R. 2320-23}**. Appellant's other sister testified Appellant was picked on by other kids, that the family moved because of the bad environment, that there was violence between her parents, and that Appellant "caught" more from his parents than the others. **{R. 2323-27}**. Appellant's wife stated he was "the best male role model [she] had ever met in [her] life", and was her protector and friend. After displaying some family photographs,

she noted that Appellant began to "shut down" after his grandmother died in 2001. **{R. 2327-32}**. Appellant's mother testified, contending that the family had a difficult home life with her husband's anger and abuse, on top of bad schools and a poor environment. She stated he had problems as an infant and she had taken diet pills during her pregnancy because she did not know she was expecting. She described the effects of Appellant's learning disability, and his difficulties in school, with his peers, and in trying to find employment. She also displayed some family photos, and described Appellant's love for his family. **{R. 2332-2351}**. Finally, Appellant's father testified, admitting he was responsible for anger and violence in the home, but stating that was how he grew up and he did not know any better. He denied ever drinking, though. **{R. 2351-58}**.

ARGUMENT

I. THERE IS NO NEED FOR A REMAND FOR RECONSIDERATION OF THE MOTION FOR A NEW TRIAL BASED ON THE TRIAL COURT'S REFUSAL TO PROVIDE FUNDS FOR GSR TESTING OF THE GLOVES FOUND ON MARCUS, WHERE THE ISSUE ARGUED NOW IS NOT PRESERVED, AND WHERE IN ANY EVENT THE JUDGE ASSUMED FOR PURPOSES OF HIS ANALYSIS THAT GSR WOULD BE FOUND ON THE GLOVES.

Appellant first contends the trial court erred in refusing during the hearing on the motion for a new trial to order testing for gunshot residue (GSR) on gloves found in the Navigator and Marcus Thompson's pants. He asserts this was fundamentally unfair and denied him "his right to present a meaningful and complete defense during a future trial" – which is in and of itself a claim for relief that requires this Court to grant a new trial for a different substantive reason in the first place. In any event, Appellant did not make the arguments to the trial court that he makes now, and the judge's express assumption for purposes of his new trial analysis that GSR was on the gloves precludes any need for a remand. Indeed, the judge's correct conclusion that for purposes of the new trial motion the presence of GSR made no difference in the analysis provided a reasonable basis for denying the funding request.

A. Events below

During Deputy Stazer's testimony at trial, he stated that as Marcus Thompson exited the passenger side of the Navigator, "that's when the gloves and the shells fell out of his pant leg". **{R. 1392-93}**. Stazer testified on cross it was a black knit glove. **{R. 1403; 1408}**.

Investigator Frier testified on cross that there were some gloves or a glove recovered from Marcus Thompson at the scene, but he was not present. **{R. 1419-20;**

1427}.

Crime scene officer Collins testified that he did not find any gloves, but that he understood some gloves were later found in Thompson's clothes at the evidence room. **{R. 1493-99}.**

SLED agent Stoner testified she was never given any gloves to analyze. **{R. 1537-38}.**

During the defense case, Evidence Custodian Kyzer testified she brought on black glove with a grey inside, and one black glove marked "ladies' one size", which were recovered from the pockets of the jeans Marcus was wearing. She stated she was showing the evidence to members of the solicitor's office when they found the gloves in the pants. **{R. 1626-30; 1640}.**

After Appellant's conviction, he filed a motion for a new trial based on a statement given by a cellmate of Marcus Thompson that Marcus had bragged he was the triggerman. This Court granted a remand to hear the motion. The details of this hearing will be more fully set forth in Issue V, *infra*, which substantively challenges the judge's denial of that motion.

Briefly, Kevin Fuller wrote a letter to the solicitor's office in which he claimed his cellmate Marcus had been bragging that he was the triggerman, but the police found no gunshot residue on Marcus because he was wearing gloves inside out. **{R. 2751}.** Subsequently, Fuller gave a statement to investigators in which he again asserted Marcus had been bragging about killing Tracy, and stated Lexington County did not check the inside of the gloves. **{R. 2752}.** Fuller also wrote another letter to the solicitor in which he

requested "help" and "probation" on his pending charges since he had provided this information. **{R. 2754}**. All of this information was turned over to defense counsel.

On August 9, 2006, an evidentiary hearing was convened on the motion for a new trial based on after-discovered evidence. Marcus Thompson was present and denied being the shooter or ever claiming to be the shooter to Fuller. He stated he did not participate in either the robbery or the murder and only met up with Appellant at the Economy Inn after Appellant went and committed the crime. **{R. 2603-24}**.

Fuller testified at the hearing and reiterated his story about Marcus's alleged confession. **{R. 2630-83}**. He stated that "Rocky" Johnston was also in the cell and could verify his statements. **{R. 2674-77}**. However, Rocky Johnston was called by the solicitor and denied ever hearing Marcus confess to shooting Tracy, and that instead Marcus always said Appellant killed Tracey. **{R. 2688-2709}**. Rocky stated that Fuller asked him if Fuller could use what Marcus said to get help on Fuller's charges. **{R. 2697-2698}**. The State also introduced copies of Marcus's pleas, noting they did not occur until June 20th, 2006. **{R. 2710}**.

After the defense had finished its presentation, it asked the judge about its request to test the gloves for GSR. The judge stated he was still considering it but would leave the record open. **{R. 2686}**.

At the end of the hearing, the defense request was made again. Defense counsel admitted that even if GSR was found on the gloves, it would not be conclusive, but contended it would be relevant and helpful. The court inquired about the significance of Fuller's claim that Marcus said he fired the gun earlier in the day prior to the crime, and the

State agreed that any GSR could be from the earlier shooting – and pointed out that Marcus himself stated he put on the gloves to move the gun after Appellant told him he had used it to kill a man, which could be responsible for GSR. The defense replied that all of this was a question for the trier of fact. **{R. 2723-25}.**

The court then concluded:

> COURT: Okay. All right. I'm going to say on the record and I'll put it in the order that I don't think that the existence or nonexistence of the gunshot residue can have any impact . . . on the believability of what Mr. Fuller said or what Mr. Thompson said. And for purposes . . . of my analysis here, I'm just going to assume that there is gunshot residue on those gloves. So that's the way I'm going to treat that. I see no reason for the State to pay for . . . that testing to be done.

{R. 2726}.

In the written order denying the motion for a new trial, the judge noted:

> 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 not reason to fund those tests.

{R. 2773}.

B. The constitutional issue was not preserved below, and Appellant does not raise the statutory issue on direct appeal.

In his brief, Appellant asserts that the due process right to have a fair opportunity to present a defense required testing of the gloves, citing Ake v. Oklahoma, 470 U.S. 68 (1985). However, no such constitutional argument was made below; thus, this contention is not preserved. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

Of course, S.C.Code Ann. § 16-3-26(C) (Rev. 2003) authorizes a judge to grant fees to an indigent capital defendant where expert services are reasonably necessary. Obviously, Appellant's request below was based in this statutory right. However, Appellant nowhere in his brief mentions this statute or the "reasonably necessary" standard. As such, he is arguing a different issue on appeal than that asserted at trial, and his issue is not preserved. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002) (constitutional argument not raised to or ruled upon by the trial court not preserved for review).

C. There could be no error because the trial court assumed for purposes of the new trial hearing that there was gunshot residue on Thompson's gloves.

As noted in the events at trial, the judge expressly stated on the record that he was going to assume for purposes of the motion that Marcus's gloves had GSR on them. **{R. 2726}**. This precludes any possible reversible error on appeal, as that of course would be the best possible result upon which Appellant could hope from testing. The judge concluded that given the accounts presented from the various witnesses, it made no difference to his analysis whether the GSR was on the gloves.

Although Appellant attacks this by noting that Thompson might predictably try to provide a nonculpable reason why he possessed the handgun and some point, this overlooks that it is Fuller's account upon which Appellant is relying in his motion, and Fuller also stated in his letter to the solicitor, his statement to police, and his testimony on the stand that Thompson said he and Appellant were practicing shooting the gun that day. **{R. 2751-52; 2629-30}**. The fact of the matter was that whichever account the judge believed in his credibility analysis of the witnesses presented, there would be a reason for GSR to

be present on the gloves, assuming it had been deposited in the first place and had not been wiped or brushed off, given GSR's notorious fragility. **{R. 1487-88}**. If the judge believed Fuller, there would be GSR from the earlier shooting, the murder itself, and the act of hiding the gun under Appellant's seat while he was being handcuffed. If the judge believed Thompson, then the GSR was explainable by Thompson's statement that when Appellant arrived in Tracy's Navigator, the gun was lying in the passenger's seat, so Thompson put on the gloves to give it to Appellant because he did not want his fingerprints on a gun Appellant had just used to murder someone. **{R. 2611-13}**. If the judge believed Thompson was lying about how the GSR got on his gloves – well, then he would of course believed Fuller's account and granted the motion for a new trial.[1]

Of course, authorization for expenditure of funds for expert witnesses is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of that discretion. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982); State v. Owens, 277 S.C. 189, 284 S.E.2d 584 (1981). See also Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996). For the reason that testing was not necessary to the analysis on the motion for a new trial, it also was not "reasonably necessary" under § 16-3-26(C), and the judge did not abuse his discretion.

The judge's assumption there was GSR on the gloves therefore precludes any need

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[1] In the written order, the judge refer's to "Thompson's testimony that he fired the gun earlier in the day", when in fact Thompson only stated he used the gloves to move the pistol after Appellant killed Tracy; this bit of confusion in the written order does not change the analysis correctly noted by the judge at the hearing that there was an "innocent" explanation provided by Thompson for the GSR, regardless of whether it was target shooting or moving the gun when he got in the passenger side of the Navigator.

for a remand for testing and a reconsideration of the motion for a new trial.[2]

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING DR. STEEDMAN'S TESTIMONY ABOUT AN ALLEGED ABNORMALITY FOUND ON A "SPECT SCAN", WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED, AND WAS ALSO JUSTIFIED BY RULE 403, SCRE. REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INTRODUCED FROM APPELLANT'S THREE OTHER EXPERT WITNESSES.

Appellant raises two issues with regard to the trial court's limitation of testimony from defense penalty phase expert Dr. John Steedman. In this first issue, he asserts that the judge erred in excluding testimony under Rule 403 from Dr. Steedman that "spect scan" films showed an abnormality on a portion of Appellant's brain, because the evidence was mitigating. However, Appellant completely misses the boat on what happened at trial with this issue – Dr. Steedman's testimony was specifically restricted on one point as to the "spect scans" only due to the defense's violation of a mutual discovery order of the judge, to which the defense had consented. In any event, the judge did not commit an abuse of discretion in by excluding the evidence under Rule 403 in the alternative. In any event, exclusion of his testimony was harmless, given the testimony allowed from Steedman as well as the testimony from the other defense experts.

A. Events at trial

At a pre-trial conference on February 23rd, 2006, the State requested that the judge order the defense to require their trial experts to write reports to be turned over to the State

[2] As to Appellant's contention that if this Court orders a retrial on the basis of one of the other issues it should also order testing for GSR, the State would assert that such a ruling would be a premature advisory opinion and unwarranted. If this case is retried all kinds of circumstances and strategies could change, and it appropriately should be litigated under the circumstances existing at the point of some future trial – if one is necessary – rather than in a hypothetical fashion in a direct appeal where it cannot independently provide any basis for relief. Indeed, as the judge noted in his order, the defense strategically decided not to ask for GSR testing on the gloves during trial. **{R. 2773 n.1}**.

as part of reciprocal discovery, and that the experts be required to preserve their notes. The defense replied that there was no authority to require the defense to generate such reports, although the defense conceded that if they did exist, they would be discoverable. The State noted that an expert's underlying data would be disclosed upon cross pursuant to Rule 705, SCRE, but that a break would have to be taken in the trial to allow the State to review the notes and data, and potentially obtain and prepare their own expert in rebuttal. The State admitted there was no statutory authority for such a request, but stated it had been done in prior cases. The judge responded that he wanted both sides to have their discovery be prepared to resolve any discovery issues at the next pre-trial hearing. **{R. 2493-2500}.**

The issue was raised again at the March 30th, 2006, hearing, when the State asserted it had not received any reciprocal discovery and the defense responded it had no written reports. The defense agreed that both sides should disclose their list of potential witnesses prior to trial. However, the State again asserted that the defense was purposefully ordering their experts not to prepare reports in order to gain a strategic advantage, and the failure to disclose would result in delays at trial. The defense stated there was nothing requiring it to disclose its mitigation case prior to trial. The court noted that obviously the defense was trying to gain a strategic advantage, but that there was no mystery about that. The judge noted that there was nothing to require him to order reports, but the question was whether he had the discretion to do so. The judge ultimately noted he would let the parties know the following Monday whether he would require reports, but ordered both sides to be prepared to disclose the substance of any expert opinions. The judge also pointed out that once the consensual disclosure of witness lists was made,

"much of the mystery of what the experts' opinions are going to be is going to be removed". **{R. 2530-37}.**

During *voir dire*, the judge ruled that he was not going to require the defense to require its experts to prepare reports for disclosure if a report had not already been done. Both sides expressed that there were names on the opposing party's witness list of which they were unaware of their relevance to the case, and defense noted "as much as possible, we identified what their speciality was". The State again expressed concerned that the trial would be delayed because the names did not help much. **{R. 1162-65}.**

After the defense stated it essentially knew what the opinions of its experts were, the judge ruled:

> COURT: So I am going to direct that you all have a conversation tomorrow morning in which you all discuss the individual experts that both sides have called and what is the . . . general nature and substance of the opinions that will be offered by those experts.

{R. 1165 lines 5-11}. The defense then specifically said *it did not object to that ruling*, but requested that it apply to the State as well, and include lay witnesses. The court agreed on both counts. **{R. 1165-66}.**

The State noted that it had only been provided so far with some xeroxed copies of photographs and a two page document of a brain scan, but the people conducted it were not on the witness list. Defense counsel then stated it would only take about 20 minutes for her to discuss the opinions of the defense experts with the State, and the parties agreed to meet at 8:30 the next morning to do so. **{R. 1166-67}.**

After some other matters the next morning, the State noted that the defense did not discuss the experts' opinions "as to what their purpose in trial would be". The State pointed

out that the defense disclosed a witness who was a neurologist and who had run some tests, but the State had not been provided anything about the tests or what the expert's conclusions would be. The defense pointed out that the neurologist was still reviewing the raw data and they had told the solicitor they would "give them a heads up on what he was going to testify to". **{R. 1175-76}**. The defense stated that they have provided the "spect scan" to the State and were working on getting the State a better copy, but the neurologist had just received the scan and was reviewing it. Defense counsel noted the scan had findings from the "pathologist" who read the scan, but they did not have a report from him. The defense noted that it had disclosed Dr. Schwartz-Watts had diagnosed PTSD, and they had documentation of a learning disability. Counsel stated their social worker would testify also as to childhood trauma, and their psychopharmacologist would describe the effects of drugs. The defense promised to provide curriculum vitae for all their experts that morning, and the judge told the parties to call him that afternoon on his cell if they did not have the matter resolved. **{R. 1176-79}**.

During Dr. Steedman's testimony on direct in the penalty phase, he began to discuss the "spect scan", for which he had brought the original films. Dr. Steedman noted that the radiologist found a "questionable abnormality" in the left subfrontal cortex, but that the radiologist found its significance questionable and did not believe it would be reflective of "dementia or other severe abnormality". As Dr. Steedman started to elaborate on this, the State objected, and after a bench conference, the jury was sent out. **{R. 2274-75}**.

The judge then gave the State an opportunity to look over the spect scan films and the report from it. Under questioning by the judge, defense counsel agreed there had been

a MRI done a couple of days prior, but Dr. Steedman disputed defense counsel's assertion he had received the MRI, saying he was only told it was normal. The State complained that it had not been given the spect scan films earlier and had no expert to review them. However, defense counsel asserted the State had been given copies which referenced where the original films were housed. Defense counsel apologized and also admitted that she thought there had been report prepared about the normal MRI, but in fact she had only been orally advised that the results were normal. **{R. 2275-77}.**

The State pointed out that had been willing to put a copy of the "spect sheet" in evidence as it had received that, but it had not been provided access to the films, and could not go to the hospital to view Appellant's medical information. The court asked Dr. Steedman if a "questionable abnormality" was significant, and he explained that the radiologist was saying it was not enough for dementia or other cognitive loss. Dr. Steedman agreed the radiologist did not want to say for sure what he saw was even abnormal, but that Dr. Steedman was in fact going to say he believed they did reflect an abnormality. **{R. 2277-78}.**

The court noted that while it did not matter why this information had not been disclosed to the State in a timely manner, the question was whether that affected admissibility. Dr. Steedman stated he initially got the report, but wanted to see the original films, and it was a "long time" before he got them. However, he admitted he did not get around to looking at them until recently, but he had advised the defense investigator two nights prior that he thought there was a definite abnormality. **{R. 2278-79}.**

The State pointed out that was the problem – all they had been provided indicated

there was nothing but a "questionable abnormality" of "questionable significance", and they were not told Dr. Steedman had done his own review to the contrary. The State noted it had no expert to review the films, and had only learned the substance of Dr. Steedman's opinion that morning. When defense counsel tried to assert that they had the mutual disclosure at the beginning of trial, the solicitor immediately pointed out that all they were told is Dr. Steedman is a neurologist, and offered to put up testimony that nothing substantive was offered. Defense counsel did not challenge this representation.[3] **{R. 2280-81}**.

When the judge asked Dr. Steedman to state his findings, Dr. Steedman stated he found a "significant underperfusion of an area of left orbitofrontal cortex". When asked if he would relate this to the behavior of the defendant, Dr. Steedman admitted that he could only say it "might be a factor" affecting the defendant's behavior, as spect scans have not really "panned out as a useful technique" since they are "vague or fuzzy images" showing regions of less blood flow. When asked if he had anything more specific, Dr. Steedman stated that the possibly affected region of the brain has been identified as an area related to "memory problems, emotional problems, and judgment and planning problems". However, he conceded "I wouldn't want to . . . draw too specific an inference from" the scans, noting he could not say that someone with this scan would be behaving a certain way. However, he believed it would be confirmatory evidence, not primary evidence. **{R. 2281-83}**.

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[3] The record is at odds with Appellant's misleading assertion on page 13 of his brief that "Assistant Solicitor Graham agreed that he had a conversation with defense counsel about Dr. Steedman's testimony" – inasmuch as it implies any substance was discussed. The record reflects the assistant solicitor hotly disputed that the defense offered any substance about Dr. Steedman's testimony, and offered to put up testimony to that effect – and defense counsel did not dispute this assertion.

When the State pointed out that this proposed testimony fell short of the standard of a reasonable degree of medical certainty, the court agreed that this "elaborate sort of dire-sounding name" might confuse the jury and lead them to misunderstand and misapply the significance the expert was attaching to it. Dr. Steedman again agreed the spect scan had only limited significance to behavior of the defendant, stating such a study was like a "shadow". **{R. 2283-84}.**

The judge then noted that on one hand he had prejudice to the State from lack of an opportunity to have their own expert review the scans, and on the other very little probative value as to an effect on the defendant. The court noted that the State was given the radiologist's report which would lead one to believe that nothing more needed to be done to reply, and then Dr. Steedman came in to contradict it. The court concluded:

> COURT: 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. 2284-86} (emphasis added). After a break, the judge reiterated his ruling, noting that Dr. Steedman could testify to his opinions, his other findings, and even the radiologist's findings on the spect scans – but the only limitation was he could not say that he saw a specific and definite abnormality on the scans. **{R. 2287-94}.**

B. Since Appellant failed to appeal both bases for the court's ruling, the issue is not preserved; indeed, Appellant waived his right to challenge this issue by his consent to the mutual discovery arrangement.

As set forth above, the trial court was clear that it was concerned with the defense's

violation on this issue of the mutual discovery arrangement to which both parties had agreed – particularly since what had been disclosed would lead a reasonable person to conclude that there was nothing of substance there, and what was not disclosed was just the opposite. Regardless, the court was clear that it was basing its ruling on either the violation of the discovery arrangement or Rule 403, stating "*under either analysis* I find – I'm going to exclude it". **{R. 2286 lines 17-18}**. In his statement of the issue on appeal and his discussion, Appellant only challenges the judge's determination that the prejudicial effect of the evidence outweighed any probative value of the evidence, and he makes no arguments that the trial erred in ordering the discovery exchange on the first morning of trial – indeed, he could not as he his expressly consented to the mutual disclosure. **{R. 1165-66}**.[4] See Rule 208(b)(1)(B), SCACR ("The brief of appellant shall contain [a] statement of each of the issues presented for review [and] [o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

Since the judge expressly ruled on alternative bases and Appellant has not challenged both on appeal, the discovery ruling is the law of the case and precludes relief on appeal. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996)

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[4] Of course, this Court has held that the Rule 5, SCRCrimP provides no basis for a trial court to mandate creation of defense expert reports solely for disclosure to the State. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). This trial happened prior to Northcutt; regardless, the trial court declined to order such reports. The trial court merely was trying to avoid significant delay to a jury already burdened with capital voir dire and a capital trial, since the State would be entitled to review any defense expert's notes and underlying data prior to cross, and could argue they needed to seek review by their own expert. See Rule 705, SCRE. This seems fairly part of the trial court's general power and discretion to control the conduct of a criminal trial, which will not the basis for reversal absent prejudice. See State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Indeed, this discovery exchange occurred after jury selection, and this Court has held it is appropriate to exchange witness lists for jury selection. See State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998). And, as the trial court noted, the witness lists alone went a long way in alerting each side to the subject matter of the other's witnesses. **{R. 2530-2537}**. However, whether the trial court could order the mutual exchange is inconsequential as Appellant expressly agreed to the procedure.

(holding when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (an unchallenged ruling, right or wrong, is the law of the case). Alternatively, the issue was waived by the defense's consent to the discovery exchange on the first morning of trial. State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("[A] party cannot complain of an error which his own conduct has induced.").

C. The judge correctly excluded the evidence under Rule 403, SCRE.

There is no doubt that Dr. Steedman's testimony that the spect scan showed a brain abnormality is relevant under Rule 401. Of course, Rule 403 allows exclusion of relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. A 403 analysis is subject to an abuse of discretion standard, State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), and an abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" Hamilton, 344 S.C. at 357-58, 543 S.E.2d at 593 (Ct. App. 2001).

Here, the only opinion excluded was that the spect scan showed an abnormality; however, Dr. Steedman admitted this was of limited significance. He conceded that at best he could only say the abnormality "might have" an affect on Appellant's mentation. **{R.**

2281-82}. He stated a spect scan was at best only confirmatory evidence, that he did not want to draw any specific inference from it, and that it was only of limited significance – even referring to the test itself as "shadows" from which he was trying to draw a conclusion. **{R. 2282-84}**. And, he even noted that spect scans had not really "panned out" as an effective clinical tool (which, as an aside, is precisely the kind of statement the State might not have had the available expertise to elicit had they not objected on the discovery violation). **{R. 2281-82}**.

In contrast, the trial court was concerned that the jury might attach undue significance to the actual opinion – "a significant underperfusion of an area of left orbitofrontal cortex". The judge thought this very "dire" sounding name would carry undue weight with the jury despite an "indeterminate effect". **{R. 2283}**.

Given the admitted limited probative value of the spect scan to an actual effect on Appellant's mentation – where Dr. Steedman could not say to a reasonable degree of medical certainty that the possible abnormality indicated by the spect scan would have *any* effect – and the undue prejudice of the "dire" sounding medical descriptions, it cannot be said the trial court abused its discretion in excluding the evidence. See generally State v. LaBounty, 716 A.2d 1 (Vt. 1998) (trial court did not err in excluding defense expert evidence that alleged sex abuser did not fit the typical profile for such abusers, as it likely would have led to an unnecessary side trial into the actions of others which was a distraction from adjudication of the defendant's actions in the case).

D. Any error in limiting Dr. Steedman on his conclusion as to the "spect scans" was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses.

Regardless, any error was harmless given Dr. Steedman's other testimony and the testimony of the other defense experts. As this Court noted in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), addressing the trial court's erroneous requirement that the defense generate and produce expert reports, such an error is not reversible when in view of its relationship to the entire case it could not have reasonably affected the result of the trial.

Here, Dr. Steedman testified that Appellant had two abnormalities with his reflexes, which indicated neurological damage **{R. 2269}**, that Appellant had a learning disorder **{R. 2270}**, that his early problems in school were indicative of early problems not cause by later drug use **{R. 2272}**; that Appellant's "brain functioning was not normal to begin with", which was exacerbated by drug use **{R. 2273}**; that the radiologist found the questionable abnormality on the spect scans, but a radiologist does not meet the patient and is only looking for severe dysfunction like dementia **{R. 2295-96}**; that the radiologist's findings were "not inconsistent" with his own finding of brain dysfunction **{R. 2295}**; that the spect scan was "not inconsistent with someone having difficulties" **{R. 2297}** – and most importantly, Dr. Steedman testified on cross that he believed the abnormality referred to in the radiologist's report could be a "contributing factor to poor judgment". **{R. 2310}**.

Moreover, Dr. Schwartz-Watts specifically testified that she had a spect scan performed and "that test came back abnormal . . . there's a small area that is not normal on there". **{R. 2157}**. She later noted that parts of Appellant's brain work and parts do not

work well at all **{R. 2161}**; that his huffing of freon did nothing but damage his brain **{R. 2166}**; and that Appellant had a "bad brain in the sense that he has a learning disability", and "we even know that from the spect scan that there's an abnormality". **{R. 2168}**. Similarly, Dr. Loring stated that while neurological issues were not her specialty, Appellant had a probable "learning disability and brain damage", which would account for his impulsiveness and inability to follow directions.

Given that Dr. Steedman still was able to testify to brain dysnfunction, and indeed tie the abnormality to Appellant's judgment, and the fact that both Dr. Schwartz-Watts and Dr. Loring referred to his alleged brain damage, with Dr. Schwartz-Watts calling the spect scan "abnormal", it cannot be said there was reversible error in the limitation of just but one aspect of Dr. Steedman's testimony. See Northcutt, 372 S.C. at 217-18, 641 S.E.2d at 878 (finding any error harmless from forced generation of expert reports, where the reports merely summarized underlying data that was disclosed to the State under Rule 5, and where even though the judge excluded a new diagnosis because it was not included in the report, the expert was able to explain that her older diagnosis was not credible and she was concerned at the time the defendant was suffering from the new diagnosis).

Any error was harmless and the trial court's ruling should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN LIMITING DR. STEEDMAN TO ISSUES OF NEUROLOGY AND NOT PSYCHIATRY, WHERE THE RULING WAS BASED ON THE DEFENSE VIOLATION OF A MUTUAL DISCOVERY ARRANGEMENT TO WHICH IT CONSENTED; REGARDLESS, ANY ERROR WAS HARMLESS GIVEN THE OTHER EXAMINATION PERMITTED AND THE TESTIMONY INRTODUCED FROM APPELLANT'S THREE OTHER EXPERT WITNESSES.

Appellant next contends that the trial court erred in only allowing Dr. Steedman to testify as to issues of neurology and not psychiatry, since Dr. Steedman was a qualified psychiatrist, and the State's objections supposedly only went to weight, not admissibility. Again, Appellant completely misses the boat on what happened at trial with this issue – Dr. Steedman's testimony was limited to neurology only due to the defense's violation of a mutual discovery order of the judge, to which the defense had consented. In any event, exclusion of his testimony was harmless, given the testimony allowed from Steedman as well as the testimony from the other defense experts.

A. Events at trial

As noted before in the events at trial in the preceding issue, and incorporated here, the defense ultimately consented to a mutual exchange of witness names and substance of testimony the first morning of the State's case in chief.

During their penalty phase case the defense called Dr. John Steedman, who testified he was a physician board certified in general adult neurology and psychiatry. The defense then offered Dr. Steedman as an expert in "the fields of neurology and psychiatry". The State asked to approach, and after a bench conference off the record, the defense offered Dr. Steedman as an expert only in neurology – for which there was no objection by the State. The Court qualified Dr. Steedman, but pointed out:

Not that you're not qualified as a psychiatrist. You're going to testify as a

neurologist.

{R. 2263-66}.

As Dr. Steedman's testimony on direct was ending, defense counsel asked him for his opinion on "the cumulative effect of having the deficits that you identified: the brain impairment along with the mental illness of [PTSD] and substance abuse." The State objected that this was outside the field of neurology, at which point defense counsel offered to rephrase. Defense counsel then asked:

> In your experience is there any sort of combined effect when [PTSD], substance abuse, and the sorts of brain problems or brain functioning or brain dysfunction you found – is there some sort of cumulative effect?

The State objected again, but the court allowed Dr. Steedman to answer yes or no – and he answered, "yes". **{R. 2298-99}.**

The court then noted the State was objecting to "the next answer", and asked defense counsel to demonstrate Dr. Steedman's qualifications. Dr. Steedman testified that he frequently has patients with a combination of mental illness and neurological impairment. However, when counsel asked if based on this experience Dr. Steedman could identify the combined effect of mental illness and brain impairment, the State objected, noting "[h]e was only qualified as a neurologist, Your Honor, and *that was done for a reason* and now she's trying to . . . qualify him in another area" (emphasis added). **{R. 2299}.**

The court agreed, and asked Dr. Steedman if this issue was something within his area of expertise as a neurologist. Dr. Steedman agreed that it was, but elaborated as follows:

> 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 to me and I have to decide wether it is a psychiatric problem for which they need to then receive treatment from somebody who practices psychiatry more regular than I do, and I have ot 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.

The State then asked to approach and the jury was sent out. **{R. 2299-2300}.**

In a proffer, Dr. Steedman testified that behavioral symptoms that might result from a patient with PTSD and a brain impairment would be "a cumulative effect on poor judgment, depression, anxiety, thought disorders, paranoia" – which he stated were in the "psychiatric realm" and which was why he studied both neurology and psychiatry to understand patients better. Dr. Steedman added a patient might also have difficulty in employment and conforming to the rules of society. Dr. Steedman stated the behavioral consequences would all be in the psychiatric realm except possibly poor employment and school functioning. **{R. 2301-02}.**

The court then sustained the State's objection, after defense counsel agreed that the "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". The judge noted that Dr. Schwartz-Watts had already testified as to those psychiatric issues, so he was going to sustain the objection to anything outside of testimony on neurology. **{R. 2302-03}.** When defense counsel asked if this would preclude her qualifying Dr. Steedman in psychiatry, as "his opinion mirrors that of Dr. Watts", the court responded:

COURT: Well, you know, this thing – this think goes both ways. I mean if he is a - - if you want to elict opinions from him within the range - - in the field of psychiatry and if those are opinions that are different from those that were offered by Dr. Schwartz-Watts, then that give rise to the prejudice to the State in having late learned that he is a Psychiatrist. But, on the other hand, if those opinions are the same as Dr. Swartz-Watts, there's no prejudice to the State, but there's no reason to offer them because these opinions - - there is at least diminished reason to offer them. So it is a - - it almost removes the necessity of me spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - we're spinning our wheels.

DEFENSE COUNSEL: Well, your Honor, we would certainly take the position that Dr. Steedman's testimony would dove tail with Dr. Schwartz-Watts but tha tis not a mirror image. She is not a Neurologist.

COURT: And - - and - - I recognize that, and I have not restricted you in any way not has the state asked me to restrict you in any way from eliciting anything about his neurological work on this Defendant or his neurological opinions. We're talking specifically now about whether or not he can go beyond that area in to the realm of psychiatry, and the answer is no.

{R. 2303-04}. After a short break, the judge elaborated:

There is - - there's no suggestion on my part and I don't believe on anybody's part that anybody, particularly you, sir, have done anything improper. I'm not suggesting that you're not qualified as a psychiatrist. The defense - - that is - - this is again another instance of my trying to reconcile the strategies of both sides, all legitimate.

The defense seeks to disclose as little as possible about the evidence that they would offer. The State asks to have as much as possible about what the defense would offer or disclose. I attempted to reconcile those last week. Or perhaps it was the week before, by ordering that you all have a conversation in which you would disclose the nature of the experts and the - - and the nature of their opinions. This witness was disclosed as a neurologist.

I am confining his testimony to neurology, and that shouldn't have 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 wight that area, but I'm not going to allow it for the reasons that I have stated.

{R. 2304-05}. Cross examination then proceeded.

B. Since the judge limited Dr. Steedman to neurology only and not psychiatry based on a discovery violation and not on any concern about Dr. Steedman's qualifications, and Appellant consented to that mutual discovery, then his issue is not preserved, not properly presented on appeal, and waived by his consent.

Like the previous issue, Appellant misses the boat by arguing on appeal the wrong basis for the judge's ruling – and thus his ground must fail as there was no objection made at trial on the basis asserted on appeal, and, alternatively, the issue must be rejected as Appellant has failed to challenge the basis for the trial court's ruling.

Appellant argues the issue on appeal as if the State objected and the trial court excluded the testimony because of the extent of Dr. Steedman's qualifications in psychiatry. That is simply not the case. As seen by the development of the issue at trial as set forth above, the judge excluded the expert's testimony on psychiatry because the defense had violated the parties' *consensual* discovery agreement to mutually disclose the identity and nature of the testimony of everyone on the respective witness lists. As the judge specifically stated, since Dr. Steedman was only disclosed to the State as a neurologist, the judge "confin[ed] his testimony to neurology, which shouldn't come as a surprise to anybody". **{R. 2305 lines 9-12}**. There was no objection or ruling whatsoever on whether Dr. Steedman had the education and experience to testify as an expert in psychiatry – indeed, judge repeatedly said to Dr. Steedman that he was a qualified psychiatrist, and the State only objected – at least as much as they could put on the record with the jury present – that "he was only qualified as a neurologist, . . . and that was done for a reason". **{R. 2266 lines 1-2; 2299 lines 20-22; 2303 lines 3-4; 2304 lines 21-24}**.

Thus, Appellant's arguments on qualification miss the boat entirely. Appellant

makes no arguments that the trial erred in ordering the discovery exchange on the first morning of trial – indeed, he could not at his expressly consented to the mutual disclosure. **{R. 1165-66}**.[5] Since the issue litigated below is not the same as the one raised here, and indeed since Appellant fails to challenge on appeal the actual basis of the judge's decision, then the issue is both not preserved at trial and not properly presented on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."); Rule 208(b)(1)(B), SCACR ("The brief of appellant shall contain [a] statement of each of the issues presented for review [and] [o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). Indeed, since Appellant has not challenged on appeal the actual basis of the judge's decision, it is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (an unchallenged ruling, right or wrong, is the law of the case).

Alternatively, the issue was waived by the defense's consent to the discovery exchange on the first morning of trial. State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("[A] party cannot complain of an error which his own conduct has induced."); State v. McCrary, 242 S.C. 506, 131 S.E.2d 687 (1963) (where defendant consented to trial of two indictments at the same time, he cannot complain of it on appeal); State v. Marlowe, 120 S.C. 205, 112 S.E. 921 (1922) (where defendant consented to excuse seated juror on account of sickness, he cannot complain on appeal), overruled on other

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[5] As noted before in the previous issue, while Northcutt precludes an order requiring generation of expert reports for disclosure to the other side, here the trial court was simply trying to avoid needless delay and complication after the parties had already exchanged witness lists for jury selection – which seems part of the general discretionary power of the trial court to control the conduct of trial. In any event, whether the trial court could order the mutual exchange is inconsequential as Appellant expressly agreed to the procedure.

grounds, Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005).

C. Any error in limiting Dr. Steedman to neurological issues only was harmless given the examination otherwise permitted and the extensive presentation on the issue from other witnesses.

Even if the limitation of Dr. Steedman's testimony to matters of neurology was error, it was harmless. As this Court noted in State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007), addressing the trial court's erroneous requirement that the defense generate and produce expert reports, such an error is not reversible when in view of its relationship to the entire case it could not have reasonably affected the result of the trial.

Here, they had already heard from psychiatrist Dr. Schwartz-Watts, social worker Dr. Loring, and psychopharmacologist Dr. Morton as to possible psychiatric effects of the cumulation of PTSD, neurological dysfunction, and substance abuse. Dr. Schwartz-Watts was specifically asked about how the "[PTSD], an impaired brain, and combination of drug effects affect someone's judgment", to which she answered they would all contribute to his "horrible judgment" based on his "bad brain in the sense that he's got a learning disability", "couple it with the drugs he's used", "and then we know that on a spect scan he's got a questionable abnormality". **{R. 2168}**. Dr. Loring noted that while she had to leave the neurological issues to others (which, of course, Dr. Steedman did testify on), Appellant's probable learning disability and brain damage "would account for some of his being impulsive and not following directions well". **{R. 2214}**. Dr. Morton testified that symptoms that could have resulted from Appellant's PTSD and substance abuse included increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. **{R. 1944-48}**.

In any event, Dr. Steedman was allowed to answer in the affirmative when asked if there would be a cumulative effect from mental illness, substance abuse, and brain impairment – which was confirmatory and corrobortative of the opinions of the other experts. **{R. 2299}**. Further, on cross, when the solicitor asked whether the abnormality caused Appellant to attack another inmate in jail, Dr. Steedman gave the most significant portion of the very answer he initially wanted to give – that the brain abnormality was "a contributory factor to poor judgment". **{R. 2310}**. In any event, allowing him to list a few symptoms that had already been discussed at length by the psychiatrist, the psychopharmacologist, and the social worker is not the sort of additional information the absence of which is reversible error. See Northcutt, 372 S.C. at 217-18, 641 S.E.2d at 878 (finding any error harmless from forced generation of expert reports, where the reports merely summarized underlying data that was disclosed to the State under Rule 5, and where even though the judge excluded a new diagnosis because it was not included in the report, the expert was able to explain that her older diagnosis was not credible and she was concerned at the time the defendant was suffering from the new diagnosis).

Any error was harmless and the trial court's ruling should be affirmed.

IV. THE TRIAL COURT DID NOT ERR IN EXCLUDING JUROR KYZER, GIVEN THE JUROR'S HESITATION, HIS VACILLATING AND CONFLICTING ANSWERS, AND THE JUDGE'S EXPRESS RESOLUTION OF CREDIBILITY AND DEMEANOR ISSUES; REGARDLESS, ANY ERROR WAS HARMLESS AS JUROR KYZER COULD ONLY HAVE BEEN AN ALTERNATE AND NO ALTERNATES WERE USED DURING TRIAL.

Appellant next contends the trial court erred in excluding Juror Kyzer for cause, asserting that his responses made him qualified under Wainwright v. Witt, 469 U.S. 412 (1985). However, there was ample support in the record for the judge's excusal of Juror Kyzer for cause, given the juror's hesitation, his vacillating and conflicting answers, and the judge's express resolution of credibility and demeanor issues. Regardless, any error in exclusion was harmless beyond a reasonable doubt, as the jurors were struck in order of qualification, based on this order Juror Kyzer could have at best been an alternate, and no alternates were used in the case.

A. Events at trial

As voir dire began for Juror Kyzer, and after the trial court went through basic questions relating to the guilt, the court explained the concept of aggravating and mitigating factors. After Kyzer said he thought he understood them, the court asked if the lawyers could hear Kyzer, to which defense counsel replied, "just barely". **{R. 934}.**

When the court asked what type of juror Kyzer was on the descriptive sheet listing the three types of jurors – (1) those who would always vote for death, (2) those who would always vote for life, and (3) those who could decide between both penalties – Kyzer stated he was "in between the second [auto-life] and third [both penalties] one". **{R. 935}.** Kyzer agreed he could vote to return a life sentence, but flatly said he was not sure when asked if he could return a death sentence. **{R. 936}.**

Under questioning by the solicitor as to what he meant by being in between the second and third categories, Kyzer: (1) stated "to me its just hard to judge . . . someone else for something they've done"; (2) pointed out that "I'm just not sure what I could do"; (3) agreed that he hesitated for a long time before answering the judge that he did not know if he could vote for death, and (4) stated "I don't think so" when asked if he could sign a "verdict form for death", based on his beliefs about the death penalty. **{R. 937}.**

The defense then attempted to rehabilitate the juror. As the process was explained, Kyzer agreed that it would be "very difficult" for him to consider a death sentence, but stated that if told by the judge that he had to consider both sentencing options, he would "try" to do so, although he added: "It would depend, I guess, upon the severity of the case. Yes, maybe I could". **{R. 939-40}.**

When the solicitor followed up with questions on the difference between considering something and actually signing his name to the death verdict, Kyzer responded, "that was a hard question", and he would have to "know for sure" before he could put his name on the line. **{R. 940-41}.**

The judge then asked to take over the questioning, and asked Kyzer if there was any "particular source" for his beliefs on the death penalty. Kyzer then stated the following:

> I guess maybe - - I don't know whether it's just a belief or that I can't - - I find it hard for me to pass judgment of someone else, you know, even - - I know we've all got to live by the law. I guess maybe if it would be a family matter or something that someone had killed maybe I could - - you know, I might could put my name on the line.
>
> * * *
>
> We were just brought up, you know, 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. 941 line 20 – 942 line 16}. Kyzer then told the judge that he could consider the death penalty and could "put his name on that line". **{R. 942-43}**.

After the judge sent Kyzer out, he apologized for taking over for the solicitor and assured the parties he was not trying to act as an advocate, but merely believed the poor juror really felt on the spot and was trying to "alleviate that". **{R. 943-44}**.

The solicitor then resumed questioning, and Kyzer admitted that if the victim was not a family member "his feelings [on the death penalty] would interfere . . . some" with his ability to sign a death verdict. Kyzer then reiterated "probably so" when asked the same question. **{R. 945-46}**.

The defense then took another stab at Juror Kyzer, asking him again that if a finding of murder had already been made and the judge told him he had to consider one of the two sentences, could he sign his name to the form – to which Kyzer responded "I'd still have to think about that". He then agreed that if all 12 jurors thought death was the right sentence, he could sign his name as well. **{R. 946-47}**.

The defense argued that despite Kyzer's hesitation, his "bottom line" was that he could consider both penalties and sign a death verdict. The solicitor responded with three points: (1) that under State v. Platt, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court has specifically held that the ability to merely consider both penalties was not sufficient for qualification; (2) that in State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984), this Court held a juror was properly disqualified when he said he could vote for death in cases that affected his own family or loved ones; and (3) that in State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), this Court held a juror was not qualified who could not sign her name

to the death verdict. The solicitor argued that viewed in totality this juror's responses were insufficient to find him qualified. **{R. 949}.**

The judge agreed, ruling as follows:

> I think the juror is not qualified. The - - there's several things that I think need to be mentioned, and the first is the juror's demeanor. Every time he got ready to answer a question, he took a deep breath and he had what I considered to be a very troubled look on his face. From that primarily I believe that - - that this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.
>
> The - - you know, a lot of times I think we see jurors who hesitate as you mentioned, Mr. Littlejohn, and I can get - - I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the - - the issue that they're about to discuss.
>
> I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by his - - what he thought would be the question of whether or not he would be able to impose the death penalty. And so this - - this juror to me is like so many that have - - that have been addressed in the appellate decision of our Supreme Court and in other courts, and I think primarily of the case from the Fourth Circuit called U.S. Versus Tipton where they - - where they discuss several jurors who gave conflicting answer to different questions during the entire course of their voir dire, and in the end I am left, as that District Judge was, with the impression that substantially impair his performance of his duty to consider - - to follow the instructions that I would give him. And so I find that he is disqualified.

{R. 950 line 1 – 951 line 10}.

B. General Rules

In Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court noted that the appropriate test for exclusion of a juror in a capital case was simply whether the juror's views on capital punishment would "prevent or substantially impair" her ability to follow her oath and the trial court's

instructions on the law. Wainwright specifically noted that the test for exclusion required neither automatic decisionmaking by the juror nor "unmistakable clarity" as to the juror's beliefs. Id. at 424-25. See also Morgan v. Illinois, 504 U.S. 719, 729-30 (1992).

The trial court's determination of a juror's qualification for a capital trial is within its sole discretion, and that decision is not reviewable on appeal unless wholly unsupported by the evidence. Further, on appeal the responses of the challenged juror must be considered in light of the entire *voir dire*. "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999).

C. The trial court is entitled to and indeed is in the best position to judge the credibility and demeanor of the juror in deciding whether he is qualified, regardless of how his answers appear in the cold record.

Appellant is absolutely correct that juror "vacillation" during capital voir dire has been held to be a sufficient reason to exercise a peremptory strike. See, e.g. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). He is also correct that the solicitor could have used a peremptory strike on Kyzer. However, Appellant is incorrect in arguing that Juror Kyzer's vacillation and equivocation in this case does not support exclusion for cause.

Part of the trial judge's job during qualification is to make credibility determinations about a juror's responses on her ability to be fair to both sides. Indeed, in Wainwright the Court noted:

> Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 425-26. See also Wainwright, 469 U.S. at 422 (noting that the State may still challenge a juror for cause if he refuses to follow the statutory scheme and "truthfully answer" the questions posed by the trial judge); Wainwright, 469 U.S. at 429 (in discussing application of the presumption of correctness in federal habeas corpus, noting that determination of juror impartiality is accomplished by *voir dire* "culminating in a finding by the trial judge concerning the venireman's state of mind', and that "such a finding is based on determinations of demeanor and credibility that are peculiarly within the trial judge's province"); Andrews v. Collins, 810 F. Supp. 759, 769 (E.D. Tex. 1992) ("The trial court is in the best position to rule on a prospective juror's qualification because the court views the juror's demeanor and credibility, and as here, participates in the *voir dire* examination to clarify any ambiguities.").

And, as the United States Supreme Court held just last year:

> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [citations omitted]. Leading treatises in the area make much of nonverbal communication. See, e.g., V. Starr & M. McCormick, Jury Selection 389-523 (3d ed.2001); J. Frederick, Mastering Voir Dire and Jury Selection 39-56 (2d ed.2005).

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007).[6]

Moreover, this Court has repeatedly affirmed disqualification of a juror based on

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[6] Appellant seems to contend that because Uttecht was a federal habeas case resulting from a state conviction, the deference discussed there is inapplicable here. It is true that pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 federal courts may not grant habeas relief on a state court conviction unless the decision was an objectively unreasonable application of clearly established federal law, or an unreasonable determination of the facts. See Williams v. Taylor, 120 S.Ct. 1495, 1522 (2000) (construing the standard of review in 28 U.S.C. § 2254(d)(1)). However, simply because the AEDPA imposes an additional layer of deference to state court determinations has nothing to do with Uttecht's discussion of Wainwright and its progeny that the inherent nature of the determination of a juror's substantial impairment necessitates substantial deference to the trial court which participated in voir dire – and this discussion is applicable whether the case is on direct appeal or federal collateral attack. See generally Uttecht, 127 at 2222-24.

difficulty in considering the death penalty, even where that difficulty was not absolute, or the juror's answers were conflicting. See, e.g. State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999) (juror's equivocation to one ambiguous question insufficient to overcome previous definite answers); State v. Simpson, 325 S.C. 17, 479 S.E.2d 57 (1996) (no error in excluding juror who, although initially qualified, stated three times the next day that he could never impose the death penalty); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (rejecting allegation that juror should have been qualified because she was not "emphatically opposed" to the death penalty, where juror said she did not "think" she could vote for death or sign the form, and it was apparent that imposing death would "extremely difficult" for the juror); State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993) (record supports disqualification of juror where juror initially said he "probably could" consider death for a non-triggerman, but then repeatedly stated he did not "think" he could); State v. Riddle, 314 S.C. 1, 443 S.E.2d 557 (1994) (no error in disqualifying a reverend who said her Christian beliefs would "hinder" her, who said she could not give death, and who was unable to say otherwise); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (no error in disqualifying juror who said his bias might affect his partiality, even though juror said he would try not to be prejudiced); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (trial court had reasonable basis for excluding juror where he consistently maintained his opposition to the death penalty and did not believe he could consider it); State v. Chaffee, 285 S.C. 21, 328 S.E.2d 464 (1984) (considering questioning in entirety, reasonable basis existed for trial court to exclude juror for cause).

Indeed, most recently, this Court rejected a similar claim relating to a juror who changed her answers after questioning on the value of a fair cross-section of the

community, affirming the trial court's credibility determination that the juror's subsequent "correct" answers were fueled by the later questioning and not a true representation of the juror's capabilities. State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) (specifically noting that the trial court was in the best position to judge the demeanor of the juror, and further noting that disqualification of a juror is not reviewable unless wholly unsupported by the evidence).

And, a trial court could exclude a juror even if the juror said all the right things, if, for example, there was evidence or a basis to believe the juror was concealing his real views on the death penalty to achieve a certain result in the case. See Uttecht v. Brown, 127 S.Ct. 2218, 2223 (noting that deference to the express or implicit findings of the trial judge is necessary even in the absence of clear statements from the juror as to his impairment, as some "may wish to hide their true feelings", and thus where there is ambiguity, the trial court "aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State") (quoting Wainwright, 469 U.S. at 434).

D. Here, there was ample support in the record for the judge's excusal for cause, given Juror Kyzer's hesitation, his vacillating and conflicting answers, and the judge's express resolution of credibility and demeanor issues.

Here, it cannot be disputed that Juror Kyzer's answers were all over the place, during which – although he occasionally said the "right" things – he hesitated, said he was "in between" the categories, said repeatedly he was not sure he could return a death sentence, said he did not "think" he could sign the form for a death verdict, said it would be "very difficult" for him to consider a death sentence, said it was "hard" for him to pass judgment on someone else, agreed he would not "feel comfortable" giving death, admitted

if the victim was not a family member that "probably would" interfere with his ability to sign a death form, and even during his answers during defense rehabilitation often qualified them by saying he would "try" or "maybe" be able to consider death or sign the form. See Events at Trial, *supra*. The vacillation, hesitation, and conflict is alone sufficient support in the record to infer a proper basis for the trial court's ruling under the deferential standard of review.

Of course, the trial court is not required to set forth detailed findings as to why it excluded a juror for cause. As noted in Wainwright:

> We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record.

469 U.S. at 430.

Here, however, there is no need to infer – the trial court did expressly set forth its reasoning, noting that his assessment of the juror's "troubled" demeanor and frequent hesitation was not that the juror was simply thinking carefully about his answers, but that he was so troubled by the idea of participating in giving a death sentence that he would be substantially impaired in the performance of his duty. **{R. 950-51}.**

Given this record, the judge's role, and his express findings, that decision is clearly sustainable.[7]

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[7] Appellant seems to contend that because Uttecht noted the defense waived any objection, it is inapplicable since the defense strenuously objected here. However, in the end, the strenuousness of an objection is not dispositive of whether the record has any support for a judge's decision to disqualify a juror – ultimately it is the juror's answers and the judge's resolution of credibility and demeanor issues. Uttecht merely referred to the defense lack of objection as an additional fact supporting the trial court's determination to disqualify the juror, and it is of no consequence that such a fact does not exist here.

E. Any error is harmless since at best Kyzer could have been the second alternate, and no alternates were used in the case.

Here, even if the judge erred in excluding the juror, any error was harmless. Here, the jurors were ultimately struck in the order they were qualified. **{R. 8-10; 31-33}**. Kyzer at best would have been available for selection as the second alternate, as all strikes were used in the selection of the actual jurors, and the jury was set, before alternate selection began. No alternates were used in the case. Thus, even if Kyzer was erroneously excluded, it made no difference in this trial. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (finding error for failure to allow defense questioning harmless, because given the order of jury selection, at best juror could have been an alternate, and no alternates were used); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) (any error in qualification or alternate capital juror was harmless beyond a reasonable doubt where no alternates were used).

V. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR A NEW TRIAL BASED ON AFTER-DISCOVERED EVIDENCE, WHERE THE COURT IS TASKED WITH ADJUDGING THE CREDIBILITY OF SUCH EVIDENCE, AND THE RECORD PROVIDES AMPLE SUPPORT FOR THE TRIAL COURT'S DETERMINATIONS IN THAT REGARD.

Appellant next contends the trial court erred in refusing to grant his motion for a new trial based on after-discovered evidence due to a claim by codefendant Marcus Thompson's cellmate that Marcus confessed to being the shooter. However, the trial court in handling such a motion is tasked with adjudging the credibility of the new evidence, and his assessment of issues of demeanor and credibility are entitled to great deference on appeal. Here, even if the cellmate's account was considered, it would not affect the guilt phase as Appellant would still face clear accomplice liability, and the judge's credibility resolutions are amply supported and sufficient to reject the claim as to both phases.

A. Events at trial

After Appellant's conviction, he filed a motion for a new trial based on a statement given by a cellmate of Marcus Thompson that Marcus had bragged he was the triggerman. This Court granted a remand to hear the motion.

Kevin Fuller wrote a letter to the solicitor's office in which he claimed his cellmate Marcus had been bragging that he was the triggerman. Fuller said Marcus told him Appellant opened the door to the Navigator and then Marcus shot Tracy in the head. Marcus gave the gun to Appellant, and Appellant then drove the Navigator and Marcus drove Appellant's car to a hotel. They left in the Navigator but they were caught by police. Fuller claimed Marcus told him police found no gunshot residue on him because he was wearing gloves inside out, which he learned from the show "CSI". **{R. 2751}.**

Subsequently, Fuller gave a statement to investigators. Some of the details were

similar, except Fuller added that Marcus said when Kevin opened the Tracy's truck door, Tracy started to get out to defend himself, so Marcus shot him behind the ear at which point Tracy fell by the truck. Fuller also said this time Marcus said he had the gun when they were pulled in the Navigator, and it took 10 to 20 minutes for the officers to arrest Appellant while Marcus sat in the car. During this time, Marcus allegedly slid the gun under Appellant's seat. **{R. 2752}**.

Fuller also wrote another letter to the solicitor in which he requested "help" and "probation" on his pending charges since he had provided this information. **{R. 2754}**. All of this information was turned over to defense counsel.

On August 9, 2006, an evidentiary hearing was convened on the motion for a new trial based on after-discovered evidence. Marcus Thompson, who received 28 years for his role in the crime, was present and under questioning by the defense denied being the shooter or ever claiming to be the shooter to Fuller. **{R. 2603-07}**. On cross, Marcus noted gave a statement to police shortly after the crime in which he said he did not participate in either the robbery or the murder. He stated he dropped Appellant off and drove to the Economy Inn, after Appellant showed up with the SUV and said he shot someone in the head. Marcus testified he put on the gloves and handed the gun to Appellant so he could get in the passenger seat, and that when they were pulled by police Appellant put the gun under the driver's seat. He also noted Fuller talked about wanting to get out of jail. **{R. 2603-24}**. On redirect, Thompson was questioned about inconsistencies in his various statements and admitted portions of them were not true. **{R. 2621-24}**.

Fuller testified at the hearing and reiterated his story about Marcus's alleged

confession. Fuller said the two men were looking for a ride to Atlanta for a party, and approached Tracy's car. Appellant opened the door, and Tracy had what appeared to be a gun, so Marcus shot him behind the ear. Marcus bragged that the police did not check the inside of the gloves, and said that when the officers were arresting Appellant he slid the gun under the driver's seat. **{R. 2629-31}**.

When pressed in greater detail, Fuller claimed Marcus said he "stuck the gun in the back of that man's – well, it was to the side of his head and shot the man dead and he slid out of the truck". **{R. 2634}**.

On cross, the solicitor probed a number of subjects with Fuller, including: (1) Fuller's request in the letter for the solicitor's help and probation on Fuller's case **{R. 2637; 2660-62}**; (2) his lengthy prior record **{R. 2638-40}**; (3) drug use **{R. 2639-40; 2663}**; (4) inconsistencies on when he says Thompson allegedly confessed **{R. 2648; 2678-80}**; (5) inconsistencies between the letter and his subsequent statement to investigators, such as what Marcus did with the gun after the murder, and how the shooting took place **{R. 2649-75; 2666-73}**; (6) his mental health issues **{R. 2663-65}**; and (7) Fuller's claim Marcus said there was blood on his hand which he smeared on the truck **{R. 2673}**.

Fuller also stated that "Rocky" Johnston was also in the cell and could verify his statements. **{R. 2674-77; 2683}**. However, Rocky Johnston was called by the solicitor and denied ever hearing Marcus confess to shooting Tracy, and said that instead Marcus always claimed Appellant killed Tracey. **{T. 2688-2709}**. Rocky stated that Fuller asked him if Fuller could use what Marcus said to get help on Fuller's charges. **{R. 2697-98}**. The State also introduced copies of Marcus's pleas, noting they did not occur until June

20th, 2006. **{R. 2710}.**

The judge denied the motion for a new trial in an Order filed on September 26th, 2006. As to the guilt phase, the judge noted the evidence was clear that both Appellant and Marcus committed the crime, and that the defense did not object to a charge on the hand of one is the hand of all. Thus, since Fuller's recitation of Marcus's account has Mercer opening the door to Tracy's SUV before Marcus fired the shot thinking Tracy had a weapon and was going to hurt Appellant, the "after-discovered evidence" would actually "support, rather than undermine" the guilt phase verdicts under the "hand of one" type of accomplice liability. **{R. 2767}.**

As to the sentencing phase, the judge noted there were two issues: (1) whether it could be believed that Marcus Thompson told Fuller what Fuller claims, and (2) if it can, whether what Marcus substantively said was the truth. As to these issues, the judge found Fuller was "not a believable person", that his statements and testimony were "full of major inconsistencies and contradictions", that Fuller admitting lying on several occasions, and that Fuller told "markedly different stories" about when Marcus first allegedly confessed, and about what he supposedly did with the weapon after the crime. The judge pointed out that Fuller asked for help from the solicitor's office after providing the information, and that Rocky stated Fuller intended to fabricate a story to help himself. The judge noted that Fuller was insistent that Rocky overheard this conversation, but Rocky denied it. Finally, the judge noted there were known facts inconsistent with Fuller's account, including (1) there was no blood on the Navigator even though Fuller stated there was a blood smear and Tracy fell against the SUV; and (2) there were inconsistencies as to where Tracy was

when he was shot.

As to Fuller, the judge concluded:

> 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 Sgt. Davis. I believe Fuller purposefully made different statements about this at different times when Fuller's view of what the story suited Fuller's view 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.

{R. 2768-70}.

The judge also found Thompson to have little credibility as well, but noted the solicitor's concession Thompson was protected by double jeopardy made him more credible on balance than Fuller. **{R. 2770-71}.**

As to Rocky Johnston, the judge concluded he was the one witness with nothing to gain, and stated: "I observed him to be straightforward. His testimony was believable." **{R. 2771}.**

Finally, the judge addressed what a jury would likely believe if the new evidence was offered, and concluded that based on these finding "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed". The court also found very little likelihood the jury would believe the substance of Fuller's account over Thompson's in court testimony, given that – while the judge found Thompson had little credibility – Thompson still "calmly and convincingly went through the entire sequence of events". Finally, the judge noted that the defense had made a strategic decision at the first trial not

to call Thompson so that it had freedom to argue the State's failure to call and/or present evidence about Thompson was reasonable doubt. Had Thompson testified, in the judge's view this would have aided the State's case more than his absence, which freed the defense to its arguments. The judge concluded that after considering all the trial evidence and the hearing evidence, there was essentially no chance the new evidence would change the outcome. **{R. 2771-73}**.

B. The trial court must consider the credibility of the evidence when assessing a motion for a new trial, and that determination is entitled to deference on appeal.

Of course, to obtain relief, Appellant 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 have been discovered prior to trial in the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001); State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999). The parties conceded only the first element was in play.

With this in mind, it is important to note that in making that determination the trial court first has an important gatekeeping function to determine the credibility of the supposed new evidence. For example, in Johnson v. Catoe, this court affirmed the trial court's finding that the recanting witness in that case was not credible, and that as such it was not probable that her new testimony would change the result of the trial. 345 S.C. 389, 548 S.E.2d 587. The Johnson Court, which, unlike in this case, was acting in its original jurisdiction, stated:

> [T]o decide whether [the witness's] statement would probably change the result of petitioner's trial, we are required to determine [the witness's]

credibility.

345 S.C. at 400 n.6, 548 S.E.2d at 593. As quoted in the case of State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977):

> The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him . . . resides the power to weigh such evidence . . . .

See also State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) (affirming a trial court's denial of a motion for a new trial based on a witness's recantation, where the judge found that the new testimony was not "believable" based on the many versions offered); State v. Parker, 249 S.C. 139, 153 S.E.2d 183 (1967) (affirming a trial court's rejection of a motion for a new trial based on the affidavit of a state inmate that his testimony was untrue, and noting: "It is a fixed rule that the credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for the determination by the circuit judge to whom it is offered."); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959) (affirming trial court's testimony that repudiation was not believable, and noting "to hold such affidavits sufficient to require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes"); State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1999) (same); State v. Deese, 266 S.C. 534, 225 S.E.2d 175, 176 (1976) ("When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence"). See also United States v. Roberts, 262 F.3d 286 (4th Cir. 2001) (affirming trial court that concluded, after viewing witness's demeanor, that it was not reasonably well satisfied the trial testimony was false); United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989).

Of course, part and parcel of that judge's duty to assess the credibility of the newly

discovered evidence is this Court's deference to that determination on appeal, as the judge had the opportunity to observe the evidence and testimony firsthand:

> The credibility of newly discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this Court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion (citation omitted).

State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965) (refusal to grant new trial on ground of after-discovered affidavit by inmate who confessed and who thought he had nothing to lose not abuse of discretion).

C. The judge correctly concluded that Fuller's testimony could have no effect on the guilt phase.

While the judge's credibility finding as to Fuller, Thompson, and Johnston, to be discussed *infra*, would obviously support rejection of the new trial claim as to the guilt phase as well, it worth noting at the outset that the judge correctly observed that Fuller's account, even if believed, would have no effect on the guilt phase. Of course, as noted before, in all his various accounts he stated Appellant was the one to open the SUV's door and start the carjacking, although he contended Marcus said he fired the fatal shot. Moreover, in his statement to investigators as well as his hearing testimony, Fuller stated that Marcus said he and Appellant were looking for a truck to take to Atlanta to party, when they saw the victim and Appellant jumped out and opened the door. **{R. 2752; 2629-31}**. Obviously, assuming the truth of Fuller's account, such conduct on the part of Appellant in planning the carjacking and being the one to begin it by opening the door would provide more than ample basis for criminal liability as either a principal second or under the doctrine of "the hand of one is the hand of all". See generally State v. Langley, 334 S.C.

643, 515 S.E.2d 98 (1999).

D. The judge's credibility findings have ample support in the record and are sufficient to affirm the guilt and penalty phases.

Respondent has already set forth in the Events at Trial section a list with record citations of the multiple issues with Fuller's testimony, and has already recounted the trial court's detailed list of reasons why he disbelieved Fuller's testimony and found no chance it would change the result at trial. Of course, part of this was his express reliance on his personal observations of the witnesses as they testified. Indeed, given that his assessment of demeanor was so eloquently and expressly set out, and such a determination is entitled to great deference on appeal, that alone is sufficient support in the record to affirm the judge on his rejection of this evidence as requiring a new penalty phase.[8]

However, without detailing again every little inconsistency in Fuller's accounts, or basis for not believing him, a few main ones bear repeating. First, of course, is Fuller's request for help or probation on his charges from the solicitor's office, which is a substantial motive to lie and goes a long way in justifying a conclusion of fabrication. **{R. 2754; 2637; 2660-63}.**

Next is the conflict of Fuller's version with other relatively objective facts of the crime. Of course, the judge pointed out that Fuller stated – although it varied – that Tracy

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[8] In the penalty phase, the judge declined to give a Tison charge, and instead charged the jury that it could only find death if it found Appellant was the triggerman. The judge so ruled because of the lack of any evidence someone other than Appellant was the triggerman. **{R. 2251-58}**. Of course, in Tison v. Arizona, 481 U.S. 137, 158 (1987), the United States Supreme Court held that a death sentence could not be available for an accomplice unless the individual's participation in the felony was major and with a reckless indifference to human life. However, given Fuller's account that Appellant was still heavily involved in the crime, set forth in subsection C, Fuller's account would require a Tison charge and Appellant would remain death-eligible.

was shot in, at or near the car, and that blood was on the car **{R. 2751-52; 2632-34; 2673-74}**, but no biological evidence was found on or in the car – a virtual impossibility when a .357 hollow point hits someone's head. **{R. 1440-41; 1447-52}**. Indeed, Tracy was found lying in the brush and grass, not the parking lot. **{R. 1330; 1341-43}**.

There were other inconsistencies as well. For example, Fuller testified Marcus saud "he stuck the gun in the back of that man's – well, it was to the side of his head and shot than man dead and he slid out of the truck" **{R. 2634}**, but the pathologist testified there was no soot or stippling on the entrance wound, indicating a distance of at least two feet. **{R. 1576-77}**. And, Fuller claimed in one of his versions that the officers took 10 to 20 minutes to secure Appellant, while Marcus sat in the SUV and during which he was able to put the gun under the driver's seat **{R. 2752}**, but Deputy Stazer testified for his own safety he kept his eyes on both subjects, and he saw no movement from the passenger. Stazer pointed out that had the passenger moved, he would have responded with lethal force. **{R. 1390-91}**. Tracy's roommate Clifton Magwood only saw one assailant, who he described as a "heavy build, muscular" black man, and who was wearing dark clothes and appeared to have a gun in his hand **{R. 1337-38}**, but officers noted Marcus was much more slender than Appellant, and was wearing a white shirt under a dark shirt that was clearly visible. **{R. 1395; 1413-16}**.

Perhaps recognizing the ample support in the record for the trial court's resolution of the issues entrusted to it, Appellant tries to allege the trial court relied on a non-existent fact – inasmuch as the judge stated Johnston said Fuller asked him about fabricating a story to help Fuller's case and get his charges dismissed **{R. 2769}**, when Johnston

testified "[Fuller] 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" (emphasis added). **{R. 2697-87}.** Appellant reads this too closely if he asserts there is no reference to fabrication, as the quote is "out of what Marcus told us", which reasonably could mean someone was going to take the basic facts relayed and then fabricate a story more likely to get attention. Regardless, we should trust the trial court's interpretation who was there to hear inflection and demeanor to decide what Johnston meant, rather than parse the cold record for nuances of meaning to reverse a carefully drafted order. Indeed, this was but one of many factors mentioned. If this Court was that concerned, perhaps a remand for clarification would be more appropriate, but that does not seem necessary with such a weak point.

Second, this Court should not accept Appellant's request for judicial notice of an inmate search on Timothy Johnston, as the record does not reflect that the one serving 3 years for *Richland* County charges is even the same person, and even if it was, does not reflect if the Lexington charges are still pending, or if they were dismissed or otherwise resolved, if it was for any of the infinite number of other reasons that could exist other than some nefarious *quid pro quo*.

Third, Appellant repeatedly asserts he did not test positive on a GSR test. Not only is this not conclusive of anything, as GSR is extremely fragile and its absence conclusive of nothing **{R. 1486-88}**, but Appellant did have two round lead balls on his left palm – which, although not conclusive of GSR, is in fact consistent with it, and inconsistent with environmental contamination. **{R. 1517-19}.**

The trial court's determination has support in the record and should be affirmed.

VI. THE TRIAL COURT CORRECTLY REFUSED TO ALLOW THE DEFENSE TO CALL THE NONTESTIFYING CODEFENDANT'S ATTORNEY TO TESTIFY ABOUT WITH WHAT THE PROSECUTOR CHARGED THE CODEFENDANT; SUCH EVIDENCE GOING TO THE PROSECUTOR'S BELIEF ABOUT THE CASE WAS NOT ONLY IRRELEVANT BUT CONFUSING AND WASTEFUL UNDER RULE 403, AND ALSO NOT PERMISSIBLE UNDER THIS COURT'S THIRD PARTY GUILT RULES.

Appellant next contends that the trial court erroneously excluded testimony during the guilt phase from the codefendant's attorney that the codefendant had only been charged as an accessory, and had been released on bond. However, any inquiry into the prosecutor's belief about the case – as shown by his charging decisions – was not relevant and would lead to confusion and waste of time; moreover, evidence about the prosecutor's charging decisions would not be permissible under our third party guilt rules. Regardless, given the other examination permitted and defense arguments made, as well as the strong evidence of guilt, it cannot be said that any error was reversible.

A. Events at trial

During the defense guilt phase case, Appellant indicated his intent to call the attorney for codefendant Marcus Thompson, David Ferrell. The State objected, and outside of the presence of the jury asserted that since it had not called Marcus as a witness, and Marcus was not on trial, anything his attorney had to offer was irrelevant. The defense responded that it thought it was relevant how Marcus had been treated by the State, to which the State responded that how Marcus would be treated was a matter only for the day when Marcus's case was called. **{R. 1593-94}**.

The trial court questioned the defense on relevance, noting that while it could potentially see relevance in a situation where Marcus had testified and his treatment by the State might go to motive, bias, or other issues of credibility, the mere fact of the State's

choice as to how to charge Marcus constituted an opinion as to guilt that was not admissible. **{R. 1594-95}.**

The defense responded that it showed the State had "chosen to totally ignore Marcus Thompson's role in the crime", to the point where they had allegedly not sought to revoke Marcus's bond even though he got in trouble. The court responded that in order for such evidence to be admissible under the rules for third party guilt it would have to exonerate the defendant, and nothing about Marcus's charges does anything to show that Appellant was not at least guilty by the hand of one is the hand of all – at least with regard to the armed robbery and murder charges. The defense replied that hand of one did not matter since the State's theory all along was that Appellant was the triggerman. **{R. 1595-96}.**

The State then interjected that such a ruling would require the State to get into "all the evidence we have and don't have against Marcus Thompson", which would be a "smokescreen" since Thompson was not on trial. The solicitor pointed out that while it was "natural" for the defense to try to shift blame to the codefendant, he was not on trial and had not been called. **{R. 1596}.**

Defense counsel agreed when the court asked if the defense was just calling Ferrell to testify that Marcus was not indicted for murder and armed robbery, but instead was indicted for accessory after the fact. The court then sustained the State's objection. **{R. 1597}.**

B. The trial court properly concluded that any inquiry into the prosecutor's belief about the case was not relevant and would lead to confusion and waste of time; moreover, the judge also properly concluded that the prosecutor's charging decisions would not be permissible under our third party guilt rules.

The prosecutor's charging decisions here were not relevant, and were also excludable under this Rule 403 as well as this Court's rules as to third party guilt. A 403 analysis is subject to an abuse of discretion standard, State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593 (Ct. App. 2001), and an abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" Hamilton, 344 S.C. at 357-58, 543 S.E.2d at 593 (Ct. App. 2001).

Appellant claims he wished to introduce the prosecutor's charging decisions to show the State failed to investigate Thompson and ignored his role in the crime. Sometimes, such inferences may arise when a codefendant is testifying for the State is cross-examined on deals received or hopes for favorable treatment, pursuant to Rule 608(c), SCRE. See, e.g. State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (defense should have been allowed to examine testifying co-defendant on pending charges with same prosecutor's office under 608(c)). However, the focus and basis for admissibility under Rule 608(c), SCRE is the credibility of the *testifying* codefendant, and, of course, in the trial Marcus did not testify.

Alternatively, the defense may try to raise such inferences by cross-examining

testifying police officers or investigators on certain things that were not done or not done as to the investigation of a codefendant or witness. See, e.g. State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) (finding not error to allow officer to state all witnesses pointed to defendant where specifics were not mentioned and it was in response to defense cross on why the officer did not perform GSR on everyone at the scene). Of course, here the defense did in fact have the opportunity to cross examine the officers and investigators, and did as much as possible attempt to bring up Marcus, his involvement, his arrest, and items in his possession. **{R. 1398-1408; 1419-28; 1486-90; 1496; 1520-37; 1541; 1585-87; 1629-30}**. Despite his conclusory assertion to the contrary, Appellant clearly had an evidentiary predicate to make a "rush to judgment" argument, and indeed he extensively did in closing. **{R. 1672 lines 11-23; 1671-88}**.

In any event, showing what *the officers* did or believed as they conducted their investigation is a far cry from introducing into evidence the charging decisions of the prosecutor to show *the prosecutor's* purported belief about the case – which is the only thing for which Marcus's lawyer's testimony could be offered. Obviously, had the State tried to offer such evidence to show what the prosecutor believed to support its case, the case would be reversed, as this Court has recently emphasized that it is even improper for a prosecutor to interject his personal opinion by arguing in closing that "we expect the death penalty". State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). There is no good reason why the defense on the other hand should be able to present evidence on the beliefs of the prosecutor trying the case.

And, a number of courts have held in various contexts that prosecutor's charging

decisions were not sufficiently relevant and admissible. United States v. Dufresne, 58 Fed. Appx. 890 (3rd Cir. 2003) (decision by state not to bring drug charges not relevant in federal drug prosecution; the reasons for such a decision are not in the record, are unreviewable, and irrelevant to the issues in the case, including credibility of witnesses); Brigman v. State, 64 P.3d 152 (Ak. Ct. App. 2003) (where State decided to drop all charges against testifying codefendant after his testimony, holding it was not error to allow defense evidence on this decision; the district attorney's state of mind is not relevant, and in any event a charging decision does not necessarily show the actual state of mind of the State, as it may dismiss charges for a number of reasons other than a belief in innocence); People v. Bount, 840 N.E.2d 762 (Ill. Ct. App. 2005) (finding irrelevant fact that State charged defense witness with possession of same drugs after defense witness testified defendant had nothing to do with them; court noted that the possession could be joint anyway, which would not preclude defendant's guilt, and in any event whether the State believed the witness's account in its charging decision was not relevant – the issue at trial was which account the *jury* believed). See also United States ex. rel. Santiago v. Roth, No. 91 C 3303, 1991 W.L. 278309 (N.D. Ill. 1991) (unpublished) ("The State's decision not to charge Ephraim Sanchez and any inference it might have raised regarding the State's view of its own witnesses' credibility were only marginally, if at all, relevant to the issue of petitioner's guilt.").

Here also, the prosecutor's personal belief as evidenced by charging decisions has little, if any, relevance to the trial. As the authorities note, a charging decision involves more than just an assessment of witness credibility, so the charging decision is not all that probative on the prosecutor's belief anyway. See Brigman, *supra*. Regardless, as the

solicitor noted, he would have to respond – and indeed would have the right to respond based on the defense's opening of the door on this issue – with a mini-trial as to the evidence regarding Marcus to justify and defend any "belief" he had about the case that led to his charging decisions. Not only does that violate Northcutt, and not only can the State not fathom a reason why this Court would want a capital trial to degenerate into such an endeavor, but this seems precisely what the provisions of Rule 403 referring to confusion of issues, misleading the jury, and waste of time refer. Moreover, it seems at its core to violate Rule 3.7, Rule 407, SCACR, generally prohibiting a lawyer acting as a witness in a cause where he is also the advocate. Fundamentally, the issue Appellant seeks boils down to making the prosecutor's belief and the basis for it a factual issue in the trial – which violates Rule 3.7 in spirit if not on its face.

If, on the other hand, the evidence is offered as third party guilt, it clearly fails. South Carolina's standard for admission of third party guilt evidence requires that such evidence "must be limited to such facts as are inconsistent with [Petitioner's] own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence". State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (citing 20 Am. Jur. 254). Moreover, the United States Supreme Court's recent decision in Holmes did not invalidate Gregory. In Holmes, the Court overruled application of the limits on third party guilt only to the extent that the lower court's rejection of the proffered evidence relied solely on the fact that the prosecution's other forensic evidence was strong – as opposed to simply analyzing the strength of the third party guilt evidence in and of itself. The United States Supreme Court in Holmes specifically noted that the Gregory rule was "widely accepted" and "not challenge[d]" there. 126 S.Ct. at 1733. It was only the "radical change" and "exten[sion]"

of the rule to consider the strength of the prosecution's evidence – as opposed to the probative value or potential adverse effects of the third party evidence – that led to reversal.

Here, merely showing Marcus was charged only as accessory in the crime – but still charged all the same – does absolutely nothing to exculpate Appellant as a participant in the crime, whether as the triggerman or as principal based on accomplice liability. Indeed, Appellant is incorrect when he asserts that this case is like Holmes in that the trial court applied the third party guilt rules relying solely on the State's theory of the case – to the contrary, while the State argued Appellant was the triggerman, the court noted that it did not matter for purposes of the guilt phase if Appellant was the trigger man based on the doctrine of hand of one is the hand of all, and thus the charging decision could not be exculpatory to Appellant. **{R. 1595-96}.**

As far as Appellant's present counsel's aspersion in a brief filed before this Court on a long-serving solicitor as being "arrogant" because the solicitor stated it was up to his office to decide how ultimately to resolve the charges against Marcus – that is precisely the power our system gives the office he obtained by election. There is nothing arrogant about this statement and Appellant's aspersion is not only completely unnecessary to make in an official document before this Court, but also completely unhelpful to his case.

C. Any error was harmless.

Given the other examination and argument counsel was able to do and make with regard to the investigation of Marcus, detailed above, and the strong evidence of guilt, where Appellant was pulled over with the murder weapon under his seat in the victim's car

shortly after the shooting, it cannot be said that exclusion of Fuller's testimony reasonably affected the result of trial. See generally State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007).

CONCLUSION

For the foregoing reasons Respondent respectfully submits this Court should affirm Appellant's conviction and sentences.

Respectfully submitted,

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June 24, 2008.

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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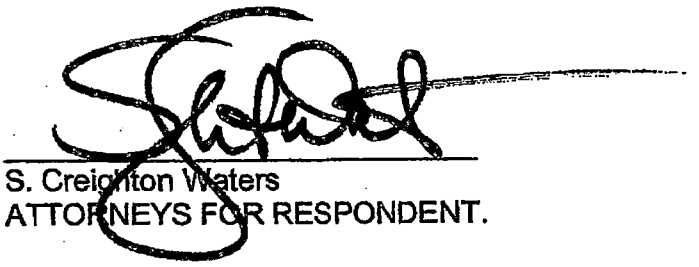

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June 24, 2008.

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.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date **served** the **Final Brief of Respondent**, dated June 24, 2008, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorneys of record:

Robert M. Dudek, Esquire
South Carolina Office of Appellate Defense
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and I certify that I this date served the **Final Brief of Respondent** by depositing three copies of the same in the United States mail, first class postage prepaid upon:

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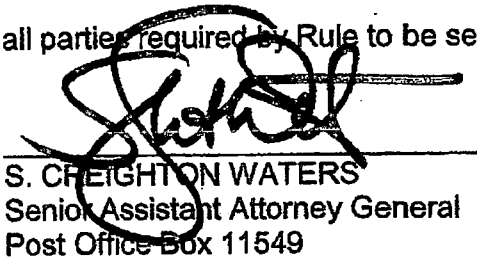
I further certify that I have served all parties required by Rule to be served.

This 24th day of June, 2008.



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IN THE SUPREME COURT

Appeal from Lexington County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

ARGUMENT IN REPLY 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968) 5

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) 3, 4, 5

Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991).....5

State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) 3

State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990) 4

State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995).....4

Uttecht v. Brown, 511 U.S. __, 127 S.Ct. 2218 (2007).....3, 4

Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985) 3, 4

ARGUMENT IN REPLY

4.

The state's argument that the removal of Juror Kyzer was harmless error is untenable under *Gray v. Mississippi*, 481 U.S. 648, 107 S.Ct. 2045 (1987). If the state is arguing for a change in the law on harmless error that is still true given that the exact manner of jury selection is always subject to change in practice in our state.

The state argues that "even if the judge erred in excluding the juror [Kyzer] any error was harmless" because "here the jurors were *ultimately* struck in the order they were qualified." Respondent's brief at 50 (emphasis added). Appellant respectfully submits such a harmless error analysis cannot stand given the per se reversible error holding of Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987). However, even if it could, given the practical reality that the manner of jury selection is always subject to change after all of the jurors are qualified that this Court recognized in State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007), such a harmless error analysis would still be impracticable.

In State v. Bryant, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007) this Court held that "because a trial court is given enormous discretion in conducting a criminal trial, we logically conclude that [an] 'established practice' [of selecting a jury] does not refer to only one method of impaneling a jury." Therefore, *any* -- the "jurors are struck in order" harmless error -- argument that the wrongful exclusion of a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Uttecht v. Brown, 511 U.S. __, 127 S.Ct. 2218 (2007) qualified juror (here Juror Kyzer) can be harmless error under Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) cannot withstand Constitutional scrutiny given the

reality of jury selection in this state recognized in State v. Bryant, 372 S.C. 305, 313, 642 S.E.2d 582, 587 (2007)

This is a wrongful removal of a Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844 (1985); Uttecht v. Brown, 511 U.S. __, 127 S.Ct. 2218 (2007) qualified juror case under the analysis founded in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987), it is not a harmless error denial of the right to question a juror *voir dire* case or a case involving a qualified juror who never would have served anyway as to state cites to in State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) and State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990). Respondent's brief at 50. The error in wrongfully excluding Juror Kyzer, a death qualified juror, was not harmless under Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) -- it was reversible error.

Further, regarding the underlying premise, Juror Kyzer was a qualified juror as the following exchange indicates:

> Q. [I]f 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.

R. 942, l. 17 – 943, l. 16.

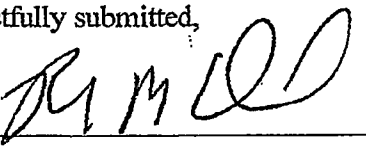
During subsequent questioning by the solicitor Kyzer was asked if he could sign his name to the death penalty verdict form sentencing someone to death or if his feelings would interfere with that ability. Kyzer responded that his feelings would interfere with "it some." R. 945, ll. 2 – 9. However, on 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.

Juror Kyzer was qualified, he had the right to serve, and his removal was not harmless. Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) See, also, Powers v. Ohio, 499 U.S. 400, 406, 111 S.Ct. 134 (1991)(the right of the individual juror to serve and participate in the administration of justice and the harm to the community as a whole by the wrongful exclusion of a qualified juror must be taken into account). *Citing* Duncan v. Louisiana, 391 U.S. 145, 147-158, 88 S.Ct. 1444 (1968).

CONCLUSION

By reason of the arguments in appellant's brief, and in this reply brief, appellant's conviction and his death sentence should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.

Respectfully submitted,

By: 

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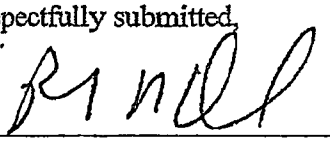
June 26, 2008

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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June 26, 2008

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

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon S. Creighton, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 26th day of June, 2008.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 26th day of June, 2008.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008 .

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kevin Mercer, Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavyset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11" to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.[1] Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.[2] The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

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[1] Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

[2] This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty. Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

(1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt.*
(2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."
(3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.
(4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe[3] and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror's bias need not be "proved with 'unmistakable clarity' . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. Finally, the *Wainwright* Court noted that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, "I'm not sure, sir."

The State followed the court's questioning by pursuing the same line of inquiry, to which Juror Doe responded that "it's just hard to judge, you know, someone else . . . for something that they've done."

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[3] We use the pseudonym John Doe.

Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

> I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.
>
> . . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.
>
> I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . .

> . follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. *See Uttecht v. Brown*, 551 U.S. 1, __, 127 S.Ct. 2218, 2224 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against

Thompson.[4] Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.[5]

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma,

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[4] Neither the State nor Mercer called Thompson as a witness.

[5] Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

nightmares[,] . . . distressive recollections" and substance abuse. Beyond Mercer's life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court's exclusion of expert testimony in the penalty phase. "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality." While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. "SPECT Scan"

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a "SPECT Scan" conducted on Mercer's brain.[6] The SPECT Scan was initially reviewed

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[6] SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 121 (2006). According to Dr. Steedman, "a SPECT Scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody's brain in terms of how much blood flow is running through the cortex. It's mainly useful in detecting whether

by a radiologist who noted a "questionable abnormality." Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called "discovery order" violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.[7] The probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called "discovery order" cannot withstand even minimal scrutiny, for there was no formal

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there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working." An abnormal SPECT Scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

[7] This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. filed Sept. 8, 2008) (Shearouse Adv. Sh. No. 35 at 35) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel's failure to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.

discovery order.[8] In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad

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[8] In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "'could not reasonably have affected the result of the trial'").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are "reasonably necessary"); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court's discretion). Before trial, the trial court authorized $53,000 for Mercer's defense. The trial judge went further and invited defense counsel to request additional funds "if what I have authorized in this order is not going to get you all the way to trial." The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson's possession. As discussed above, the defense opted to challenge the adequacy of the State's investigation, pointing to the State's failure to test Thompson's gloves. Having elected not to test Thompson's gloves for trial purposes, there is no abuse of discretion in the denial of Mercer's post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson's cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for "help" and "some probation" with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller's letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard

the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show 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). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.[9] *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C.

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[9] The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

534, 538; 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller's testimony that Thompson admitted to being the triggerman. Thompson's participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court's conclusion concerning Fuller's testimony:

> 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.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder. Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."[10] Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavyset assailant toward the rear of the Navigator; Magwood found

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[10] This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.[11]

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[11] The trial court charged the jury:

> Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.[12] We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

> The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

> beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

[12] As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

3118

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

DP

THE STATE,

RESPONDENT,

V.

KEVIN MERCER,

APPELLANT

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Appeal from Lexington County

John C. Few, Circuit Court Judge

Opinion No. 26582

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Kevin Mercer petitions this Court to rehear this case because this Court may have overlooked the fact that Dr. Schwartz-Watts testified that appellant was not *without fault* for his poor judgment and inability to conform his conduct to the standards expected by society. She testified appellant's severe drug and alcohol abuse affected "his brain." A radiologist would only note a "questionable abnormality" R. 2154, l. 3 – 2157, l. 2.

That was much different from than Dr. Steadman's proffered testimony that appellant suffered from a brain impairment -- it was *not his fault* -- and it caused his "poor judgment, depression, thought disorders" and paranoia. "They come from the brain." The abnormality caused

appellant's problems with "conforming one's behavior to living in society." R. 2301, l. 14 – 2302, l. 22,

While this Court found the state's objection to this testimony was ""specious," it nonetheless held the error was harmless because it was cumulative to Dr. Schwartz-Watts' testimony. State v. Kevin Mercer, Op. No. 26582 (filed January 12, 2009) at p. 13. Appellant respectfully submits that this Court should reconsider that holding, and grant rehearing.

Further, defense counsel's plea to the trial judge that Dr. Steedman's testimony "mirrors [and] dove-tails with Dr. Schwartz-Watts" must respectfully be understood in the context of the trial court's incorrect reasoning that *if Dr. Steadman's testimony was different than Dr. Watt's* then it was unduly prejudicial to the state "in having learned late that he is a psychiatrist," and it would not be admitted. R. 2302, l. 21 – 2304, l. 3. Within this context trial counsel urged that Dr. Steadman's testimony was not so different from Dr. Watt's testimony that the state would be prejudiced by the alleged "discovery order violation" in revealing the scope of Dr. Steadman's testimony.

This Court's opinion, as it now stands, finds the trial court erred by not allowing the jury to hear Dr. Steadman's strong opinion about appellant's brain abnormality -- an abnormality which appellant could not help having -- but finds that error harmless because Dr. Steadman's testimony is said to be cumulative to Dr. Watt's testimony that appellant may have a brain abnormality, but that problem with his brain was in large part appellant's *own fault because he badly abused drugs and drank excessively.* That makes a major difference to a juror. It is a distinction with a huge difference. In everyday terms it was like the difference between voluntary and involuntary intoxication. If you did it to yourself, it is your own fault. If it (the

brain abnormality) is an act of God, you are excused to the extent that you will serve the rest of your life in prison as opposed to being executed.

Dr. Steadman would have been an impressive and convincing defense witness had the trial court not erroneously limited his testimony Dr. Steadman 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. Steadman was qualified as an expert in neurology without objection. R. 2265, ll. 14 – 24.

Dr. Steadman's testimony was not -- most respectfully – "merely cumulative" to Dr. Watt's testimony. It was much different. Cf. State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983). Appellant respectfully requests rehearing because excluding this relevant strongly mitigating evidence violated appellant's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

Respectfully submitted,

By: _____

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Melissa Jane Reed Kimbrough
Attorney at Law – Pro bono

ATTORNEYS FOR APPELLANT.

This 27th day of January, 2009.

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

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon S. Creighton Waters, Esquire, this 27th day of January, 2009.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of January, 2009.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018.

3122

The Supreme Court of South Carolina

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CLERK OF COURT

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February 19, 2009

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
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Columbia, SC 29211

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Re: The State v. Mercer, Kevin

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

February 19, 2009."

The remittitur is today being forwarded to the lower court.

Very truly yours,

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

ROBERT M. DUDEK
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South Carolina Commission
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Division of Appellate Defense
1330 Lady Street, Fourth Floor
Columbia, SC 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

QUESTIONS PRESENTED
Capital case

1.

Whether the court erroneously held that the exclusion of mitigation expert neurological testimony offered pursuant to Lockett v. Ohio and Eddings v. Oklahoma s howing Petitioner suffered from a specific brain abnormality which was offered to explain his poor judgment, his paranoia, and other problems relevant to his impulsive crime was harmless error where a single juror could have prevented a death verdict?

2.

Whether it was reversible error for the court to disqualify Juror Kyzer where Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under Uttecht v. Brown, and Wainwright v. Witt?

TABLE OF CONTENTS

QUESTION PRESENTED 1

TABLE OF CONTENTS 2

APPENDIX INDEX 3

TABLE OF AUTHORITIES 4

CITATION TO OPINION BELOW 6

JURISDICTION 6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 7

STATEMENT OF FACTS 7

HOW THE FEDERAL ISSUE WAS RAISED BELOW 8

WHY THE WRIT SHOULD BE GRANTED 19

HOW THE FEDERAL ISSUE WAS RAISED BELOW 23

WHY THE WRIT SHOULD BE GRANTED 26

CONCLUSION 29

APPENDIX

1. OPINION OF THE SOUTH CAROLINA SUPREME COURT A1

2. ORDER DENYING PETITION FOR REHEARING A15

3. RULE 403, SCRE A18

4. SOUTH CAROLINA CODE §16-3-20 ..... A19

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 8

Arizona v. Fulminante, 499 U.S. 279 (1991) 21

Atkins v. Virginia, 536 U.S. 304 (2002) 17, 20

Benge v. Johnson, 474 F.3d 241 (6th Cir. 2007) 26

Chapman v. California, 386 U.S. 18 (1967) 21, 22

Eddings v. Oklahoma, 455 U.S. 104 (1982) ..... passim

Fahy v. Connecticut, 375 U.S. 85 (1963) 21

Gray v. Mississippi, 481 U.S. 648 (1987) 27, 28

Hitchcock v. Dugger, 481 U.S. 393 (1987) ..... passim

Lockett v. Ohio, 438 U.S. 586 (1978) 17, 19, 20

McKoy v. North Carolina, 494 U.S. 433 (1990) 17, 20

Penry v. Lynaugh, 492 U.S. 302 (1989) 17, 20

Skipper v. South Carolina, 476 U.S. 1 (1986) 17, 21

State v. Kevin Mercer, 672 S.E.2d 556 (2009) 6, 8, 18, 19

State v. McClure, 537 S.E.2d 132 (2000) 20

State v. Sims 405 S.E.2d 377 (1991) 17

State v. Singleton, 326 S.E.2d 153 (1985) 17

United States v. Hasting, 461 U.S. 499 (1983) 22

Uttecht v. Brown, 551 U.S. 1 (2007) 25, 26, 27, 28

Von Dohlen v. State, 602 S.E.2d 738 (2004) 20

Wainwright v. Witt, 469 U.S. 412 (1984) 25, 26, 27

Wiggins v. Smith, 539 U.S. 510 (2003) 18

Witherspoon v. Illinois, 391 U.S. 510 (1968) 27

Yates v. Evatt, 500 U.S. 391 (1991) 21, 22

STATUTES

S.C. Code § 16-3-20(b)(2) 17, 20, 21

S.C. Code § 16-3-20(c)(b)(6) 17, 20, 21

S.C. Code § 16-3-20(c)(b)(7) 17, 20, 21

OTHER AUTHORITIES

28 U.S.C §1257(a) 7

RULES

Rule 403, SCRE 11, 12, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 7

U.S. Const. Amend. VIII 7, 19, 20

U.S. Const. Amend. XIV 7, 20

SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

Kevin Mercer asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming petitioner's murder conviction and death sentence is reported as State v. Kevin Mercer, 672 S.E.2d 556 (2009). App.1-14.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 12, 2009. The petition for rehearing was denied on February 19, 2009. App. 15. This Court's jurisdiction is

invoked pursuant to 28 U.S.C §1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

This case also involves the Eighth Amendment to the United States Constitution, which states in pertinent part, "Excessive bails shall not be required . . . nor cruel and unusual punishment inflicted."

In addition, this case involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "[N]or shall any state deprive any person of life, liberty . . . without due process of law . . . ."

STATEMENT OF FACTS

Petitioner and co-defendant Marcus Thompson were 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 in shooting death of Army Sergeant Tracy Davis, and the stealing of his automobile from an apartment complex. R. 2729 - 2736. Petitioner and Thompson were stopped about seventeen minutes later by Trooper Dennis Stazer after a BOLO on the victim's automobile was dispatched, and they were arrested without incident. The crime, from any vantage point, was impulsive and hard to fathom. R. 1366, l – 1370, l. 25.

The state's theory at trial was that petitioner was the triggerman, he simply liked the victim's automobile, and that vehicle was stolen so the men could go to Atlanta. Petitioner was

sentenced to death by a Lexington, South Carolina jury. Marcus Thompson, whom petitioner maintained was the triggerman, was later allowed to plead guilty to being an accessory after the fact of murder and armed robbery.[1] He received a twenty-six year sentence.

After petitioner 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 [petitioner] getting the blame." R. 2751. The South Carolina Supreme Court held petitioner's mandatory direct appeal in abeyance and remanded for a hearing on petitioner's motion for a new trial based on this after-discovered evidence. After a hearing, the trial judge, John Few, denied the motion, and the state supreme court affirmed that ruling on appeal. State v. Mercer, 672 S.E.2d 556, 563-567 (2009).[2]

HOW THE FEDERAL ISSUE WAS RAISED BELOW

During the penalty stage of the trial the defense called Dr. John Steedman as a witness. Dr. 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.

---

[1] Petitioner and Thompson were not tried together.

[2] The South Carolina Supreme Court rejected petitioner's argument that the trial judge violated this Court's holding in Ake v. Oklahoma, 470 U.S. 68 (1985), by denying him funding to have the gloves Thompson admitted he was wearing on the day of the shooting tested for gunshot residue. See State v. Mercer, 672 S.E.2d 556, 563-567 (2009).

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 petitioner. R. 2267, ll. 1 – 20. Dr. Steedman also read reports on petitioner's educational and other testing. R. 2267, ll. 21 – 25. Dr. Steedman said petitioner told him he graduated from high school and that he had done well.[3] "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 petitioner as having a significant learning disorder. However, petitioner did not qualify as being mentally retarded.[4] 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 petitioner's spect scan himself, and he also read the

---

[3] Petitioner, 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.

[4] The trial judge also wrote in his report that petitioner had "below average" intelligence. The lowest selection of the three choices available. See Trial judge's report at 1. R. 2778.

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).

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 reading the scan was stating 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 petitioner. 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).[5]

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

[5] See Rule 403, SCRE. App. 18.

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.

After Dr. Steedman was precluded from opining that petitioner had a specific brain abnormality, the following occurred with defense counsel:

> 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 only that the radiologist found a "questionable abnormality" in petitioner's brain. The solicitor asked if this "questionable abnormality" caused petitioner to "attack an inmate in the jail with shanks."[6] Dr. Steedman answered that the abnormality may have been a contributory factor to poor judgment. R. 2307, l. 16 – 2310, l. 14.

Dr. Watts had testified at length about petitioner's drug use, and its effect on him:

---

[6] This was a sarcastic reference to a fight petitioner had with another inmate while confined prior to trial at the Lexington County Detention Center. R. 2001, l. 1 – 2035, l. 25.

> [I] need to back up because there's one other part of the history you all need to know about which I also considered very significant. Mr. Mercer has abused a lot of drugs, So – A lot and very many and probably in combinations that I'm not very familiar with or comfortable with in knowing how they interact. He gave a history of using up to 12 grams of cocaine a day, smoking up to four ounces of marijuana a day which is a lot, drinking up to a 12-pack of beer, also drinking liquor every day, huffing Freon which is not something you hear of very often, using hallucinogens like angel dust. And what Mr. Mercer put it in the context of is that he had been using drugs for a very long period of time, but the death of his grandmother which was very significant. His grandmother appears to be one of the primary attachments for him. She had died, I believe, a year before Mr. Davis, Sergeant Davis, was killed, the year preceding that and that his drug use escalated after that period of time. So he was using a lot of drugs and certainly in combinations that I was concerned about the effects it would have on his brain.

R. 2154, ll. 5-25.

Whenever Dr. Watts talked about petitioner having a brain abnormality it was always coupled with his extreme drug use, and other non-significant facts such as petitioner had a learning disability and him finishing 180 out of a class of 181 at Columbia High School.[7] R. 2155, l. 6 – 2169, l. 4. Dr. Watts also acknowledged she diagnosed petitioner with an anti-social personality disorder, and as having an oppositional defiant disorder. R. 2174, l. 15 – 2177, l. 15.

The trial judge charged the jury that it was to 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,

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[7] Coach Charles Macaluso testified that petitioner played the defensive line for him at Columbia High School for four years. Macaluso testified that petitioner "was in special needs classes, but he caused no problems whatsoever. He was – he was an outstanding student. He worked hard in the off-season program." R. 2314, l. 16 – 2315, l. 12.

S.C. Code §16-3-20(c)(b)(2)(6)&(7). App. 21. The excluded evidence was probative of the jury's consideration of each of these three mitigating circumstances.

Petitioner argued on direct appeal to the South Carolina Supreme Court:

> 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)[8]; 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 petitioner suffered from a specific brain abnormality was clearly relevant, and it was helpful to petitioner'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.

Brief of Appellant at 16-17.

In its opinion, the South Carolina Supreme Court addressed this issue under the caption heading: "Exclusion of Expert Mitigation." The Court noted that it "was clear error to exclude this testimony." The Court wrote that application of Rule 403, SCRE, had to be "cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence." The

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[8] Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304 (2002).

Court stated the state's objection to this evidence was "specious." The Court, citing this Court's opinion in Wiggins v. Smith, 539 U.S. 510 (2003), reminded "the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence." The Court found the error in excluding Dr. Steedman's mitigation testimony was harmless beyond a reasonable doubt because Dr. Donna Schwartz-Watts had testified similarly to Dr. Steedman about petitioner's brain abnormality. State v. Mercer, 672 S.E.2d 556, 561-563 (2009). App. 6-8.

Petitioner took strong exception to the harmless error analysis as it pertained to this mitigating evidence:

> This Court may have overlooked the fact that Dr. Schwartz-Watts testified that petitioner was not *without fault* for his poor judgment and inability to conform his conduct to the standards expected by society. She testified petitioner's severe drug and alcohol abuse affected "his brain." A radiologist would only note a "questionable abnormality" R. 2154, l. 3 – 2157, l. 2.
>
> That was much different from than Dr. Steadman's proffered testimony that petitioner suffered from a brain impairment -- it was *not his fault* -- and it caused his "poor judgment, depression, thought disorders" and paranoia. "They come from the brain." The abnormality caused petitioner's problems with "conforming one's behavior to living in society." R. 2301, l. 14 – 2302, l. 22,
>
> While this Court found the state's objection to this testimony was ""specious," it nonetheless held the error was harmless because it was cumulative to Dr. Schwartz-Watts' testimony. State v. Kevin Mercer, Op. No. 26582 (filed January 12, 2009) at p. 13. Petitioner respectfully submits that this Court should reconsider that holding, and grant rehearing.
>
> * * *
>
> This Court's opinion, as it now stands, finds the trial court erred by not allowing the jury to hear Dr. Steadman's strong opinion about petitioner's brain abnormality -- an abnormality which petitioner could not help having -- but finds that error harmless because Dr. Steadman's testimony is said to be

> cumulative to Dr. Watt's testimony that petitioner may have a brain abnormality, but that problem with his brain was in large part petitioner's *own fault because he badly abused drugs and drank excessively*. That makes a major difference to a juror. It is a distinction with a huge difference. In everyday terms it was like the difference between voluntary and involuntary intoxication. If you did it to yourself, it is your own fault. If it (the brain abnormality) is an act of God, you are excused to the extent that you will serve the rest of your life in prison as opposed to being executed . . . Petitioner respectfully requests rehearing because excluding this relevant strongly mitigating evidence violated petitioner's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

Petition for rehearing at 1-3. The South Carolina Supreme Court denied rehearing. App. 15.

WHY THE WRIT SHOULD BE GRANTED

Evidence that petitioner had a specific brain abnormality was strong mitigating evidence since it helped explain to the jury why petitioner acted impulsively in committing the crime in this case, given his lack of judgment, which was caused by his brain abnormality. The exclusion of this expert testimony violated petitioner's Due process and Eighth Amendment right to present a complete defense against his proposed execution. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). Finding the error harmless beyond a reasonable doubt because it was cumulative to other evidence petitioner had a "questionable brain abnormality" which his drug use heavily contributed to, based on the entire record was a violation of the above cases. It cannot be said with any confidence that the exclusion of this mitigating evidence did not affect the verdict, particularly where the death verdict must be the unanimous vote of twelve jurors.

In Von Dohlen v. State, 602 S.E.2d 738, 746 (2004), the South Carolina Supreme Court, quoting State v. McClure, 537 S.E.2d 132, 141 (2000) stated, "we note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all." Further, a death verdict must be unanimous. See S.C Code

§16-3-20 (C). App. 22.

In Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), this Court, *citing* Lockett v. Ohio, 438 U.S. 586, 604 (1978), reiterated that the Eighth and Fourteenth Amendments mandate that a "sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See, also, Penry v. Lynaugh, 492 U.S. 302, 338 (1989)[9]; McKoy v. North Carolina, 494 U.S. 433(1990). Here, petitioner wanted the jury to consider the neurological opinion of Dr. Steedman that petitioner suffered from a specific brain abnormality. That brain abnormality may have affect petitioner's behavior and provided the jury with an explanation for his impulsive crime. Dr. Steedman's opinion that petitioner 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 to supply "any other reason" not to sentence petitioner to death. S.C. Code § 16-3-20(c)(b)(2)(6) & (7). App. 21.

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 (1982). See, also, Hitchcock v. Dugger, 481 U.S. 393, 398 (1987); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). The South Carolina Supreme Court agreed that evidence petitioner suffered from a specific brain abnormality was clearly relevant. That court erred however by finding the exclusion of this helpful evidence to petitioner's penalty phase defense was harmless error beyond a reasonable doubt.

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[9] Overruled on other grounds in Atkins v. Virginia, 536 U.S. 304 (2002).

It cannot be said here that it appears beyond a reasonable doubt that this excluded mitigating evidence would not have affected the verdict, particularly where one juror can force the imposition of a life sentence pursuant to South Carolina Code §16-3-20, and jurors can vote for a life sentence "for any reason or no reason at all." Chapman v. California, 386 U.S. 18 (1967). There is a *reasonable possibility* that if the jury heard evidence that petitioner had a specific brain abnormality -- *that was not the result of his drug abuse* – that a life sentence and not death would have been the punishment it imposed. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

"To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Yates v. Evatt, 500 U.S. 391, 403 (1991). A review of the entire record reveals this jury heard evidence from Dr. Schwartz-Watts that that petitioner used an extraordinary amount of drugs every day. She testified that she was naturally concerned about the effect these drugs had on petitioner's brain. That testimony cannot fairly be ruled cumulative to Dr. Steedman's testimony that petitioner had a specific brain abnormality, it was not a "questionable abnormality."

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. Here, Dr. Steedman was precluded was offering the jury an explanation -- petitioner had an abnormal brain -- for petitioner's impulsive seemingly unexplainable crime. It cannot be confidently said that, based on the whole record, this constitutional error was harmless beyond a reasonable doubt. United States v. Hasting, 461 U.S. 499, 509, n. 7 (1983). The exclusion of

this relevant mitigating evidence of petitioner's specific brain abnormality was reversible error, and the South Carolina Supreme Court erred by finding the error harmless. Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). Hitchcock v. Dugger, 481 U.S. 393, 398 (1987); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986); Yates v. Evatt, 500 U.S. 391, 403 (1991); Chapman v. California, 386 U.S. 18 (1967).

2.

It was reversible error for the court to disqualify Juror Kyzer where Kyzer stated he could impose the death penalty, and sign the death verdict form since he was a death qualified juror under *Uttecht v. Brown*, and *Wainwright v. Witt*

HOW THE FEDERAL ISSUE WAS RAISED BELOW

Juror Kyzer told the judge he could find petitioner 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.[10] 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

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[10] The first "type of juror" is said to be one who would always vote for death if the defendant was convicted of murder, regardless of the mitigating evidence. The second type of juror would always for vote a life sentence regardless of the aggravating circumstances or other evidence in aggravation. The third type of juror could vote for death or for a life sentence depending on "all of the circumstances." By the way these "three types" are presented it is intuitive that jurors are led to believe the third type of juror – the "open minded juror" – is the preferable type of juror.

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 colloquy 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.

On appeal to the South Carolina Supreme Court petitioner argued that Kyzer was a qualified juror pursuant to Wainwright v. Witt, 469 U.S. 412 (1984) and Uttecht v. Brown, 551 U.S. 1 (2007). The South Carolina Supreme Court held the disqualification of Kyzer did not violate petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution. The Court, citing this Court's decision in Uttecht v. Brown, 551 U.S. 1, 9 (2007)

stated it was appropriate to grant the trial court broad discretion since that court can view the demeanor of the venire. The Court then affirmed the disqualification of Kyzer. App. 4-5.

WHY THE WRIT SHOULD BE GRANTED

This Court recently revisited Wainwright v. Witt in Uttecht v. Brown, 551 U.S. 1 (2007). In that five to four decision, the majority of this Court noted its deference to the trial court, especially in a federal habeas corpus case. To grant habeas relief the ruling on the federal issue must involve an application of federal law that 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 from the highest court of South Carolina. The deference this Court granted in the habeas case of Uttecht v. Brown is not 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 of this Court about the defense's true position at trial.

This Court wrote that under Wainwright v. Witt, 469 U.S. 412 (1985) the judgment whether a venireman is biased is often based upon a determination by the trial court of the demeanor and credibility of the potential juror which are entitled to deference. 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.[11] This 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

[11] The pagination to the United States Reports on volume 551 has not been done by Westlaw to date. Hence, the citation to the Supreme Court Reporter.

> 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.

This 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 whose scruples against the death penalty would not substantially impair the performance of their duties." Uttecht v. Brown, 127 S.Ct. at 2831.

As stated, this Court in Uttecht emphasized that the defense did not object to Juror Z's removal. This 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 petitioner 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 this Court's conclusion that capital defendants are entitled to an impartial jury is to have force, this Court should respectfully hold that the excusal of Juror Kyzer, a qualified juror, was reversible error. The trial judge pointedly asked petitioner "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 (1987); Uttecht v. Brown, 551 U.S. 1 (2007).

CONCLUSION

By reason of the foregoing arguments, the petition for a writ of certiorari to the Supreme Court of South Carolina should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER.

May 20, 2009

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2008

No. 2008-_____

KEVIN MERCER,

PETITIONER

versus

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 20th day of May, 2008.

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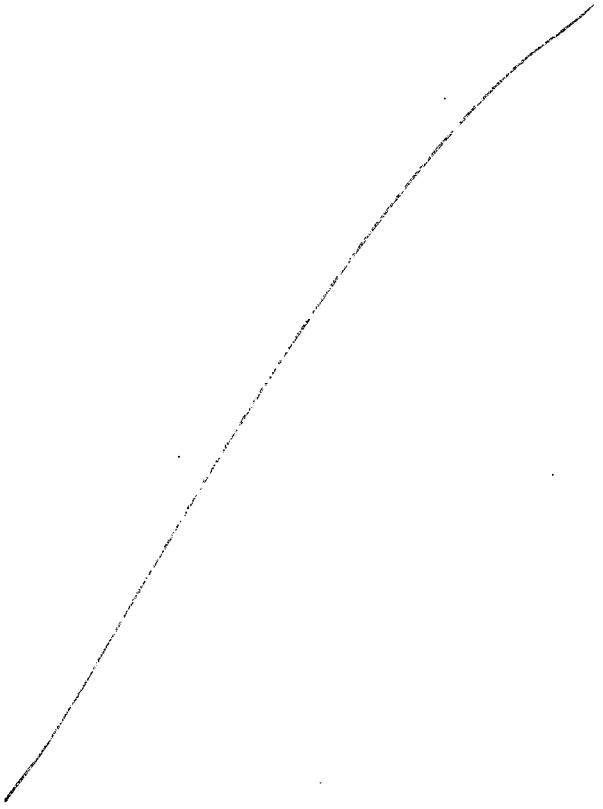
ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2009.
_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018



IN THE SUPREME COURT OF THE UNITED STATES

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A P P E N D I X

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ATTORNEY FOR PETITIONER.

Skip Navigation

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Kevin Mercer, Appellant.

Appeal From Lexington County
John C. Few, Circuit Court Judge

Opinion No. 26582
Heard October 7, 2008 – Filed January 12, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of South Carolina Commission on Indigent Defense, and Melissa Jane Reed Kimbrough, of Kimbrough & Taggart, both of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General S. Creighton Waters, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

JUSTICE KITTREDGE: This is a mandatory appeal from a sentence of death. On March 16, 2002, Army recruiter Sergeant First Class Tracy Davis was gunned down

outside his apartment in Lexington County, South Carolina. Kevin Mercer (Mercer) was convicted of murder, armed robbery, and possession of a firearm in the commission of a violent crime, and sentenced to death. In his appeal, Mercer challenges: (1) the disqualification of a juror; (2) the exclusion of evidence, both in the guilt and sentencing phases; (3) the denial of his post-trial motion for additional funds to test gloves for gunshot residue; and (4) the denial of his post-trial motion for a new trial based on after-discovered evidence. We affirm.

I.

Prior to his death, Sergeant First Class Tracy Davis (Davis) lived near Columbia, South Carolina, where he served as an active-duty member of the United States Army. He was attached to Fort Jackson where he trained Army recruiters.

On the evening of March 16, 2002, Davis arrived home at approximately 11:30 P.M. to the Raintree Apartments. As was his custom, he backed his vehicle, a white Lincoln Navigator, into a parking spot outside his apartment. According to a witness, after exiting his truck, Davis encountered a man and words were apparently exchanged.

The witness to the encounter was Davis's roommate, Sergeant First Class Clifton Magwood (Magwood). Magwood witnessed the confrontation from an apartment window. Magwood's room is on the second floor of the apartment, and his window looks out over the parking lot. Magwood testified that he heard a disturbance, got out of bed, looked through his blinds and observed Davis with a heavyset man, apparently armed with a handgun, demanding the keys to Davis's vehicle. Magwood saw the robber forcing Davis toward the rear of the vehicle and heard Davis tell the armed man, "All right. I'll give it to you."

Magwood left his vantage point to call 911 and summon help. The 911 call was logged at 11:32 P.M. Shortly thereafter, while running downstairs to help his roommate, Magwood heard a gunshot; he hurried outside to find Davis lying in the bushes near the parking lot. Magwood saw Davis's Navigator leaving the apartment complex. Davis died as a result of a gunshot to the back of the head.

Magwood only saw one individual confront Davis with a gun. Although Magwood only saw the individual from the back, he provided an immediate and detailed description of the assailant to law enforcement. The suspect was described as "a black male"; "broad shoulders"; "heavy build, muscular"; anywhere from 5'11" to 6'2" and weighing "215 to 225." Magwood further described the suspect's clothing as "a dark outfit, could be jean or denim or some type of dark outfit with a dark hat."

Magwood's detailed description of the killer, along with a description of the Navigator, was dispatched to all officers in the vicinity, by way of a "be on the lookout," commonly referred to as a BOLO. Deputy Dennis Stazer of the Lexington County Sheriff's Office responded to the BOLO broadcast by positioning his patrol car (at 11:42 P.M.) at what he believed could be an intercept position on a nearby interstate, I-20. Within minutes, a white Navigator drove past Deputy Stazer's location. Deputy Stazer pulled in behind the suspect vehicle and initiated a traffic stop at 11:50 P.M.

There were two black males in the Navigator, Mercer in the driver's seat and Marcus

Thompson in the front passenger's seat. Deputy Stazer utilized his patrol car's "light bar . . . to light up the interior of the [Navigator]." Deputy Stazer approached the driver's side and asked the driver (Mercer) for his license and registration. Mercer produced his license, but could not find the vehicle registration. Mercer eventually located a receipt from a car dealership and handed it to Deputy Stazer. The receipt confirmed that the Navigator belonged to the murder victim, Davis. Mercer and Thompson were taken into custody.

Inside the Navigator, a .357 caliber handgun was retrieved from under the driver's seat.[1] Testing matched the handgun to the bullet removed from Davis during the autopsy. Gunshot residue (GSR) testing done on Mercer's hands revealed materials considered to be consistent with GSR, although the test results were not conclusive. Testing done on Thompson's hands resulted in a negative test for GSR. Four gloves (two pairs) were found in Thompson's possession but were not tested for GSR. As Thompson was removed from the vehicle, a plastic bag containing fourteen .357 bullets "fell out of his pants legs."

Mercer matched the detailed description of the assailant furnished by Magwood. Mercer is 5 feet 10 inches tall and weighs 220 pounds.[2] The officers on the scene of the arrest confirmed that Mercer is a broad-shouldered, muscular individual, consistent with Magwood's description. Mercer was arrested wearing a "dark[,] . . . like a denim . . . jean jacket outfit"; he was also wearing "a black . . . baseball style cap."

Conversely, Thompson is "very slender" and "narrow-shouldered" and weighs about 150 pounds. At the time of his arrest, Thompson was wearing "a black tee shirt that was over a white tee shirt," with the white tee shirt conspicuously sticking out from the black tee shirt. Thompson was not wearing a hat.

Mercer and Thompson were charged with murder, armed robbery, possession of a firearm during the commission of a violent crime, and criminal conspiracy. Based on the State's view of the evidence, Thompson pled guilty to accessory before the fact of armed robbery, and accessory after the fact of murder, and armed robbery; he was sentenced to 28 years in prison. Mercer's charges proceeded to trial with the State seeking the death penalty. Mercer pursued a third-party guilt defense, pointing to Thompson as the shooter. The jury convicted Mercer, with the jury ultimately recommending a sentence of death, from which Mercer appeals.

II.

Mercer raises six issues on appeal, which we place in four categories:

(1) Whether the trial court abused its discretion in finding a juror not death penalty qualified under *Wainwright v. Witt.*

(2) Whether the trial court abused its discretion during the guilt phase by excluding the testimony of Thompson's attorney "that Thompson was charged as only an accessory after the fact and that he was released on bond."

(3) Whether the trial court abused its discretion during the penalty phase by (a) precluding Dr. John Steedman from opining that a "SPECT Scan" of Mercer's

brain revealed an "abnormality"; and (b) precluding Dr. Steedman from offering expert psychiatric opinion testimony.

(4) Whether the trial court abused its discretion in denying Mercer's post-trial motions, one seeking additional funds to test Thompson's gloves for gunshot residue; and a second motion for a new trial based on after-discovered evidence that Thompson confessed to a cellmate that he committed the murder.

III.

Juror John Doe[3] and *Wainwright v. Witt*

Mercer claims the disqualification of Juror John Doe violated his Sixth and Fourteenth Amendment rights. We disagree. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court stated that the critical issue regarding the disqualification of a capital juror is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The *Wainwright* Court observed that a juror's bias need not be "proved with 'unmistakable clarity' . . . [because] bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.* at 424. Finally, the *Wainwright* Court noted that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . [and that] is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 425-26. It is with this standard in mind that we address whether the trial court abused its discretion in disqualifying Juror John Doe.

We have carefully reviewed the lengthy colloquy involving Juror Doe. While it is possible to cherry-pick certain responses and perhaps conclude that Juror Doe is qualified, a review of the totality of the responses reveals a potential juror vacillating and struggling with his strong convictions against the death penalty. Juror Doe, without hesitation, expressed an ability to impose a life sentence. Conversely, when the trial court asked if the juror could vote for a sentence of death, Juror Doe responded, "I'm not sure, sir."

The State followed the court's questioning by pursuing the same line of inquiry, to which Juror Doe responded that "it's just hard to judge, you know, someone else . . . for something that they've done." Following up, the State zeroed in on Juror Doe's reservations, asking whether Juror Doe could sign his name to a death penalty verdict, to which Doe responded, "I don't think so, sir."

Defense counsel attempted to rehabilitate Juror Doe, but without much success. Doe stated he would "try" to consider both options. The trial court permitted both sides to vet Juror Doe thoroughly. Doe answered, "probably so," when asked if his feelings would interfere with serving on the jury. And when Doe was asked, "if you were convinced that a death sentence was appropriate that you could sign that form along with the other jurors," he answered, "[t]hat goes back to like having to put my name on the line you said when -- for a death sentence. I'd still have to think about that."

The trial court concluded that Juror John Doe was not qualified under *Wainwright*:

> I think the juror is not qualified. . . . There's several things that I think need to be mentioned, and the first is the juror's demeanor. . . . I believe that . . . this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.
>
> . . . A lot of times I think we see jurors who hesitate . . . [and] I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the . . . issue that they're about to discuss.
>
> I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by . . . what he thought would be the question of whether or not he would be able to impose the death penalty. . . . And in the end I am left . . . with the impression that . . . this juror's views on the death penalty would substantially impair his performance of his duty to . . . follow the instructions that I would give him. And so I find that he is disqualified.

We find the trial court acted well within its broad discretion in finding Juror Doe's views would substantially impair his ability to follow his oath and the court's instructions on the law. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007) ("Deference to the trial court is appropriate [which necessarily involves granting the trial court broad discretion] because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."); *State v. Wood*, 362 S.C. 135, 141, 607 S.E.2d 57, 60 (2004) (adhering to the rule that a "trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis . . . [to] conclude[] that the juror would not have been able to faithfully discharge his responsibilities as a juror"); *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999) (following the rule that unless unsupported by the evidence, "determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge"). Even the cold record before us reflects Juror Doe's hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court's instructions. *State v. George*, 323 S.C. 496, 503, 476 S.E.2d 903, 908 (1996) (finding that the trial court acted correctly by disqualifying a juror that "declared that she did not think she could sign a form recommending the death penalty"); *State v. Longworth*, 313 S.C. 360, 366, 438 S.E.2d 219, 222 (1993) (disqualifying a juror who initially stated "he 'probably could' consider" the death penalty but later stated he did not "think so"). We affirm the disqualification of Juror John Doe.

IV.

Exclusion of Marcus Thompson's Lawyer's Testimony

During the guilt phase, Mercer sought to introduce testimony from Thompson's lawyer regarding the reduced charges against Thompson.[4] Specifically, Mercer wanted to introduce testimony that he and Thompson were initially charged with the same offenses, but later Thompson's charges were reduced and he was released on bond. Mercer claimed the information was relevant as part of his defense of third-party guilt. The State

objected to this testimony, asserting that it was not relevant to third-party guilt or otherwise. The trial court sustained the objection. Finding the proffered testimony of Thompson's attorney concerning Thompson's reduced charges and bail status not relevant to any issue before the jury, including third-party guilt, we affirm pursuant to Rule 220(b)(1), SCACR.[5]

V.

Exclusion of Expert Mitigation Evidence

Mercer retained numerous well-credentialed experts for the penalty phase, including a neurologist, a forensic psychiatrist, a pharmacologist, a sociologist licensed as a clinical social worker, and a corrections expert. During the penalty phase, the defense presented a comprehensive review of Mercer's troubled life.

The mitigation evidence revealed much about Mercer. A sampling of the evidence reveals that Mercer has a "damaging disability in terms of . . . making judgment[s] and inferences" and that he suffers from "untreated depression." The experts opined that Mercer's abusive upbringing resulted in post-traumatic stress disorder and anxiety disorder, which "are connected with previous trauma, nightmares[,] . . . distressive recollections" and substance abuse. Beyond Mercer's life experiences, he suffered from a myriad of cognitive deficiencies, including neurological dysfunction and learning disabilities. Because Mercer struggled from an early age to function in life and hold regular employment, he was found to be disabled by the Social Security Administration.

Against this backdrop of a thorough mitigation presentation, we are presented with two challenges to the trial court's exclusion of expert testimony in the penalty phase. "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Washington*, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (internal citations omitted).

We first address the claim that the trial court abused its discretion in preventing Dr. John Steedman from opining that a "SPECT Scan" of Mercer's brain revealed an "abnormality." While we agree that it was clear error to exclude this testimony, we do not find that Mercer was prejudiced by the error. Next is the assignment of error in connection with the trial court precluding Dr. Steedman from offering psychiatric opinion testimony. Again, we find no reversible error.

A. "Spect Scan"

Dr. Steedman is a medical doctor who is board certified in neurology and psychiatry. Dr. Steedman analyzed a "SPECT Scan" conducted on Mercer's brain.[6] The SPECT Scan was initially reviewed by a radiologist who noted a "questionable abnormality." Dr. Steedman was prepared to render a stronger finding of an abnormality. The State objected strenuously against such testimony, claiming surprise and prejudice. After an offer of proof and lengthy discussion, the trial court sustained the objection on the basis of Rule 403, SCRE, and a so-called "discovery order" violation. This ruling rises to the level of an abuse of discretion.

Application of Rule 403 should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence.[7] The probative value of Dr. Steedman's excluded testimony was, as a matter of law, not substantially outweighed by its potential for prejudice, as a result of the purported late disclosure or otherwise. Reliance on the so-called "discovery order" cannot withstand even minimal scrutiny, for there was no formal discovery order.[8] In any event, Dr. Steedman was disclosed to the State, as was the general substance of his testimony.

We nevertheless find no reversible error. When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged—the SPECT Scan abnormality—was already in evidence without objection.

Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function. . . . But what it does, it's a . . . picture of how your brain functions, and that test came back abnormal. There's a . . . small area that's not normal on there. . . ." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and . . . we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts. We therefore find the trial court's error in excluding Dr. Steedman's opinion testimony was harmless beyond a reasonable doubt. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting *State v. Key*, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)) (noting that an error is harmless when it "'could not reasonably have affected the result of the trial'").

B. Exclusion of Dr. Steedman's psychiatric opinion

As noted, Dr. Steedman is board certified in both neurology and psychiatry. When Mercer sought to elicit brief testimony from Dr. Steedman as a psychiatrist, the State objected, claiming Dr. Steedman was only disclosed as an expert in neurology. The basis of the State's objection arose from the nonexistent discovery order, discussed above. The trial court entertained the objection, and Mercer proceeded to make an offer of proof. The offer of proof of Dr. Steedman's psychiatric opinion comprises a mere half page in this voluminous record. The thrust of Dr. Steedman's psychiatric opinion was that the "types of [Mercer's] abnormalities . . . are a cumulative effect on poor judgment, depression, anxiety, thought disorders, [and] paranoia." The State's objection was sustained, and Dr. Steedman was prevented from rendering a psychiatric opinion.

Although the basis of the State's objection was specious, no reversible error is present. The excluded evidence was presented to the jury through other witnesses, especially Dr.

Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly . . . mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. *State v. Graham*, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

VI.

Denial of Mercer's Post-trial Motions

We finally address Mercer's two post-trial motions. These motions cannot be properly understood and evaluated in a vacuum, for they naturally flow from Mercer's efforts to create a reasonable doubt in the State's case by pointing to Marcus Thompson as the shooter.

The centerpiece of Mercer's guilt phase defense was third-party guilt—Thompson as the triggerman. As defense counsel asserted in the opening statement to the jury:

> One of the key factors in this case was omitted [from the solicitor's opening remarks], and that is riding in the Lincoln Navigator was a second person. Ladies and Gentlemen that second person is not here today. We don't know where he is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was.
>
> . . . .
>
> . . . Suffice it to say Marcus Thompson was in the Navigator and he's not here today, and we believe that Marcus Thompson, in fact, was the shooter. That's our theory. It's pretty simple.

This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman. This approach was directly linked to what Mercer characterized as a "tunnel vision" approach to the investigation. One example comes from the gloves taken from Thompson that were not tested for gunshot residue (GSR). Counsel for Mercer argued forcefully that the State's decision not to test the gloves for GSR demonstrated the State's myopic view to focus on Mercer at the expense of a thorough and proper investigation. The following excerpts from the closing argument illustrate this defense strategy:

> [The State does not] want to talk about Marcus Thompson. . . . You know, we had to dig and bring out the things about Marcus Thompson. They didn't want to show you any evidence about him. They wanted to ignore anything about him that would give you the full picture of what happened on May 16, 2002. . . . We had to pull it out of them.
>
> . . . .
>
> . . . But do we know that it wasn't Marcus Thompson with gloves on that pulled

that trigger in that dimly-lit parking lot?

. . . .

They didn't show you the gloves because it points directly to Marcus Thompson being the shooter.

. . . .

. . . And we'd know . . . if they had sent those gloves to the [State Law Enforcement Division] lab. We'd know if they were full of barium, antimony, and lead. We'd know that.

. . . .

. . . Maybe Marcus Thompson with his gloves on shot Sergeant Davis and then went and got Kevin [Mercer]. It's up to the State to prove it, and they haven't done it.

. . . .

They chose to declare Kevin Mercer the shooter and ignore the other evidence, ignore the other possibilities, ignore Marcus Thompson and his gloves.

A. Denial of funding post-trial to test Thompson's gloves

Mercer's post-trial motion for funds to test Thompson's gloves for GSR was denied. The matter of authorizing funds to capital defendants lies within the sound discretion of the trial court. S.C. Code Ann. § 16-3-26(C)(1) (2003) (authorizing the trial court to award funds where court determines requested funds are "reasonably necessary"); *see also State v. Matthews*, 291 S.C. 339, 345, 353 S.E.2d 444, 448 (1986) (holding that the decision to award funds to capital defendants is a matter within the trial court's discretion). Before trial, the trial court authorized $53,000 for Mercer's defense. The trial judge went further and invited defense counsel to request additional funds "if what I have authorized in this order is not going to get you all the way to trial." The record discloses no additional funding request prior to this post-trial motion.

Of particular significance to a proper resolution of this post-trial funding request is the fact that Mercer retained a GSR expert for trial. The expert, Jeffrey Hollifield, is a chemist, formerly employed with the South Carolina State Law Enforcement Division. Hollifield was assigned the limited task of analyzing the inconclusive results of the GSR test conducted on Mercer. For apparent strategic reasons, Hollifield was not tasked with testing the gloves found in Thompson's possession. As discussed above, the defense opted to challenge the adequacy of the State's investigation, pointing to the State's failure to test Thompson's gloves. Having elected not to test Thompson's gloves for trial purposes, there is no abuse of discretion in the denial of Mercer's post-trial motion for additional funding.

B. Denial of new trial motion based on after-discovered evidence

Following the trial, and while the case was initially on appeal, Solicitor Myers received a letter from Kevin Fuller, who had been one of Thompson's cellmates at the Lexington County Detention Center. In a second letter to Solicitor Myers, Fuller asked for "help" and "some probation" with his pending charges. According to Fuller, Thompson had admitted to shooting the victim. Solicitor Myers promptly forwarded Fuller's letters to defense counsel, who filed a motion for a new trial based on after-discovered evidence. Because this information came to light after the filing of the appeal, we remanded the matter to the trial court to conduct an evidentiary hearing. The trial court heard the matter fully and, in a detailed order, denied the new trial motion, both as to the guilt and sentencing phases. Mercer assigns error to the denial of his new trial motion.

The decision whether to grant a new trial rests within the sound discretion of the trial court, and this Court will not disturb the trial court's decision absent an abuse of discretion. *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007); *State v. Simmons*, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983). Having carefully considered the new trial motion, fully cognizant of Mercer's third-party guilt defense, we find no abuse of discretion in the denial of his motion.

In order for Mercer to prevail in his new trial motion premised upon after-discovered evidence, he must show 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). The State concedes that all elements are met, save the first element.

In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.[9] *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977) (noting that the determination of whether new evidence is credible for purposes of a new trial motion rests with the trial court); *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) (noting that the trial court is tasked with assessing the new evidence in a motion for a new trial); *State v. Pierce*, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) (quoting *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)) ("The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion."). On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence.

The after-discovered evidence is limited to Fuller's testimony that Thompson admitted to being the triggerman. Thompson's participation in, and first-hand knowledge of, the crime, was clearly known to Mercer and the State from the beginning. With the proper standard of review in mind, we review the trial court findings.

We begin with the trial court's conclusion concerning Fuller's testimony:

> 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.

Fuller's criminal record includes multiple convictions for burglary, aggravated assault and battery, and criminal domestic violence. Fuller characterized his criminal history as a "nice record." We recognize that all the key participants in the post-trial hearing have extensive criminal records.

More relevant to the inquiry is careful scrutiny of the actual statements Fuller attributes to Thompson. Given the inconsistencies with Fuller's story, there is a basis to sustain the trial court's lack of credibility finding. For example, on cross examination at the evidentiary hearing, Fuller gave varying versions as to when Thompson confessed to the murder. Concerning the substance of the various statements, when Fuller was confronted with the inconsistency "about what happened to the gun," he said he "miswrote" the initial statement because he "was in a hurry."[10] Another inconsistency is found in Fuller's account of where Davis was shot—as Davis was exiting his vehicle (which is Fuller's account) versus outside the vehicle.

Fuller informed investigators in a July 19, 2006, interview that another cellmate could corroborate Thompson's alleged confession. The other cellmate, Timothy Johnston, did testify, but he denied Fuller's account of the Thompson confession. The trial court found Johnston's testimony credible.

Fuller's credibility may be assessed not only by internal inconsistencies within his statements and testimony, but also by contrasting the purported Thompson confession against what are fairly solid facts. First, the only witness to the crime, Magwood, provided a physical description of the assailant, a description that closely matched the much bigger Mercer and not the slender Thompson. Second, Magwood saw Davis being forced, apparently at gunpoint, by the heavyset assailant toward the rear of the Navigator; Magwood found Davis lying in the bushes next to the parking lot. This is at odds with the Fuller account of the murder occurring in the area of the driver's door. Third, Fuller testified to a blood smear on the Navigator; the vehicle was stopped only minutes after the murder and no blood was found in or on the vehicle. Fourth, according to Fuller, Thompson shot Davis "pointblank . . . behind his ear." The pathologist opined that, because of the absence of soot or stippling around the wound, the fatal shot came from a distance of "at least two feet away from the skin of the victim." Fifth, according to Fuller, Thompson moved the murder weapon during the traffic stop and placed it under Mercer's seat. This is at odds with the testimony of Deputy Stazer, who pulled the vehicle over and saw no such movement in the vehicle.

To be sure, Mercer may challenge the certitude of these so-called facts, but their cumulative effect informed the judgment of the trial court in assessing the post-trial motion based on after-discovered evidence.

Having thoughtfully considered the evidence, the trial court determined that "there is essentially no chance the jury would believe Fuller's testimony that Thompson confessed to shooting Sergeant Davis." This finding of course is beyond the applicable "would probably change the result" standard. *Spann*, 334 S.C. at 619, 513 S.E.2d at 99. In denying the post-trial motion as to the guilt phase, the trial court observed that the jury was charged, without objection, on the law of "the hand of one is the hand of all." In denying the post-trial motion as to the sentencing phase, the trial court observed that the jury was charged that it could recommend a death sentence only if it found that Mercer was the triggerman.[11]

Mercer takes issue with the denial of his post-trial motion. Mercer posits a different view of the facts. Mercer, in essence, invites this Court to make different credibility determinations, especially with respect to Fuller. Beyond Fuller, it is argued that the trial court had a valid reason not to believe cellmate Johnston over Fuller, for Johnston was facing life imprisonment with a pending burglary first-degree charge.[12] We respectfully decline Mercer's invitation to engage in *de novo* fact finding. We further reject the suggestion to ignore the trial court's gatekeeping role in post-trial after-discovered evidence motions.

> The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter for determination by the circuit judge to whom it is offered. In him, not this court, resides the power to weigh such evidence; and his judgment thereabout will not be disturbed except for error of law or abuse of discretion.

Mayfield, 235 S.C. at 34-35, 109 S.E.2d at 729.

To accept Mercer's premise that a jury must weigh the conflicting evidence ignores the *State v. Spann* factors and the gatekeeping role of the trial court as outlined in many cases, including *State v. Mayfield*. Moreover, the approach advanced by Mercer confuses the applicable standard in post-trial after-discovered evidence motions with the admissibility of third-party guilt evidence at trial.

The question before us, then, is whether the trial court's denial of the post-trial motion amounts to an abuse of discretion. We hold it does not. In so ruling, we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt. This sensitivity forms part of our consideration. We have drawn the line, however, with Mercer's desire to use Fuller's testimony for "residual doubt" as to guilt in the sentencing phase. *Franklin v. Lynaugh*, 487 U.S. 164, 172-74 (1988) (clarifying Eighth Amendment jurisprudence by noting that a state is not constitutionally required to allow a capital defendant to submit "residual doubt" mitigation evidence in the sentencing phase of a capital case). We affirm the denial of Mercer's post-trial motion based on after-discovered evidence.

VII.

We have conducted the statutorily mandated review under S.C. Code Ann. § 16-3-25 (2003). We find the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence supports the

jury's finding of a statutory aggravating circumstance, and that the sentence of death is proportionate to sentences imposed under similar situations. *State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999); *State v. McWee*, 322 S.C. 387, 472 S.E.2d 235 (1996). Mercer's convictions and sentence of death are

AFFIRMED.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

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[1] Deputy Stazer did not testify to seeing a handgun when he first approached the driver's window. Moreover, Deputy Stazer, who "had to keep [his] eyes on both of them," saw no movement from either Mercer or Thompson. Deputy Stazer testified that had there been any movement in the vehicle he considered as a threat, he would have responded with deadly force. This testimony concerning the lack of movement, especially by Thompson, acquires relevance when read in context with Mercer's post-trial motion for a new trial based on after-discovered evidence.

[2] This height and weight is taken from Mercer's driver's license which he produced to Deputy Stazer. There is nothing in the record that contradicts this description.

[3] We use the pseudonym John Doe.

[4] Neither the State nor Mercer called Thompson as a witness.

[5] Although this evidence was not admissible, we do recognize that defense counsel, in her opening remarks to the jury, referred to Thompson's reduced charges and bond status. According to counsel's opening statement, "We don't know where [Thompson] is. Last time I heard he was out on bond. Last time I heard he wasn't even charged with murder or armed robbery. That wasn't how it started out. He was charged with all the same things that Kevin Mercer was."

[6] SPECT is an acronym for single-photon emission computerized tomography. Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 Am. U. L. Rev. 51, 121 (2006). According to Dr. Steedman, "a spect scan is a . . . nuclear medicine study. It is . . . a way of looking at the function of somebody's brain in terms of how much blood flow is running through the cortex. It's mainly useful in detecting whether there are asymmetries and regional differences in blood flow . . . to parts of the brain which indicates . . . how hard those parts of the brain are working." An abnormal spect scan means there is either increased or decreased blood flow to a certain area in the brain. A decreased flow of blood to a particular region of the brain may be referred to as an abnormality and may be associated with general cognitive deficiencies and learning disorders.

[7] This Court reminds the bench and bar of the importance of a meaningful mitigation defense and, concomitantly, the ability of a capital defendant to fully present mitigation evidence. *See Council v. State*, __ S.C. __, __ S.E.2d __ (2008), Op. No. 26543 (S.C. Sup. Ct. re-filed Dec. 29, 2008) (Shearouse Adv. Sh. No. 48 at 12) (relying in large part upon *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court determined that counsel's failure

to adequately investigate and present mitigating evidence resulted in the ineffective assistance of counsel requiring a new sentencing hearing). The trial courts, vested with considerable discretion in evidentiary matters, must not neglect the due process implications involved in a capital defendant's right to present mitigation evidence.

[8] In this case, the State repeatedly asked the trial court to order Mercer to disclose his experts and to require a written report from his experts. The trial court refused to order defense experts to produce written reports. *State v. Northcutt*, 372 S.C. 207, 216-17, 641 S.E.2d 873, 878 (2007) (holding that Rule 5, SCRCrimP, provides no basis for a trial court to require the creation of written defense expert reports for disclosure to the State). The trial court ultimately relented to the State's discovery requests by ordering the parties to meet and attempt to resolve the impasse. This was done, and because defense counsel failed to hit the bull's eye concerning Dr. Steedman's precise opinion regarding the SPECT Scan study, the State cried foul. The State's claim of unfair surprise is meritless.

[9] The analytical framework at play in this post-trial motion (imposing on the trial judge a gate-keeping role in making credibility determinations) stands in stark contrast to the admissibility of third-party guilt evidence at trial. Provided threshold admissibility is met, third-party guilt evidence may not be excluded based on the trial court's view of the evidence or the perceived "strength" of the State's case. *Holmes v. South Carolina*, 547 U.S. 319, 330-31 (2006) (reversing the exclusion of evidence in a criminal trial and holding that the trial court may not exclude evidence of third-party guilt based upon a determination of the strength of the State's evidence).

[10] This inconsistency concerns Mercer's possession of the murder weapon immediately after the murder as he exited the apartment complex in Davis's Navigator.

[11] The trial court charged the jury:

> Now, you will recall that in the guilt phase of the trial I charged you on the concept of the hand of one is the hand of all. That concept does not apply in this penalty phase of the trial. . . . Before you may consider imposing the death penalty, you must first find that the State has proven beyond a reasonable doubt that the defendant, Kevin J. Mercer, fired the shot that killed the victim. If you find that the State has failed to prove that Kevin J. Mercer fired that shot, then you may not impose the death penalty but you must impose a life sentence.

[12] As between Johnston and Fuller, the trial court recalled Johnston's testimony to the effect that "Fuller thought he could benefit from fabricating a story about Thompson shooting Sergeant Davis." While the record confirms that Fuller was seeking "help" with his charges, Johnston did not testify to any such "fabrication" admission by Fuller. Mercer is correct in challenging the trial court's erroneous finding in this regard. We view the error as insignificant. The strong findings of the trial court against Fuller's credibility cannot reasonably be said to be dependent on this one finding. This finding does not form a meaningful part of the trial court's order, for it stands alone in an otherwise coherent analysis.

The Supreme Court of South Carolina

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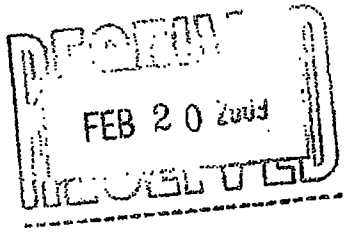

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Melissa Jane Reed Kimbrough, Esquire
Kimbrough & Taggart
1338 Pickens St.
Columbia, SC 29201-2630

Re: The State v. Mercer, Kevin

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

February 19, 2009."

The remittitur is today being forwarded to the lower court.

Very truly yours,

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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February 19, 2009

REMITTITUR

The Honorable Beth Carrigg
Clerk of Court, Lexington County
205 East Main Street, Suite 146
Lexington, SC 29072-3599

Re: The State v. Mercer, Kevin
2003-GS-32-00409

Dear Ms. Carrigg:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/dmh

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Melissa Jane Reed Kimbrough, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General S. Creighton Waters
The Honorable Donald V. Myers

APPENDIX A

RULE 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value substantially outweighed by the danger of unfair prejudice, confusion of tl issues, or misleading the jury, or by considerations of undue delay, waste time, or needless presentation of cumulative evidence.

Discussion in Text:

Rule 403 is discussed in § 9.2, *infra*.

Next Part>>

Code 1976 § 16-3-20

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 3. Offenses Against the Person
Article 1. Homicide

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The 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.

(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.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall 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. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a

CROSS REFERENCES

Requirement that part of sentence be served as prerequisite to parole and deductions in time for earned work credits, see § 24-21-610;
Governor's power to commute sentences, see the South Carolina Constitution, Article IV, § 14.

LIBRARY REFERENCES

Homicide ⇔358.
Sentencing Guidelines ⇔350H1668, 350H1778.
WESTLAW Topic Nos. 203.
C.J.S. Homicide §§ 366 to 367, 370.

RESEARCH REFERENCES

ALR Library

21 ALR, Federal 2nd Series 1, Validity, Construction, and Application of Aggravating and Mitigating Provisions of Death Penalty Statutes--Supreme Court Cases.

122 ALR 5th 145, Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of...

79 ALR 5th 33, Victim Impact Evidence in Capital Sentencing Hearings--Post-Payne v. Tennessee.

Encyclopedias

21 Am. Jur. Proof of Facts 2d 645, Expert Testimony at Sentencing.

51 Am. Jur. Proof of Facts 3d 413, Proof of Chemical Dependency and Rehabilitative Efforts as Factor in Sentencing.

S.C. Jur. Appeal and Error § 77, Pleadings.

S.C. Jur. Appeal and Error § 129, Trial Matters.

S.C. Jur. Constitutional Law § 80, Criminal Proceedings.

S.C. Jur. Constitutional Law § 94, Civil Remedies and Proceedings.

S.C. Jur. Homicide § 23, Statutory Requirements.

S.C. Jur. Homicide § 24, Constitutionality.

S.C. Jur. Homicide § 27, Aggravating Circumstances.

S.C. Jur. Homicide § 28, Mitigating Circumstances.

S.C. Jur. Jury § 17, Disqualifications.

S.C. Jur. Jury § 26, Disqualifications for Cause.

S.C. Jur. Jury § 27, Peremptory Challenges.

S.C. Jur. Poisons § 10, Criminal Liability.

No. 08-10556

October Term, 2009

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN MERCER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

HENRY D. McMASTER
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ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether certiorari is warranted as to a "garden variety" harmless error decision, where the testimony excluded as to one defense expert was repeatedly elicited elsewhere during the mitigation case?

2. Whether certiorari is warranted as to the judge's decision to disqualify a potential juror based on his inability to give a death sentence, where the judge made express findings about credibility and demeanor which are entitled to great deference on appeal?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

RESPONDENT'S STATEMENT OF THE CASE 2

REASONS WHY CERTIORARI SHOULD BE DENIED 5

A. How the issue was raised below as to the limitation of expert testimony 6

B. No federal constitutional claim as to the limitation of testimony is preserved for this Court's review. 12

C. Any limitation of Dr. Steedman's testimony was harmless. 13

D. How the federal issue was raised below as to disqualification of the juror 17

E. A trial court's credibility determination that the juror was unqualified is entitled to deference, and given the support in this record for that determination, there is nothing extraordinary that would compel a granting of certiorari. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Federal Cases

Adams v. Texas, 448 U.S. 38 (1980) 20

Bailey v. Anderson, 326 U.S. 203 (1945) 13

Brown v. United States, 411 U.S. 223 (1973) 17

Chapman v. California, 386 U.S. 18 (1967) 13

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 13

Lockett v. Ohio, 438 U.S. 586 (1978) 12

Lucas v. Brooks, 85 U.S. 436 (1873) 17

Morgan v. Illinois, 504 U.S. 719 (1992) 20

Satterwhite v. Texas, 486 U.S. 249 (1988) 13

Uttecht v. Brown, 127 S.Ct. 2218 (2007) 21

Wainwright v. Witt, 469 U.S. 412 (1985) 4, 20

State Cases

State v. Bryant, 672 S.E.2d 556 (S.C. 2009) 1, 5

State v. Byram, 485 S.E.2d 360 (S.C. 1997) 12

Federal Statutes

28 U.S.C. § 1257 1

Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for a Writ of Certiorari to the South Carolina Supreme Court filed by Kevin Mercer, who has been convicted in the South Carolina courts of murder and sentenced to death. Respondent would show this Court the following:

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina affirming Petitioner's convictions and sentences is reported as State v. Bryant, 672 S.E.2d 556 (S.C. 2009). This decision is reprinted in the Appendix to Petitioner's brief at pages A1 through A14.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on January 12th, 2007. A petition for rehearing was denied by that court on February 19th, 2009. Although Respondent disagrees that a federal question was decided and thus jurisdiction exists as to the first question presented, Petitioner is apparently invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

According to Petitioner, this case involves:

1. The Sixth Amendment to the United States Constitution, which provides a criminal defendant with the right to trial by an impartial jury.

2. The Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment.

2. The Fourteenth Amendment to the United States Constitution, which

forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

RESPONDENT'S STATEMENT OF THE CASE

During the February 2003 term, the Lexington County Grand Jury issued a three-count indictment of Petitioner, Kevin J. Mercer, for murder, armed robbery, and possession of a weapon during a violent crime (03-GS-32-0409). The State gave notice of intent to seek the death penalty.

Jury selection took place from April 10th through April 13th, 2006. Trial began before Judge John C. Few and a jury on April 17th, 2006. The evidence showed Petitioner shot in the back of the head a highly decorated soldier named Sgt. Tracy Davis, while Petitioner was stealing the soldier's SUV in the parking lot of an apartment complex. **{R. 1316-29; 1334-38; 1346}**. A short time later, officers pulled Petitioner driving the soldier's SUV, and a pistol matched to the bullet that killed the soldier was found underneath the driver's seat. **{R. 1390-95; 1403-07; 1412-16; 1451; 1469-78; 1568}**. Petitioner also bragged about shooting the victim in the back of the head as the victim kneeled on the ground. **{R. 1544-48}**. On April 19th, 2006, Petitioner's jury convicted him of all charges. **{R. 1708-09}**.

The sentencing phase of the trial began on April 20th, 2006. The State introduced evidence of Petitioner prior convictions, including burglary, possession of marijuana with intent to distribute, and strong arm robbery, as well as previous instances in which police found him in possession of a pistol. Perhaps most striking was Petitioner's extremely bad record during his previous and pre-trial stays in jail,

in which he committed violent and non-violent disciplinaries until he had to be permanently placed in segregation, and was convicted for assault and battery with intent to kill for attacking a fellow inmate with a shank. {R. 1735-2036}. The State concluded with some victim impact witnesses, who testified about Sgt. Tracy's family relationships, his "fast-tracked" military career, and his good works for children in the community. {R. 2067-2133}.

The defense sentencing phase case consisted of forensic psychiatrist Dr. Donna Schwartz-Watts, who described his difficult upbringing, his low IQ and learning disability, his witnessing of abuse and violence, his substance abuse, and his neurological dysfunction. She diagnosed Petitioner with post-traumatic stress disorder ("PTSD"), substance abuse, a reading disorder, and a personality disorder with antisocial traits. She opined that all of these things contributed to Petitioner's "horrible judgment" {R. 2145-69}.

Dr. Marti Loring, a clinical social worker, also discussed Petitioner's alleged PTSD and described the difficulties of his upbringing. {R. 2193-19}. Dr. Alexander Morton, a psychopharmacologist, described the effects of Petitioner's substance abuse. {R. 1906-48}. Neurologist Dr. John Steedman testified as to the indications of neurological dysfunction, and there was a cumulative effect on Petitioner of the brain dysfunction, PTSD, and substance abuse. {R. 2268-2309}. Former prison warden James Aiken testified that Petitioner could be safely maintained in jail despite his horrible and violent disciplinary record. {R. 2234-48}. Finally, Petitioner's friends described his difficulties growing up, violence in the neighborhood, and anger in the

home, and his good conduct. A former teacher spoke highly of him. **{R. 2313-58}.**

On April 22nd, 2006, Petitioner's jury found the aggravating factor of robbery while armed with a deadly weapon and recommended a sentence of death. **{R. 2431-34}.** Judge Few then sentenced Petitioner to death for murder, thirty (30) years for armed robbery consecutive to the sentence Petitioner was serving for ABIK, and five (5) years consecutive for possession of a weapon. **{R. 2434-35}.**

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court. On June 26th, 2008, a Final Brief of Appellant was filed, in which of the six issues asserted the following three are relevant:

> 2. The court erred by excluding the expert opinion of neurologist Dr. John Steedman that appellant suffered from a specific brain abnormality since Dr. Stedman'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
>
> 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 objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.
>
> 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 excusing this qualified juror for cause.

The State filed its Final Brief of Respondent on June 24th, 2008. The Final Reply Brief of Petitioner was dated June 26th, 2008.

Oral argument in the case was held before the state supreme court on October 7th, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12th, 2009. State v. Bryant, 672 S.E.2d 556 (S.C. 2009). In it, the state supreme court found error on the part of the judge in limiting the testimony of Dr. Steedman, but found the error harmless given the information elicited from the other experts. As to the juror issue, the court sustained the judge's determination, noting that even the "cold record" reflected the juror's "hesitancy and profound unease with the prospect of performing his duties as a juror". Id. A petition for rehearing was denied by that court on February 19th, 2009.

This Petition for Writ of Certiorari to the South Carolina Supreme Court follows.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner raises two issues: (1) he asserts the limitation of Dr. Steedman's testimony during the mitigation case was not harmless, and (2) he claims error in the disqualification of a juror based on inability to consider the death penalty. As to the first issue, there is no compelling reason to grant certiorari on what is a basic and "garden variety" harmless error determination as to the trial court's limitation of testimony from a neurologist during the sentencing phase. The neurologist performed a review requested by the primary evaluating psychiatrist, and that psychiatrist and others discussed the very points on which the neurologist's testimony was limited.

As to the second issue, the law is well-settled that a trial court is entitled to make determinations in capital qualification based on its assessment of credibility and demeanor of the potential juror. There is no compelling reason to grant certiorari on a decision which is entitled to great deference on appeal, especially where the record here provides ample support for the judge's decision, and the judge carefully detailed his reasoning.

A. How the issue was raised below as to the limitation of expert testimony

Petitioner first contends the trial court violated the Eighth and Fourteenth Amendments when it limited the testimony of a neurologist called during the mitigation case.

At a pre-trial conference, the State requested that the judge order the defense to require their trial experts to write reports to be turned over to the State as part of reciprocal discovery. The State noted that otherwise a break would have to be taken before cross for its own expert to review the defense's expert's notes and conclusions. **{R. 2493-2500}.**

During *voir dire*, the judge stated that he was not going to require the defense to require its experts to prepare reports for disclosure. **{R. 1162-65}.** However:

> COURT: So I am going to direct that you all have a conversation tomorrow morning in which you all discuss the individual experts that both sides have called and what is the . . . general nature and substance of the opinions that will be offered by those experts.

{R. 1165 lines 5-11}. The defense specifically did not object to that ruling. **{R. 1165-66}.**

The next morning, the State complained that the defense did not disclose the substance of the experts' opinions. The defense pointed out that the neurologist was still reviewing the raw data but would disclose the opinion to the State when it was ready. {R. 1175-79}.

During their penalty phase case the defense called Dr. John Steedman, who was offered as an expert in neurology and psychiatry. After a bench conference off the record, the defense offered Dr. Steedman as an expert only in neurology, and the court accepted him. {R. 2263-66}.

During his direct examination, he began to discuss the "spect scan". Dr. Steedman noted that the radiologist who conducted the test found a "questionable abnormality" in the left subfrontal cortex, which the radiologist did not believe was reflective of "dementia or other severe abnormality". As Dr. Steedman started to elaborate on this, the State objected, and after a bench conference, the jury was sent out. {R. 2274-75}.

The court asked Dr. Steedman if a "questionable abnormality" was significant. Dr. Steedman stated the radiologist did not want to say for sure what he saw was even abnormal, but Dr. Steedman believed there was an abnormality. {R. 2275-78}.

The State pointed out that it had been only provided with a report indicating there was nothing but a "questionable abnormality" of "questionable significance", and it had not been told Dr. Steedman had done his own review to the contrary. The State noted it had no expert to review the films, and had only learned the substance of Dr. Steedman's opinion that morning. When defense counsel tried to assert that they had

the mutual disclosure at the beginning of trial, the solicitor immediately pointed out that all they were told is Dr. Steedman is a neurologist, and offered to put up testimony that no substantive opinion had been offered. Defense counsel did not challenge this representation. {R. 2280-81}.

When the judge asked Dr. Steedman to state his findings, Dr. Steedman stated he found a "significant underperfusion of an area of left orbitofrontal cortex". Dr. Steedman admitted that he could only say it "might be a factor" affecting the defendant's behavior, as spect scans have not really "panned out as a useful technique" since they are "vague or fuzzy images" showing regions of less blood flow. Dr. Steedman stated that the possibly affected region of the brain has been identified as an area related to "memory problems, emotional problems, and judgment and planning problems". However, he conceded "I wouldn't want to . . . draw too specific an inference from" the scans, noting he could not say that someone with this scan would be behaving a certain way. He believed it would be confirmatory evidence, not primary evidence. {R. 2281-83}.

The court agreed with the State that this "elaborate sort of dire-sounding name" might confuse the jury and lead them to misunderstand and misapply the significance the expert was attaching to it. {R. 2283-84}. Reasoning that there was prejudice to the State from lack of an opportunity to have their own expert review the scans, and little probative value as to an effect on the defendant, the court concluded:

> COURT: 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. 2284-86} (emphasis added). After a break, the judge reiterated that the only limitation was Dr. Steedman could not say that he saw a specific and definite abnormality on the scans. **{R. 2287-94}**.

During direct, defense counsel asked Dr. Steedman for his opinion on "the cumulative effect of having the deficits that you identified: the brain impairment along with the mental illness of [PTSD] and substance abuse." The State objected that this was outside the field of neurology. Defense counsel rephrased:

> In your experience is there any sort of combined effect when [PTSD], substance abuse, and the sorts of brain problems or brain functioning or brain dysfunction you found – is there some sort of cumulative effect?

The State objected again, but the court allowed Dr. Steedman to answer "yes". **{R. 2298-99}**.

The court then asked defense counsel to demonstrate Dr. Steedman's qualifications in psychiatry. Dr. Steedman testified that he frequently has patients with a combination of mental illness and neurological impairment. However, when defense counsel asked about combined effect of mental illness and brain impairment, the State objected, noting "[h]e was only qualified as a neurologist, Your Honor, and *that was done for a reason*" (emphasis added). **{R. 2299}**.

The court agreed, and asked Dr. Steedman if this issue was something within his area of expertise as a neurologist. Dr. Steedman elaborated:

> 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 to me and I have to decide wether it is a psychiatric problem for which they need to then receive treatment from somebody who practices psychiatry more regular 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.

The State then asked to approach and the jury was sent out. **{R. 2299-2300}**.

In a proffer, Dr. Steedman testified that behavioral symptoms that might result from a patient with PTSD and a brain impairment would be "a cumulative effect on poor judgment, depression, anxiety, thought disorders, paranoia" – which he stated were in the "psychiatric realm" and which was why he studied both neurology and psychiatry to understand patients better. **{R. 2301-02}**.

The court sustained the State's objection, after defense counsel agreed that the "purpose of having Dr. Steedman examine the defendant was to take his expertise and add it to the range of information that the psychiatrist [Dr. Schwartz-Watts] would use to explain the psychiatric condition that the defendant had and how that might affect his behavior". The judge noted that Dr. Schwartz-Watts had already testified as to those psychiatric issues, so he was going to sustain the objection to anything outside of testimony on neurology. **{R. 2302-03}**. When defense counsel asked if this would preclude her qualifying Dr. Steedman in psychiatry, as "his opinion mirrors that of Dr. Watts", the court responded:

> COURT: Well, you know, this thing – this thing goes both ways. I mean if he is a - - if you want to elict opinions from him within the range - - in

> the field of psychiatry and if those are opinions that are different from those that were offered by Dr. Schwartz-Watts, then that give rise to the prejudice to the State in having late learned that he is a Psychiatrist. But, on the other hand, if those opinions are the same as Dr. Schwartz-Watts, there's no prejudice to the State, but there's no reason to offer them because these opinions - - there is at least diminished reason to offer them. So it is a - - it almost removes the necessity of me spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - we're spinning our wheels.
>
> DEFENSE COUNSEL: Well, your Honor, we would certainly take the position that Dr. Steedman's testimony would dovetail with Dr. Schwartz-Watts but that it is not a mirror image. She is not a neurologist.
>
> COURT: And - - and - - I recognize that, and I have not restricted you in any way not has the state asked me to restrict you in any way from eliciting anything about his neurological work on this Defendant or his neurological opinions. We're talking specifically now about whether or not he can go beyond that area in to the realm of psychiatry, and the answer is no.

{R. 2303-05}. Cross examination then proceeded.

On direct appeal, Petitioner claimed the judge erred in refusing Dr. Steedman's opinion on the spect scan, and in limiting him to testimony on neurology. The South Carolina Supreme Court affirmed, first pointing out that Petitioner had presented a "thorough mitigation presentation". The court first concluded that the limitation of Dr. Steedman's testimony amounted to an abuse of discretion. As to the Rule 403 issue, the state supreme court reiterated that the range of probative subject matter was particularly wide in capital sentencing. As to the discovery issue, the court reasoned there was no formal discovery order, and in any event the State's claim of surprise was meritless simply because defense counsel "failed to hit the bull's eye regarding Dr. Steedman's precise opinion". **{A7-A8; A14}**.

However, as to both the spect scan issue and the limitation of Dr. Steedman to neurology, the court found the limitation harmless, noting that psychiatrist Dr. Schwartz-Watts testified she ordered the spect scan and it came back "abnormal". The state supreme court pointed out defense counsel conceded Dr. Steedman's psychiatric testimony would have dovetailed with and mirrored that of Dr. Schwartz-Watts, who testified without limitation. {A7-A8}.

B. No federal constitutional claim as to the limitation of testimony is preserved for this Court's review.

As an initial matter, no federal constitutional claim is preserved for review by this Court. While it is true that the brief on appeal mentioned some general cases of this Court on the admissibility of mitigating evidence, such as Lockett v. Ohio, 438 U.S. 586 (1978), the issue on appeal only referred to a state evidentiary rule, Rule 403, SCRE. Moreover, no federal constitutional basis was raised at trial. Finally, the state supreme court did not expressly address any federal constitutional basis, but only ruled on the evidentiary and discovery bases for the limitation. Thus, no federal constitutional issue was properly preserved for review or presented on appeal before the state supreme court, and the state supreme court did not address any federal constitutional basis anyway. See State v. Byram, 485 S.E.2d 360 (S.C. 1997) (a party cannot argue one basis in support of motion at trial and another ground on appeal, and a constitutional argument is not preserved for appeal where appellant failed to argue the constitutional basis for his request at trial); Rule 208(b)(1)(B), SCACR (ordinarily no point will be considered that is not set forth in issue on appeal).

Since the state court did not decide any federal question, much less an important one, there is no compelling reason for certiorari review, and indeed there is a lack of jurisdiction. See U.S. Sup. Ct. R. 10(b) (certiorari considered where state court of last resort has decided important federal question). See also Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

C. Any limitation of Dr. Steedman's testimony was harmless.

Federal constitutional error is not a basis for reversal if it was harmless beyond a reasonable doubt. Satterwhite v. Texas, 486 U.S. 249 (1988); Chapman v. California, 386 U.S. 18, 24 (1967). The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

In this case, there is nothing about this run-of-the-mill harmless error decision that compels certiorari review by this Court. The fact of the matter is there is ample support in the record for the state supreme court's decision that Dr. Steedman's proposed testimony was otherwise addressed in the record as to the abnormality on the spect scan, and as to the cumulative psychiatric and neurological effects. Exclusion of the testimony did not make a difference in sentencing.

As to the abnormality on the spect scan, Dr. Schwartz-Watts, the primary evaluating psychiatrist, testified she ordered the neurological consult that was performed by Dr. Steedman, because she was concerned about brain injury or

dysfunction given a history of head injuries, drug abuse, low IQs, and learning disabilities. **{R. 2155-57}**. She specifically testified that the spect scan "came back abnormal . . . there's a small area that is not normal on there". **{R. 2157}**. While she stated she ordered the consult to help her interpret the abnormality **{R. 2157}**, she later testified that parts of Petitioner's brain work and parts do not work well at all **{R. 2161}**; that his huffing of freon did nothing but damage his brain **{R. 2166}**; that Petitioner had a "bad brain in the sense that he has a learning disability", and that "we even know that from the spect scan that there's an abnormality". **{R. 2168}**.

Similarly, Dr. Loring testified that while neurological issues were not her specialty, Petitioner had a probable "learning disability and brain damage", which would account for his impulsiveness and inability to follow directions. **{R. 2214}**.

Further, Dr. Steedman testified that Petitioner had two abnormalities with his reflexes, which indicated neurological damage **{R. 2269}**, that Petitioner had a learning disorder **{R. 2270}**, that his early problems in school were indicative of early problems not cause by later drug use **{R. 2272}**; that Petitioner's "brain functioning was not normal to begin with", which was exacerbated by drug use **{R. 2273}**; that the radiologist found the questionable abnormality on the spect scans, but a radiologist does not meet the patient and is only looking for severe dysfunction like dementia **{R. 2295-96}**; that the radiologist's findings were "not inconsistent" with his own finding of brain dysfunction **{R. 2295}**; and that the spect scan was "not inconsistent with someone having difficulties" **{R. 2297}**. Most importantly, in response to a question on cross, Dr. Steedman was able to get to the heart of the matter – stating flatly that he

believed the abnormality referred to in the radiologist's report could be a "contributing factor to poor judgment". {R. 2310}.

As to the limitation of Dr. Steedman to testimony on neurology only, as opposed to cumulative neurological and psychiatric effects, the jury had already heard from psychiatrist Dr. Schwartz-Watts, social worker Dr. Loring, and psychopharmacologist Dr. Morton as to psychiatric effects from PTSD, neurological dysfunction, and substance abuse. Dr. Schwartz-Watts was specifically asked about how the "[PTSD], an impaired brain, and combination of drug effects affect someone's judgment", to which she answered they would all contribute to his "horrible judgment" based on his "bad brain in the sense that he's got a learning disability", "couple it with the drugs he's used", "and then we know that on a spect scan he's got a questionable abnormality". {R. 2168}.

Similarly, Dr. Loring noted that while she had to leave the neurological issues to others (on which, of course, Dr. Steedman did testify, although not as much as he would have liked), Petitioner's probable learning disability and brain damage "would account for some of his being impulsive and not following directions well". {R. 2214}. Dr. Morton testified that symptoms that could have resulted from Petitioner's PTSD and substance abuse included increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. {R. 1944-48}.

Moreover, Dr. Steedman was allowed to answer in the affirmative when asked if there would be a cumulative effect from mental illness, substance abuse, and brain impairment – which was confirmatory and corroborative of the opinions of the other

experts. {R. 2299}. As noted before, on cross, Dr. Steedman gave the most significant portion of the very answer he initially wanted to give – that the brain abnormality was "a contributory factor to poor judgment". {R. 2310}. In any event, allowing him to list a few symptoms that had already been discussed at length by the psychiatrist, the psychopharmacologist, and the social worker is not the sort of additional information the absence of which is reversible error.

Finally, Petitioner is at odds with the record inasmuch as he claims that the significant difference between Dr. Schwartz-Watts' testimony and Dr. Steedman's testimony is that Dr. Schwartz-Watts referred to voluntary use of alcohol or drugs – which would be Petitioner's "fault" – while Dr. Steedman only referred to brain impairment that would not be Petitioner's fault. While Dr. Schwartz-Watts did discuss the effect on the brain from a voluntary action like substance abuse, she also discussed head injuries {R. 2155-56; 2160}, a history of low IQs and learning disabilities {R. 2147-49}, and of course the brain abnormality on the spect scan {R. 2157; 2161; 2168} – all of which lack any sort of volitional component.

Further, Dr. Schwartz-Watts pointed out that the post-traumatic stress disorder ("PTSD") led Petitioner to self-medicate with drugs and alcohol. {R. 2163-67} Dr. Loring made the same point, that those with PTSD often self-medicate. {R. 2215}. Of course, it would not be Petitioner's "fault" if he had PTSD from abuse as a child; thus, even the voluntary action of substance abuse was linked with an involuntary root cause. And, Dr. Steedman also testified that Petitioner's history indicated early problems that could not have been caused by drug use. {R. 2272}.

Given this record, there is nothing "certworthy" about state supreme court's garden-variety harmless error decision. See generally, e.g. Brown v. United States, 411 U.S. 223 (1973) (improperly admitted evidence was cumulative to overwhelming evidence properly admitted); Lucas v. Brooks, 85 U.S. 436 (1873) (improper exclusion of a record is harmless, when the party offering it has proved every fact which the record, if admitted, would prove).

D. How the federal issue was raised below as to disqualification of the juror

Petitioner's second issue asserts he was denied his Sixth Amendment right to an impartial jury due to the disqualification of a juror during *voir dire*.

As voir dire began for the Juror, even defense counsel conceded he could "just barely" hear the Juror. **{R. 934}**. The Juror began by stating he was "in between" the categories of those who would always give life imprisonment and those who could consider both penalties. **{R. 935}**. The Juror flatly said he was not sure he could return a death sentence. **{R. 936}**.

The Juror then: (1) stated "to me its just hard to judge . . . someone else for something they've done"; (2) pointed out that "I'm just not sure what I could do"; (3) agreed that he hesitated for a long time before answering the judge that he did not know if he could vote for death, and (4) stated "I don't think so" when asked if he could sign a "verdict form for death", based on his beliefs about the death penalty. **{R. 937}**.

The defense attempted to rehabilitate the juror, during which the Juror: (1) agreed that it would be "very difficult" for him to consider a death sentence, (2) that he

would "try" to do so, depending "upon the severity of the case". **{R. 939-40}**.

When the solicitor followed up actually signing his name to the death verdict, the Juror responded, "that was a hard question", and he would have to "know for sure" before he could put his name on the line. **{R. 940-41}**.

The judge asked the Juror if there was any "particular source" for his beliefs on the death penalty, to which the Juror replied:

> I guess maybe - - I don't know whether it's just a belief or that I can't - - I find it hard for me to pass judgment of someone else, you know, even - - I know we've all got to live by the law. I guess maybe if it would be a family matter or something that someone had killed maybe I could - - you know, I might could put my name on the line.
>
> * * *
>
> We were just brought up, you know, 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. 941 line 20 – 942 line 16}. The Juror then told the judge that he could consider the death penalty and could "put his name on that line". **{R. 942-43}**.

However, the Juror then admitted that if the victim was not a family member "his feelings [on the death penalty] would interfere . . . some" with his ability to sign a death verdict. **{R. 945-46}**.

The defense then took another stab at the Juror, asking him again if he could sign his name to the form giving a death sentence – to which the Juror responded "I'd still have to think about that". He then agreed that if all 12 jurors thought death was the right sentence, he could sign his name as well. **{R. 946-47}**.

The judge agreed the juror was not qualified, ruling as follows:

> I think the juror is not qualified. The - - there's several things that I think need to be mentioned, and the first is the juror's demeanor. Every time he got ready to answer a question, he took a deep breath and he had what I considered to be a very troubled look on his face. From that primarily I believe that - - that this juror's views on capital punishment would substantially impair his ability to perform his duties as a juror in accordance with the instructions that I would give him.
>
> The - - you know, a lot of times I think we see jurors who hesitate as you mentioned, Mr. Littlejohn, and I can get - - I feel as though I can get a sense as to whether the juror is hesitating because they are trying to think deeply and be completely open and honest with us or are they hesitating because they are troubled by the - - the issue that they're about to discuss.
>
> I did not get the impression, as I do sometimes, that this juror hesitated because he was trying to be clear about his feelings. I got the impression that he hesitated because he was troubled by his - - what he thought would be the question of whether or not he would be able to impose the death penalty. And so this - - this juror to me is like so many that have - - that have been addressed in the appellate decision of our Supreme Court and in other courts, and I think primarily of the case from the Fourth Circuit called U.S. Versus Tipton where they - - where they discuss several jurors who gave conflicting answer to different questions during the entire course of their voir dire, and in the end I am left, as that District Judge was, with the impression that substantially impair his performance of his duty to consider - - to follow the instructions that I would give him. And so I find that he is disqualified.

{R. 950 line 1 – 951 line 10}.

Petitioner contended on direct appeal that any hesitation on the part of the Juror was insufficient for exclusion where the totality of his responses were sufficient for qualification. The state supreme court disagreed, finding that while it might be "possible to cherry-pick certain responses", the trial court "acted well within its broad discretion" in excluding the Juror – particularly since "[e]ven the cold record reflects Juror's hesitancy and profound unease with the prospect of performing his duties as

a juror in accordance with his oath and the court's instructions". {A4-5}.

E. A trial court's credibility determination that the juror was unqualified is entitled to deference, and given the support in this record for that determination, there is nothing extraordinary that would compel a granting of certiorari.

In Adams v. Texas, 448 U.S. 38 (1980), and Wainwright v. Witt, 469 U.S. 412 (1985), this Court noted that the appropriate test for exclusion was simply whether the juror's views on capital punishment would "prevent or substantially impair" her ability to follow her oath and the trial court's instructions on the law. Wainwright specifically noted that the test for exclusion required neither automatic decisionmaking by the juror nor "unmistakable clarity" as to the juror's beliefs. Id. at 424-25. See also Morgan v. Illinois, 504 U.S. 719, 729-30 (1992).

Of course, part of the trial judge's job during qualification is to make credibility determinations about a juror's responses on her ability to be fair to both sides. Indeed, in Wainwright the Court noted:

> Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

469 U.S. at 425-26. See also Wainwright, 469 U.S. at 429 ("such a finding is based on determinations of demeanor and credibility that are peculiarly within the trial judge's province"). Recently, this Court again discussed these principles:

> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [citations omitted]. Leading treatises in the area

make much of nonverbal communication [citations omitted].

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007).

Indeed, a trial court can exclude a juror even if the juror said all the right things, if, for example, there was evidence or a basis to believe the juror was concealing his real views on the death penalty to achieve a certain result in the case. See Uttecht v. Brown, 127 S.Ct. 2218, 2223 (noting that deference to the express or implicit findings of the trial judge is necessary even in the absence of clear statements from the juror as to his impairment, as some "may wish to hide their true feelings", and thus where there is ambiguity, the trial court "aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State").

Here, the trial court expressly set forth its reasoning, noting that its assessment of the Juror's "troubled" demeanor and frequent hesitation was not that the Juror was simply thinking carefully about his answers, but that he was so troubled by the idea of participating in giving a death sentence that he would be substantially impaired in the performance of his duty. **{R. 950-51}**. This determination has support in the record, as it cannot be disputed that the Juror's answers were all over the place, during which – although he occasionally said the "right" things – he: (1) hesitated, (2) said he was "in between" the categories, (3) said repeatedly he was not sure he could return a death sentence, (4) said he did not "think" he could sign the form for a death verdict, (5) said it would be "very difficult" for him to consider a death sentence, (6) said it was "hard" for him to pass judgment on someone else, (7) agreed he would not "feel comfortable" giving death, (8) admitted if the victim was not a family member that

"probably would" interfere with his ability to sign a death form, and (9) often qualified his answers by saying he would "try" or "maybe" be able to consider death or sign the form.

The law here is clear and well-settled that a judge is entitled to make a determination of qualification based on his assessment of the credibility and demeanor of the potential juror. The record supports the call the judge made on this Juror. There is nothing compelling about this issue to justify a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

*S. CREIGHTON WATERS
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

By: _____

June 10, 2009

*Counsel of Record

No. 08-10556

October Term, 2009

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN MERCER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, counsel for Respondent and a member of the Bar of this Court, certify that on June 10, 2009, a copy of the **Brief in Opposition to the Petition for Writ of Certiorari to The Supreme Court of South Carolina** in the above-entitled case was mailed, first class postage prepaid, to Robert M. Dudek, Esquire, Post Office Box 11589, Columbia, South Carolina 29211, counsel for Petitioner. I further certify that all parties required to be served have been served.

S. CREIGHTON WATERS
Senior Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
Counsel for Respondent

3206

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 5, 2009

Mr. S. Creighton Waters
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Kevin Mercer
v. South Carolina
No. 08-10556

Dear Mr. Waters:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

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STATE OF SOUTH CAROLINA)	In the Court of Common Pleas
)	
County of Lexington)	2009 DEC -4 P 1:41
Kevin Mercer #6021)	
Full name and prison number, if any, of applicant.)	APPLICATION FOR
v.)	POST-CONVICTION RELIEF
The State)	
Name of Respondent)	

2009CP3205465

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lieber Correctional Institution

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) 2003-GS-32-409
   (b) _____
   (c) _____

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) April 22, 2006 (Death Sentence)
   (b) _____
   (c) _____
   (d) _____

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2009 DEC -4 P 1:41

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty X

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. United States Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Affirmed; *State v. Kevin Mercer*(2009)

ii. Certiorari denied: *Kevin Mercer v. South Carolina*

iii. _____

(c) the date of each such result:

i. January 12, 2009

ii. October 4, 2009

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. *State v. Mercer*, 381 S.C. 149, 672 S.E.2d 556 (2009)

ii. *Kevin Mercer v. South Carolina*, 130 S.Ct. 104 (2009)

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) n/a

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel in violation of the Sixth Amendment

(b) _____

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to retain a firearms expert to show that there was gunshot residue on the gloves worn by Thompson, his alleged accomplice, to prove that Thompson was the triggerman since it was professionally unreasonable for counsel to fail to do so where funds were available and the trial court invited counsel to request additional funds if they were needed;

(b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's "SPECT Scan" revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony wherein she blamed much of the brain abnormality on drug use since there was a substantial chance the trial court would have admitted this crucial evidence had the proper argument been made at the trial level.

(c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to adequately investigate petitioner's upbringing for strong evidence in mitigation regarding not only abuse but mental illness in the family since there was a reasonable likelihood that the admission of this evidence would have led to a sentence of life imprisonment rather than death.

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

None other than the mandatory appeal to the State Supreme Court

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a FILED

ii. _____

iii. 2009 DEC -4 P 1:41

iv. _____

(b) the name and location of the Court in which each was filed:

i. n/a

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. n/a

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

ii. _____

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____ FILED

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Melissa J. Kimbrough, Esquire, 1720 Main Street, Suite 106, Columbia, SC 29201

ii. Cam Littlejohn, Esquire, 1720 Main Street, Suite 202, Columbia, SC 29201

iv. Robert M. Dudek, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, PO Box 11589, Columbia, SC 29211-1589

(b) the proceedings at which each such attorney represented you:

i. Ms. Kimbrough and Mr. Littlejohn – Trial

ii. Mr. Dudek – appeal

iii. _____

18. State clearly the relief you seek in filing this application.

New trial

19. Are you now under sentence from any other court that you have not challenged?

No

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)

VERIFICATION FILED

I, Kevin Mercer 2009 DEC -4 P 1:41 being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Kevin Mercer
KEVIN MERCER

Sworn to and subscribed before me
This 4th day of Dec, 2009

L.S.
Notary Public for South Carolina
My Commission Expires Aug 8, 2018

2009CP3205465

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Kevin Mercer, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Kevin Mercer
Applicant

Sworn to and subscribed before me
This 4th day of Dec., 2009.

L.S.
Notary Public for South Carolina
My Commission Expires: Aug 8, 2018.

COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON KEVIN J. MERCER, #6021 Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 09-CP-32-5465 **FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF**

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2003-GS-32-409

4. The date upon which sentence was imposed and the terms of the sentence: April 22, 2006 (Death Sentence)

5. A finding of guilty was made after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

FILED
2010 FEB -3 P 5:44
BERT W. CARTLEDGE
CLERK OF COURT
LEXINGTON, SC

7. The Courts to which applicant appealed:
   (a) The South Carolina Supreme Court.
   (b) The United States Supreme Court.

   The result in each Court to which applicant appealed:
   (a) Affirmed
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) January 12, 2009
   (b) October 4, 2009

   Citations of any written opinion or orders entered pursuant to such results:
   (a) *State v. Mercer,* 381 S.C. 149, 672 S.E.2d 556 (2009).
   (b) *Kevin Mercer v. South Carolina,* 130 S.Ct. 104 (2009).

8. Not applicable.

GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9 & 10 Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution when trial counsel: (1) failed to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's SPECT Scan revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony; and, (2) failed to object to extensive victim impact evidence that was outside the scope of proper victim impact evidence. *See Strickland v. Washington*, 466 U.S. 668 (1994); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).[1]

11. (a) Applicant has not filed any petition in State Court other than the mandatory appeal to the State Supreme Court.
(b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
(c) No other petitions were filed.
(d) No other petitions, motions or applications in this or any other court.

12. Not applicable.

13. None of the grounds set forth in (10) has been previously presented to this or any other Court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was previously represented by counsel.

17. Applicant was represented at trial by Melissa J. Kimbrough, Esquire, 1720 Main Street, Suite 106, Columbia, SC 29201 and Cam Littlejohn, Esquire, 1720 Main Street, Suite 202, Columbia, SC 29201.

[1] Applicant, through undersigned counsel, has requested a copy of trial counsel's files in accordance with S.C. Code § 17-27-130, but has not yet received those copies. With the exception of information "necessary" to respond to the specific claims raised in this First Amended Application For Post-Conviction Relief, applicant does not waive the attorney-client privilege to any extent. *Id.* Applicant requests that his prior counsel not disclose any other portion of his files to respondent or discuss any aspect of his representation outside the scope of this limited waiver.

On direct appeal applicant was represented by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

18. Applicant seeks relief from his conviction and sentence.

19. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

EMILY C. PAAVOLA
Death Penalty Resource & Defense Center
P.O. Box 11311
Columbia, South Carolina 29211

JASON P. PEAVY
Attorney at Law
1720 Main Street
Suite 301
Columbia, South Carolina 29201

BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

February 1, 2010

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON)	09-CP-32-5465
)	
KEVIN J. MERCER, #6021)	
Applicant,)	
vs.)	**CERTIFICATE OF SERVICE**
State of South Carolina,)	
Respondent.)	
)	

The undersigned certifies that a copy of the foregoing First Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 1st day of February, 2010, upon the following:

Donald J. Zelenka
Deputy Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

FILED
2010 FEB -3 P 5:44
BERTHA C. GREGG
CLERK OF COURT
LEXINGTON, SC

COPY

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF LEXINGTON	
Kevin Mercer, #6021,	C/A No. 2009-CP-32-5465
Applicant,	
v.	**RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT (Capital Case)**
The State of South Carolina,	
Respondent.	

FILED
2010 FEB 17 PM 4:37
Beth A. Carrigg
Clerk of Court
Lexington, SC

Respondent, above-named, here by make a Return to the first amended application for post-conviction relief ("APCR"), filed by Kevin Mercer ("Applicant") on February 1, 2010. This APCR stems from a murder conviction and death sentence.

Respondents respectfully request pursuant to South Carolina Code of Laws, Section 17-27-160(C), that this Court set a scheduling hearing with the parties within thirty (30) days to set any evidentiary hearing that may be necessary within one-hundred and eighty (180) days from that date. Respondents also would request a hearing on the motions to dismiss and for summary judgment in the instant action.

I. Procedural History

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Applicant, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). **{R. 2729-36}**. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

The trial judge in this case was the Honorable John Few. Applicant was represented at the trial level by Cameron B. Littlejohn, Jr., Esquire, and Melissa J.

Kimbrough, Esquire. Eleventh Circuit Solicitor Donald V. Myers, Esquire, Assistant Solicitor S. Rick Hubbard, III, Esquire, Assistant Solicitor D. Shawn Graham, Esquire, and Assistant Solicitor Marion Moses, Esquire prosecuted the case for the State.

Jury selection took place from April 10 through April 13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Applicant's jury convicted him of all charges. **{R. 1708-09}.**

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on April 20, 2006. Judge Few submitted the following aggravating factor to the jury:

> Murder was committed while in the commission of robbery while armed with a deadly weapon.

The following mitigating factors were submitted to the jury:

> (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
>
> (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
>
> (3) The age or mentality of the Defendant at the time of the crime.

On April 22, 2006, Applicant's jury found the aggravating factor and recommended a sentence of death. **{R. 2431-34}.** Judge Few then sentenced Applicant to death for murder, thirty (30) years for armed robbery consecutive to the sentence Applicant was serving for ABIK, and five (5) years consecutive for possession of a weapon. **{R. 2434-35}.**

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on April 24, 2006. On appeal, Applicant was represented by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission

on Indigent Defense, Division of Appellate Defense, and Melissa Jane Reed Kimbrough, Esquire. By Order of the South Carolina Supreme Court filed July 10, 2006, Applicant's case was remanded back to the Honorable John C. Few, Circuit Court Judge, to hear Applicant's motion for a new trial based on after discovered evidence. In an Order filed September 26, 2006, Judge Few denied the Motion for a New Trial Based on After-Discovered Evidence. A timely Notice of Appeal was filed on Applicant's behalf on October 4, 2006. On June 26, 2008, Dudek and Kimbrough filed with the state supreme court the Final Brief of Appellant, in which they asserted the following issues on behalf of Applicant:

> (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.
>
> (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.
>
> (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 objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

> (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 excusing this qualified juror for cause.
>
> (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.
>
> (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 st ate failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. Applicant, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008.

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Counsel for Applicant filed a Petition for Rehearing on January 27, 2009. The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court.

Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009.

Applicant filed a second Petition for Stay of Execution. The State filed a letter in response to the Petition for Stay of Execution on October 15, 2009. By Order filed November 4, 2009, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable James R. Barber, III, Circuit Court Judge, to hear this post-conviction relief action. An appointment of counsel hearing was held by this Court on November 24, 2009. Applicant was present, and he was represented at the hearing by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Esquire, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters, Esquire, and Assistant Attorney General Alphonso Simon, Jr., Esquire. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Applicant.

Attached herewith and incorporated herein by reference are the following documents:[1]

(1) Record on Appeal, containing six (6) volumes;

(2) Final Brief of Appellant;

(3) Final Brief of Respondent;

(4) Final Reply Brief of Appellant;

(5) State v. Kevin Mercer, SC S.Ct. Opinion No. 26582, filed January 12, 2009, with corrective note dated January 23, 2009;

(6) Petition for Rehearing;

(7) Order Denying Petition for Rehearing;

(8) Petition for Writ of Certiorari to the Supreme Court of South Carolina;

(9) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;

II.

Statement of Facts

Applicant was convicted and sentenced for murdering a highly decorated soldier in the parking lot of the soldier's Columbia-area apartment complex, in the process of stealing the soldier's SUV.

A. State's evidence in the guilt phase

On May 16, 2002, the night he was murdered, Army Sgt. Tracy Davis attended a softball game with his roommate, Clifton Magwood, who was also a sergeant and recruiter

[1] Respondent is only sending the attachments to the Clerk of Court. Counsel for Applicant were mailed copies of these attachments on January 20, 2010.

like Tracy. After the game, Tracy drove himself home in his white Lincoln Navigator. Meanwhile, Clifton had already arrived back at their apartment and lay down at about 11 p.m. to watch a movie. Suddenly, he heard a commotion outside and Tracy's voice saying, "I'll give it to you". Clifton looked out the window to see Tracy being robbed a heavy set broad shouldered black male about 5'11 to 6' tall, wearing a dark outfit and dark hat. This man had what looked to be a gun in his hand. **{R. 1316-29; 1334-38; 1346}.**

Clifton immediately called 911 and ran upstairs to Tracy's room to look for a pistol. Clifton could not find any bullets for the gun, and as he was coming back downstairs -- still on the phone with 911 -- he heard a gunshot. Clifton ran outside in time to see Tracy's Navigator speeding away and Tracy lying in the brush with a gunshot wound to the back of his head. Officers and EMS responded to the scene, but there was nothing they could do. Clifton gave them a description of Tracy's white Navigator with a Masonic symbol on the rear. **{R. 1299-1301; 1308-09; 1329-30; 1340-45; 1353; 1359-62; 1576-80}.**

Meanwhile, Lexington County Sheriff's Deputy Stazer was out on I-20 when he received the BOLO on Tracy's SUV. At about 11:46 p.m., he saw a white Navigator with a Masonic emblem traveling westbound. Stazer pulled the SUV, and approached its two male occupants from the passenger side. After Stazer asked for a driver's license, proof of insurance, and registration, the driver asked if he did anything wrong. Stazer told him to produce the requested documents, but after looking around in the cabin, the driver could only find a yellow Pulliam Ford receipt. The driver claimed the SUV belonged to his brother, but dispatch advised Stazer that the name on the receipt matched the victim's. Deputy Stazer's stop then became a felony one. **{R. 1313; 1379-89}.**

Stazer ordered the occupants from the car at gunpoint, and as the passenger got out, a baggie of fourteen .357 bullets and one black knit glove fell from the pants leg. Underneath the driver's seat, Stazer found a .357 revolver. The driver proved to be Applicant, who was wearing a dark jean outfit. The passenger proved to be Marcus Thompson, who was a good bit smaller and more slender than Applicant. Thompson was wearing a dark shirt over a white one, with the white shirt was clearly visible at the neck. Late, three more gloves were found in Thompson's pants after they were logged into the evidence room. **{R. 1390-95; 1403-07; 1412-16; 1451}.**

The revolver found underneath Applicant's seat had one fired casing and five unfired cartridges. This gun was conclusively matched to the bullet to the back of the head that killed Tracy. **{R. 1469-78; 1568}.**

The State also called Applicant's cellmate in pre-trial lockup, who testified that Applicant bragged about committing the murder. Applicant told the cellmate that a guy had come to him looking for a SUV, or a truck, and Applicant told him he knew where one was. They went to the apartment complex, and when Tracy arrived in the Navigator they approached him and demanded his keys. Applicant said he made Tracy get on his knees, and as Applicant and Thompson jumped in the SUV, Applicant turned and shot Tracy in the back of the head. Applicant related that he and Marcus were heading to Atlanta for "Freak Neak", which is a weekend long party for college and high school kids -- but they did not make it because they got a flat tire and the cops pulled them. **{R. 1544-48}.**

Applicant was tested for GSR at approximately 1:30 a.m. Two rounded lead particles were found on the back of his left palm, which is consistent with but not conclusive

of the presence of GSR. **{R. 1420; 1454-64; 1486; 1501-21}.** On his booking form, Applicant was listed as being left handed. **{R. 1540}.**

B. The defense's guilt phase case

The defense first called an officer to testify police searched a car belonging to Applicant found at an Economy Inn near I-20. **{R. 1585-87}.** Next, the defense called a private forensic expert to testify that he would expect higher levels of GSR on someone who fired a .357 revolver. The expert testified that a GSR transfer was possible if an officer touched his weapon and then cuffed a suspect, but admitted on cross that such a transfer was highly unlikely. **{R. 1611-26}.** An evidence custodian testified that police logged in a pair of gloves found in pants belonging to Thompson. **{1629-30}.** Applicant called his mother, who claimed he was right-handed. **{R. 1637-38}.**

C. The State's reply case

Deputy Stazer testified in reply that he had not fired his weapon since qualification in May of 2001, that he cleaned his gun right after, that he never fired his gun from that time until the incident but cleaned his gun regularly, and that he cleaned his cuffs after his cuffs after every arrest with a sanitizing spray. **{R. 1640-43}.**

D. The State's penalty phase case

In the penalty phase, the State began by introducing Applicant's fairly extensive record of driving violations and suspensions. **{R. 1735-43}.** Next, the State called a former Richland officer who caught Applicant engaging in auto tampering. **{R. 1745-47}.** Another Richland officer described responding to a civil disturbance, and then pulling over a car that matched the description given. Applicant was inside, along with five ounces of marijuana

and a .38 revolver – leading to his conviction for possession of marijuana with intent to distribute. **{R. 1748-52}**. A third Richland officer testified about Applicant's convictions for second degree burglary and strong arm robbery in 2001. **{R. 1753-55}**. The victim of that crime testified Applicant was part of a group of men that broke into her house while her grandchildren were there, pulled her out of the bath, and demanded money while holding a shotgun to her head. **{R. 1757-58}**. Yet another Richland officer testified about pulling a car Applicant was driving over in 2001, only to find a pistol after Applicant reached down for it between his legs. The officer was so concerned he purposefully left his fingerprints on the trunk of Applicant's car in case something happened. Applicant thought the whole thing was funny, laughing throughout his arrest. **{R. 1776-85}**. The backup officer also testified as to this event. **{R. 1789-91}**.

The next group of witnesses testified to Applicant's misbehavior and disciplinary infractions while in the Richland County Detention Center. **{R. 1761-75}**. A Richland County records custodian testified as to the dates of Applicant's four stints in their jail. **{R. 1793-94}**.

Various members of probation offices testified to Applicant's violation of his probation conditions and positive tests for cocaine and marijuana, to the point that his probation was revoked and he received three years and six months. **{R. 1795-1813}**.

What followed was a slew of witnesses from the Lexington County Detention Center as to Applicant's disciplinary issues to the point that even LCDC eventually sent Applicant to SCDC for safekeeping prior to trial. This list of offenses included: (1) placing a green leafy substance in his mouth and swallowing it during a surprise shakedown **{R. 1821-23}**;

(2) tapping a window to display his erect penis to a female staff member **{R. 1824-29}**; (3) overturning a food cart and dumping 30 gallons of tea because he had been put in confinement allegedly without an explanation **{R. 1830-35}**; (4) refusing direct orders to stay in his cell when on confinement **{R. 1837-40}**; (5) stealing medications from the nurse's cart **{R. 1841-44}**; (6) ingesting pills and then telling officers he was going to die for what he had done anyway **{R. 1855-57}**; (7) refusing a direct order to go back in his cell after recreation time had ended **{R. 1865-67}**; (8) removing bolts from a bunk and slamming it into the wall to create a six-inch hole as part of an escape plan **{R. 1869-79}**; (9) hiding a razor wrapped in toilet paper in a light fixture **{R. 1881-83}**; (10) creating a disturbance in his cell after which a shank was discovered within **{R. 1895-97}**; (11) violating mail rules **{R. 1899-1904}**; (12) inciting a fight and possessing a weapon **{R. 1887-92}**; (13) possessing contraband for which he was sentenced to 60 days disciplinary detention **{R. 1985}**; (14) slipping a note to a female officer as she passed his cell in which he propositioned her and offered to be her "secret friend" and "personal slave" **{R. 1987-1992}**; and (15) being the only occupant in a cell where officers noticed the light fixture cover was broken, and a two to three-inch piece of plastic was missing that could be used as a weapon **{R. 1993-99}**. When he returned from SCDC's safekeeper status, Applicant had to be permanently segregated for officer safety, due to all his infractions. He also had to be placed in full restraints for 72 hours because there was nothing else the officers could do with Applicant. **{R. 1999-2000}**.

Finally, the State presented LCDC officers who testified about an incident in which Applicant's roommate approached guards and told them there was a fight in the recreation

yard. When officers went to check it out, they saw the roommate run in from the yard towards the bathroom, with Applicant in hot pursuit, holding something in his hand and amidst cries of "he's got a shank!" The two inmates fought in the bathroom, and as they refused to comply with instructions to stop, other fights broke out among the inmates watching. In addition to various jailhouse infractions, Applicant was convicted for this incident of assault and battery with intent to kill ("ABIK"), for which he received twelve years, and carrying a weapon by an inmate, for which he received five years. The roommate had facial lacerations from the fight, and testified Applicant was attacking him with two shanks made from toothbrush handles and razor blades. **{R. 2004-36}**. The roommate also noted that Applicant told him one night that he did not shoot the officer who pulled him because it was the "cop's lucky day." **{R. 2038-39}**.

The State called an officer to testify as to a Wal-Mart receipt and items Applicant purchased shortly before the crime, including a dark hat and visor, as well as to introduce photographs of the victim at the crime scene. **{R. 2043-52}**. The pathologist more clearly described the wound that killed Tracy. **{R. 2053-66}**.

The State concluded with some victim impact witnesses, who testified about Tracy's military career; his deep relationship with his daughter Tay and his mother; his strong friendship with his fellow soldiers and their families; his meticulous devotion to his military duties and responsibilities; his military career, which was on the "fast track"; his posthumous promotion to Master Sergeant, for which he had been selected shortly before his murder; the naming of the award for leadership at the recruiter instruction school after Tracy; his involvement and good works in the community with the Masonic Order; and his

efforts in starting up a youth mentoring program – the center of which was named for Tracy in his honor. **{R. 2067-2133}.**

E. Defense penalty phase case

The defense began with psychiatrist Dr. Donna Schwartz-Watts. She testified: (1) Applicant had a long history of asthma, but also a large number of somatic complaints for such a young man, which may be manifestations of anxiety **{R. 2145-47}**; (2) Applicant changed schools a lot, had terrible grades, a diagnosed learning disability, and a low IQ with poor verbal skills **{R. 2146-48}**; (3) Applicant had a diagnosis of oppositional defiant disorder as a child, meaning he had problems with authority, and also had mixed developmental delay disorder **{R. 2149-51}**; (4) while Applicant was not very forthcoming during their interviews and more concerned with his somatic problems rather than the big picture of what he was facing, Applicant did say he witnessed as a child his father assault his mother, and violence in the area he grew up **{R. 2152-54}**; (5) Applicant claimed a substance abuse history, including cocaine, marijuana, alcohol, huffing freon, and hallucinogens like angel dust, and his drug use increased after his grandmother died a year prior to the murder of Tracy **{R. 2154-55}**; (6) she ordered neuropsychological testing on Applicant given his drug history and involvement in a car wreck, but could not complete the testing as Applicant's effort was too variable **{R. 2155-56}**; (7) his mother used Dexatrim in the first two months of her pregnancy **{R. 2158-59}**; (8) his mother would come home and find marks on Applicant's arms and was concerned he was being abused by his father, and Applicant told another psychologist that he had been sexually abused **{R. 2158-59}**; (9) one his sister hit him hard with a frying pan **{R. 2160}**; (10) Applicant's mother really

helped him with school and he was able to graduate 180th of a class of 181 despite his learning disability, but his lack of success there meant school was not a safe haven from chaos at home **{R. 2160-2162}**; (11) there is a family history of depression, anxiety, and substance abuse **{R. 2162-63}**; (12) Applicant's wife said he frequently awoke with nightmares, which is a symptom of post-traumatic stress disorder (PTSD) **{R. 2163-65}**; (13) Applicant had diagnoses of PTSD, substance abuse, a reading disorder, and a personality disorder with antisocial traits **{R. 2165-68; 2187}**; and (13) that all of these things contributed to Applicant's "horrible judgment" **{R. 2168-69}**.

The defense next called Dr. Marti Loring, a clinical social worker who was qualified as an expert on PTSD, trauma, and abuse. **{R. 2193}** Dr. Loring generally described the symptoms and characteristics of PTSD and testified: (1) Applicant has PTSD **{R. 2195}**; (2) Applicant's father would drink, come home, and beat Applicant's mother, during which Applicant would try to protect her **{R. 2203}**; (3) Applicant got severe beatings that were longer than his other brother, because for a time Applicant's father thought Applicant was someone else's biological son **{R. 2203-06}**; (4) Applicant's mother would beat him as well **{R. 2204-06}**; (5) part of his childhood was spent in squalid conditions in a Philadelphia home with holes, pigeons, and cats **{R. 2206}**; (6) the family had to leave Philadelphia for its safety after Applicant's older brother identified some thugs who robbed him **{R. 2207}**; (7) he has difficulty concentrating and had trouble in school despite his efforts, given his reading disability **{R. 2207-08; 2213}**; (8) he started to decline after a number of family deaths in 2001 **{R. 2210; 2217-18}**; (9) he was raped when he was young by an uncle **{R. 2213}**; (10) he had an imaginary friend named Pyro **{R. 2214}**; he had untreated

depression and anxiety that led to substance abuse **{R. 2215-16}**; and (11) his antisocial traits were in large measure learned from the difficult environment in which he was raised **{R. 2218-19}**. As Dr. Schwartz-Watts had done, Dr. Loring agreed there was no connection between Applicant's PTSD and the murder of Tracey Davis. **{R. 2223}.**

The defense had earlier called Dr. Alexander Morton, a psychopharmacologist, who described Applicant's self-reported use of alcohol, marijuana, cocaine, and other drugs such as hallucinogens. Dr. Morton opined this drug use caused psychiatric problems, and stated: (1) a drug such as cocaine so stimulates the brain that it becomes a basic need; (2) Applicant would use drugs to diminish the constant anxiety and other symptoms of PTSD; (3) Applicant first used marijuana at age nine and then moved on to various legal substances as well as hard drugs; and (4) symptoms that could have resulted from Applicant's PTSD and substance abuse include increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. **{R. 1906-48}.** On cross, Morton noted that he was a pharmacist and could not diagnose, that Applicant reported far more drug use to the defense experts than he earlier did during his state ordered evaluations, that Applicant reported drug use only that morning and not the evening of the crime, and that while people off drugs should get better, Applicant's ABIK took place after he had been in the system two years. **{R. 1948-49; 1961-67; 1972-74}.**

The defense called former warden James Aiken, who testified that SCDC's security was so infallible that it could safely manage someone with the disruptive behavior patterns of Applicant. Aiken did not believe Applicant would be a predatory type of prisoner, even though Applicant had attacked another inmate and cut his face with a weapon – because

a predator would have cut the inmate's throat, and extreme force was not required to regain control. **{R. 2234-40}**. Aiken stated that SCDC had all the equipment, training, and personnel needed to control Applicant in the setting. **{R. 2241}**. Even though under this Court's precedent the State cannot cross on the adequacy of SCDC's security measures despite Aiken's testimony as to their infallibility, Aiken then detailed with specificity the security measures available to deal with a number of potential problems in prison, and opined Applicant could be safely contained without any unusual risk to staff, other inmates, or the community (which of course, can only relate to the *general* adequacy of SCDC's security measures to prevent escape attempts). **{R. 2242-43}**. Finally, over the solicitor's adamant objection that it related to inmates other than Applicant, Aiken testified that inmates typically cannot keep up with disruptive behavior in prison because they eventually "burn out" as they get older. **{R. 2245-48}**.

Neurologist Dr. John Steedman was the next witness for the defense. Dr. Steedman examined Applicant in the jail, and found: (1) that he had a reflex disparity when tapping his biceps and triceps that indicated some sort of interruption in the pathways of the brain **{R. 2268-70}**; (2) his IQ testing, while not qualifying as mentally retarded, was in the range of a learning disorder **{R. 2270-72}**; (3) he received supplemental security income at a young age due to this disability **{R. 2271-72}**; (4) his drug use would affect his judgment and lower his functioning **{R. 2273}**; (5) there was a questionable abnormality on a "spect scan" of the subfrontal cortex, but that the radiologist thought the significance was questionable and not indicative of a severe abnormality **{R. 2274; 2294-96}**; (6) Applicant had a disability in terms of his functioning, as well as anxiety disorders and PTSD **{R.**

2297-98}; and (7) there was a cumulative effect on Applicant of the brain dysfunction, PTSD, and substance abuse **{R. 2298}**. On cross, Dr. Steedman admitted Applicant's MRI was normal, and that the "questionable abnormality was not the proximate cause of the murder, but could be a contributing factor to poor judgment." **{R. 2308-09}**.

Retired high school coach Charles Mancuso coached Applicant in football during high school. He stated Applicant was easily influenced by peers, and they had to keep things simple since he was in special needs classes. However, Applicant was a hard worker and "outstanding student." **{R. 2313-16}**.

Next was Applicant's younger sister, who stated that her brother was always there for her, that her father had anger problems, and that the family moved south to escape bad conditions. **{R. 2320-23}**. Applicant's other sister testified Applicant was picked on by other kids, that the family moved because of the bad environment, that there was violence between her parents, and that Applicant "caught" more from his parents than the others. **{R. 2323-27}**. Applicant's wife stated he was "the best male role model [she] had ever met in [her] life," and was her protector and friend. After displaying some family photographs, she noted that Applicant began to "shut down" after his grandmother died in 2001. **{R. 2327-32}**. Applicant's mother testified, contending that the family had a difficult home life with her husband's anger and abuse, on top of bad schools and a poor environment. She stated he had problems as an infant and she had taken diet pills during her pregnancy because she did not know she was expecting. She described the effects of Applicant's learning disability, and his difficulties in school, with his peers, and in trying to find employment. She also displayed some family photos, and described Applicant's love for

his family. **{R. 2332-2351}.** Finally, Applicant's father testified, admitting he was responsible for anger and violence in the home, but stating that was how he grew up and he did not know any better. He denied ever drinking, though. **{R. 2351-58}.**

III.

Allegations in First Amended Application[2]

Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution when trial counsel:

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[2]In the initial application for post-conviction relief, the allegations made by Applicant were as follows:

> Ineffective assistance of counsel in violation of the Sixth Amendment
>
> (a) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to retain a firearms expert to show that there was gunshot residue on the gloves worn by Thompson, his alleged accomplice, to prove that Thompson was the triggerman since it was professionally unreasonable for counsel to fail to do so where funds were available and the trial court invited counsel to request additional funds if they were needed;
>
> (b) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's "SPECT Scan" revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony wherein she blamed much of the brain abnormality on drug use since there was a substantial chance the trial court would have admitted this crucial evidence had the proper argument been made at the trial level.
>
> (c) Trial counsel was ineffective, in derogation of the Sixth Amendment to the United States Constitution, for failing to adequately investigate petitioner's upbringing for strong evidence in mitigation regarding not only abuse but mental illness in the family since there was a reasonable likelihood that the admission of this evidence would have led to a sentence of life imprisonment rather than death.

(1) failed to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's SPECT Scan revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony; and,

(2) failed to object to extensive victim impact evidence that was outside the scope of proper victim impact evidence. See Strickland v. Washington, 466 U.S. 668 (1994); Ard v. Catoe, 372 S.C. 318,642 S.E.2d 590 (2007).

Applicant asserts two (2) allegations in his current APCR. Both involve ineffective assistance of counsel. As will be seen, each allegation should be dismissed or denied as a matter of law, and the petition dismissed with prejudice.

A. General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

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

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating

circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

B. Motion to Dismiss Ground One as a Matter of Law

Applicant's first ground for relief is as follows:

> Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution when trial counsel failed to argue to the trial court that Dr. Steadman's proffered testimony that petitioner's SPECT Scan revealed he had a brain abnormality was materially different than Dr. Schwartz-Watts' testimony.

Applicant contends his counsel failed to argue at trial that Dr. Steedman's proffered testimony regarding his analysis of the SPECT scan was materially different from Dr. Schwartz-Watts' testimony. At trial, Dr. Steedman testified that the radiologist found a questionable abnormality in Applicant's SPECT scan. **{R. 2294-95}.** Towards the end of Dr. Steedman's direct examination, counsel asked: "[i]n your experience, is there any sort of combined effect when post-traumatic stress disorder, substance abuse, and the sorts of brain problems or brain functioning or brain dysfunction you found is there some sort of cumulative effect?" **{R. 2298}.** Steedman responded yes. The trial court then recognized an objection from the State. Defense counsel then attempted to lay foundation of Dr. Steedman's qualifications. During the course of that examination, the State objected, noting "[h]e was only qualified as a neurologist, Your Honor, and *that was done for a reason* and now she's trying to : . . qualify him in another area" (emphasis added). **{R. 2299}.** After a bench conference, the jury was sent out.

In a proffer, Dr. Steedman testified that behavioral symptoms that might result from a patient with PTSD and a brain impairment would be "a cumulative effect on poor judgment, depression, anxiety, thought disorders, paranola" – which he stated were in the

"psychiatric realm" and which was why he studied both neurology and psychiatry to understand patients better. Dr. Steedman added a patient might also have difficulty in employment and conforming to the rules of society. Dr. Steedman stated the behavioral consequences would all be in the psychiatric realm except possibly poor employment and school functioning. **{R. 2301-02}.**

The court then sustained the State's objection, after defense counsel agreed that the "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." The judge noted that Dr. Schwartz-Watts had already testified as to those psychiatric issues, so he was going to sustain the objection to anything outside of testimony on neurology. **{R. 2302-03}.** When defense counsel asked if this would preclude her qualifying Dr. Steedman in psychiatry, as "his opinion mirrors that of Dr. Watts," the court responded:

> COURT: Well, you know, this thing – this think goes both ways. I mean if he is a - - if you want to elicit opinions from him within the range - - in the field of psychiatry and if those are opinions that are different from those that were offered by Dr. Schwartz-Watts, then that give rise to the prejudice to the State in having late learned that he is a Psychiatrist. But, on the other hand, if those opinions are the same as Dr. Swartz-Watts, there's no prejudice to the State, but there's no reason to offer them because these opinions - - there is at least diminished reason to offer them. So it is a - - it almost removes the necessity of me spending all this time trying to figure out whether his opinions are the same or are they different. We're just - - we're spinning our wheels.
>
> DEFENSE COUNSEL: Well, your Honor, we would certainly take the position that Dr. Steedman's testimony would dove tail with Dr. Schwartz-Watts but that is not a mirror image. She is not a Neurologist.
>
> COURT: And - - and - - I recognize that, and I have not restricted you in any way not has the state asked me to restrict you in any way from eliciting anything about his neurological work on this Defendant or his neurological

> opinions. We're talking specifically now about whether or not he can go beyond that area in to the realm of psychiatry, and the answer is no.

{R. 2303-04}. After a short break, the judge elaborated:

> There is - - there's no suggestion on my part and I don't believe on anybody's part that anybody, particularly you, sir, have done anything improper. I'm not suggesting that you're not qualified as a psychiatrist. The defense - - that is - - this is again another instance of my trying to reconcile the strategies of both sides, all legitimate.
>
> The defense seeks to disclose as little as possible about the evidence that they would offer. The State asks to have as much as possible about what the defense would offer or disclose. I attempted to reconcile those last week. Or perhaps it was the week before, by ordering that you all have a conversation in which you would disclose the nature of the experts and the - - and the nature of their opinions. This witness was disclosed as a neurologist.
>
> I am confining his testimony to neurology, and that shouldn't have 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 wight that area, but I'm not going to allow it for the reasons that I have stated.

{R. 2304-05}. Cross examination then proceeded.

This claim should be dismissed as a matter of law because it is without merit. First, trial counsel was not deficient in making her argument in favor of the admission of Dr. Steedman's testimony regarding the SPECT scan. The South Carolina Supreme Court found that the trial court abused its discretion in not admitting Dr. Steedman's testimony. Mercer, 381 S.C. 149, 160, 672 S.E.2d 556, 561 (2009). Since the evidence should have been admitted at trial, Applicant cannot establish that counsel was deficient in its handling of the admission of the testimony.

Even if counsel was deficient in this regard, Applicant fails to show that he was prejudiced as a result. In reviewing Dr. Steedman's testimony on direct appeal, the South

Carolina Supreme Court found that the trial court's error in not admitting the testimony was harmless.

> When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged-the SPECT Scan abnormality-was already in evidence without objection.
>
> Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function.... But what it does, it's a ... picture of how your brain functions, and that test came back abnormal. There's a ... small area that's not normal on there...." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and ... we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts.

Mercer, 381 at 149, 161-2, 672 S.E.2d at 562-3. Further, in addressing Dr. Steedman's psychiatric testimony, the South Carolina Supreme Court found

> [t]he excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly ... mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

Id. at 163, 672 S.E.2d at 563.

The South Carolina Supreme Court has already reviewed the proffered testimony, and it found that Dr. Steedman's proffered testimony regarding the results of his analysis

of the SPECT scan was cumulative to Dr. Schwartz-Watts' testimony at trial. Counsel's argument by counsel would not have changed the proffered testimony. Since the South Carolina Supreme Court has found as a matter of law that the testimony from Dr. Steedman that was disallowed at trial was cumulative to testimony already presented to the jury, Applicant cannot establish that he was prejudiced as a result of any error by trial counsel in this regard. As a result, Applicant's first claim for relief in this Application for Post-Conviction Relief should be dismissed as a matter of law.

Moreover, Applicant does not identify any new *and different* facts or issues that would supposedly necessitate revisitation of the issue; thus, his allegation fails to allege sufficient facts and is insufficient to survive dismissal as a matter of law. The issue should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

C. Motion to Dismiss Ground Two As a Matter of Law

Applicant's second ground for relief is as follows:

> Applicant was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution when trial counsel failed to object to extensive victim impact evidence that was outside the scope of proper victim impact evidence. See Strickland v. Washington, 466 U.S. 668 (1994); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007).

First, Applicant's claim is insufficient as he does not set forth with particularity exactly what evidence constituted the "extensive victim impact evidence that was outside the scope of proper victim impact evidence." As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").[3]

Second, the record reflects that no improper victim impact testimony was presented during the sentencing phase of Applicant's trial. InPayne v. Tennessee, the United States

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[3] Rule 12(e), SCRCP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

Supreme Court held that victim impact evidence can properly be introduced by the State in a capital trial. 501 U.S. 808, 111 S.Ct. 2597 (1991).

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

Id. at 825, 111 S.Ct. at 2608 (quoting Booth v. Maryland, 482 U.S. 496, 517, 107 S.Ct. 2529, 2540 (1987)(WHITE, J., dissenting) (citation omitted).

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 827, 111 S.Ct. at 2609.

Since Payne, courts have consistently upheld the use of victim impact evidence. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997); see State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004). InHumphries v. State, the South Carolina Supreme Court affirmed a PCR Court's finding that trial counsel was not ineffective for not objecting to the solicitor's closing arguments that the petitioner alleged "suggested he deserved to die because his life was worth less than his victim's." 351 S.C. 362, 373, 373-77, 570 S.E.2d 160, 166-8 (2002).

> Payne does not prohibit character comparisons between defendants and victims; it prohibits comparisons that suggest that there are worthy and unworthy victims. Therefore, Petitioner cannot establish either the

> ineffectiveness prong or the prejudice prong of the test as required to overturn the PCR court's denial of relief.

Id. at 376-77, 570 S.E.2d at 168. In Hall v. Catoe, the South Carolina Supreme Court found that trial counsel was ineffective when they failed to object to the solicitor's comparison of the worth of the defendant's life with that of his victims' lives. 360 S.C. 353, 362-4, 601 S.E.2d 335, 340-1 (2004). As it distinguished Hall's case from Humphries, the South Carolina Supreme Court held that such a comparison was an improper use of victim impact evidence. Id.

Applicant's second claim for relief should be dismissed because Applicant has failed to identify any improper victim impact evidence that was presented at his trial. The record reflects there were no improper comparisons made in the presentation of the victim impact evidence at Applicant's trial. Further, Applicant fails to show that any of the presentation of victim impact evidence at his trial was so unduly prejudicial that it rendered his trial fundamentally unfair. State v. Byram, 326 S.C. 107, 118-19, 485 S.E.2d 360, 366 (1997); see Payne, 501 U.S. at 825 (acknowledging challenge under due process grounds available to defendants to challenge improper use of victim impact evidence); 501 U.S. at 831 (J. O'Connor concurring). As a result, Applicant cannot establish that trial counsel was deficient in this regard. Moreover, Applicant also cannot establish that he was prejudiced by any alleged deficiency of counsel in handling the victim impact evidence at trial. Since Applicant cannot show that trial counsel was ineffective in this regard, this ground for relief should be dismissed.

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, or in the alternative that its motion for a more definite statement be granted.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General
(Counsel of Record)

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By: _____
ATTORNEYS FOR RESPONDENT

March 17, 2010.

COPY

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Return, Motion to Dismiss and Motion for Summary Judgment,*** by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Jason Paul Peavy, Esq.
Law Offices of Jason P. Peavy, LLC
1720 Main St., Ste #301
Columbia, SC 29201

Emily C. Paavola, Esq.
Death Peanalty Resource & Defense Ctr
P.O. Box 1311
Columbia, SC 29211

This 17th day of March, 2010.

ALPHONSO SIMON, JR.

Filed
2010 MAR 17 PM 4:39
Beth A. Carrigg
Clerk of Court
Lexington, SC

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON)	
)	
KEVIN J. MERCER, #6021)	
Applicant,)	**SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
vs.)	
State of South Carolina,)	
Respondent.)	
)	

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2003-GS-32-409

4. The date upon which sentence was imposed and the terms of the sentence: April 22, 2006 (Death Sentence)

5. A finding of guilty was made after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

7. The Courts to which applicant appealed:
   (a) The South Carolina Supreme Court.
   (b) The United States Supreme Court.

   The result in each Court to which applicant appealed:
   (a) Affirmed
   (b) Petition for Writ of Certiorari denied.

   The date of each result:
   (a) January 12, 2009
   (b) October 4, 2009

   Citations of any written opinion or orders entered pursuant to such results:
   (a) *State v. Mercer,* 381 S.C. 149, 672 S.E.2d 556 (2009).
   (b) *Kevin Mercer v. South Carolina*, 130 S.Ct. 104 (2009).

FILED
2010 DEC 17 A 11:48
BETH A. GARRIGG
CLERK OF COURT
LEXINGTON, SC

8. Not applicable.

GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(a): Trial counsel's acts or omissions included:

(1) Counsel failed to impeach the State's witness, Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State. (Trial Tr. 1542-1555).

(2) Counsel failed to move pre-trial for gunshot residue testing to be conducted on the gloves found in possession of Applicant's co-defendant, Marcus Thompson.

(3) Counsel failed to secure the assistance and testimony of an expert in eyewitness identification.

9(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(b): Trial counsel's acts or omissions included:

(1) Counsel failed to present available evidence that more than one perpetrator was present at the scene of the crime when the shooting occurred.

(2) Counsel failed to object to the State's improper cross examination of Dr. Steedman (*See Tennard v. Dretke*, 124 S.Ct. 2562, 2572-73 (2004); *see also, Skipper v. South Carolina*, 106 S.Ct. 1669, 1673 (1986)) and improper statements in closing argument. (*See Tenard*, 124 S.Ct. 2562, 2572-73 (2004); *see also, State v. Davis*, 112 S.E.2d 633, 635 (1961)).

(3) Counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive

behavior prior to the age of eighteen. Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning. Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage. Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

(4) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular. (Tr. 2078-83, 2101). This testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel further failed to object to inflammatory and prejudicial evidence concerning the victim's funeral, including the introduction of a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral. (Tr. pp. 2116-29, 2118-19, 2393). This evidence was calculated to inflame the passions and prejudice of the jury and counsel's failure to object was unreasonable and prejudicial. Finally, counsel failed to object when the trial judge cried in front of the jury during the funeral video. Counsel's failure to object was unreasonable and prejudicial. *Sapp v. South Carolina*, 2006-CP-08-2204, 44-47 (S.C. Court of Common Pleas) (citing *Van Dohlen v. State*, 360 S.C. 598, 612(2004)).

(5) Counsel failed to ask their expert witnesses to prepare reports even though counsel was aware that the State would impeach the credibility of their expert witnesses without such reports.

(6) Counsel failed to prepare their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision. Instead, counsel's experts consistently told the jury that their opinions had nothing to do with the crime.

(7) Counsel unreasonably waived the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether or not the State had proven an aggravating factor and whether or not the State had proven that Applicant was the shooter. *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984).

9(c): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the hearing on his motion for new trial when trial counsel committed the acts or omissions set forth below in section 10(c). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(c): Trial counsel's acts or omissions included:

(1) Counsel failed to impeach Marcus Thompson's testimony with a letter in counsel's possession that Thompson had written to Applicant in which he stated that he (Thompson) was the person who had shot the victim.

9 & 10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution when the State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment prior to the hearing on Applicant's motion for new trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Moreover, Applicant's motion for new trial was denied based on the State's presentation of false, misleading or inaccurate evidence. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Darden v. Wainwright*, 477 U.S. 168 (1986).

9 & 10(e): Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in qualifying jurors Deborah Lucas and Phillip Lofollette and in disqualifying juror Michael Sponhour. Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

9 & 10(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive functioning, both which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11. (a) Applicant has not filed any petition in State Court other than the mandatory appeal to the State Supreme Court.
(b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
(c) No other petitions were filed.
(d) No other petitions, motions or applications in this or any other court.

12. Not applicable.

13. None of the grounds set forth in Sections 9 and 10 has been previously presented to this or any other Court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was previously represented by counsel.

17. Applicant was represented at trial by Melissa J. Kimbrough, Esquire, 1720 Main Street, Suite 106, Columbia, SC 29201 and Cam Littlejohn, Esquire, 1720 Main Street, Suite 202, Columbia, SC 29201.

On direct appeal applicant was represented by Robert M. Dudek, Esquire, of the South Carolina Office of Appellate Defense, 1122 Lady Street, Columbia, South Carolina 29201.

18. Applicant seeks relief from his conviction and sentence.

19. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

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BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

December 16, 2010

COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

KEVIN J. MERCER, #6021)
Applicant,) **THIRD AMENDED APPLICATION**
vs.) **FOR POST-CONVICTION RELIEF**
State of South Carolina,)
Respondent.)

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.

2. Name and location of Court which imposed sentence: Lexington County Court of General Sessions.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 2003-GS-32-409

4. The date upon which sentence was imposed and the terms of the sentence: April 22, 2006 (Death Sentence)

5. A finding of guilty was made after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

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LEXINGTON, SC
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7. The Courts to which applicant appealed:
(a) The South Carolina Supreme Court.
(b) The United States Supreme Court.

The result in each Court to which applicant appealed:
(a) Affirmed
(b) Petition for Writ of Certiorari denied.

The date of each result:
(a) January 12, 2009
(b) October 4, 2009

Citations of any written opinion or orders entered pursuant to such results:
(a) *State v. Mercer,* 381 S.C. 149, 672 S.E.2d 556 (2009).
(b) *Kevin Mercer v. South Carolina,* 130 S.Ct. 104 (2009).

8. Not applicable.

GROUNDS FOR RELIEF WITH SUPPORTING FACTS

9(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(a): Trial counsel's acts or omissions included:

(1) Counsel failed to impeach the State's witness, Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State. (Trial Tr. 1542-1555).

(2) Counsel failed to move pre-trial for gunshot residue testing to be conducted on the gloves found in possession of Applicant's co-defendant, Marcus Thompson.

(3) Counsel failed to secure the assistance and testimony of an expert in eyewitness identification.

9(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

10(b): Trial counsel's acts or omissions included:

(1) Counsel failed to present available evidence that more than one perpetrator was present at the scene of the crime when the shooting occurred.

(2) Counsel failed to object to the State's improper cross examination of Dr. Steedman (*See Tennard v. Dretke*, 124 S.Ct. 2562, 2572-73 (2004); *see also, Skipper v. South Carolina*, 106 S.Ct. 1669, 1673 (1986)) and improper statements in closing argument. (*See Tenard*, 124 S.Ct. 2562, 2572-73 (2004); *see also, State v. Davis*, 112 S.E.2d 633, 635 (1961)).

(3) Counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive

behavior prior to the age of eighteen. Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning. Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage. Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

(4) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular. (Tr. 2078-83, 2101). This testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel further failed to object to inflammatory and prejudicial evidence concerning the victim's funeral, including the introduction of a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral. (Tr. pp. 2116-29, 2118-19, 2393). This evidence was calculated to inflame the passions and prejudice of the jury and counsel's failure to object was unreasonable and prejudicial. Finally, counsel failed to object when the trial judge cried in front of the jury during the funeral video. Counsel's failure to object was unreasonable and prejudicial. *Sapp v. South Carolina,* 2006-CP-08-2204, 44-47 (S.C. Court of Common Pleas) (citing *Van Dohlen v. State*, 360 S.C. 598, 612(2004)).

(5) Counsel failed to ask their expert witnesses to prepare reports even though counsel was aware that the State would impeach the credibility of their expert witnesses without such reports.

(6) Counsel failed to prepare their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision. Instead, counsel's experts consistently told the jury that their opinions had nothing to do with the crime.

(7) Counsel unreasonably waived the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether or not the State had proven an aggravating factor and whether or not the State had proven that Applicant was the shooter. *State v. Stewart,* 283 S.C. 104, 320 S.E.2d 447 (1984).

9(c) & 10(c): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the State's inflammatory and prejudicial presentation of victim impact evidence – which included a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral (Tr. pp. 2116-29, 2118-19, 2393) – and by the fact that the trial judge cried in front of the jury during this presentation.

9 & 10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States

Constitution and the corresponding provisions of the South Carolina Constitution when the State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment prior to the hearing on Applicant's motion for new trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Moreover, Applicant's motion for new trial was denied based on the State's presentation of false, misleading or inaccurate evidence. *See Napue v. Illinois*, 360 U.S. 264 (1959); *Brady v. Maryland*, 373 U.S. 83 (1963); *Darden v. Wainwright*, 477 U.S. 168 (1986).

9 & 10(e): Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in qualifying jurors Deborah Lucas and Phillip Lofollette and in disqualifying juror Michael Sponhour. Appellate counsel's performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

9 & 10(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive functioning, both which began before he was eighteen years old, he is ineligible for capital punishment. *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

11. (a) Applicant has not filed any petition in State Court other than the mandatory appeal to the State Supreme Court.
    (b) Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in State or Federal court.
    (c) No other petitions were filed.
    (d) No other petitions, motions or applications in this or any other court.

12. Not applicable.

13. None of the grounds set forth in Sections 9 and 10 has been previously presented to this or any other Court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was previously represented by counsel.

17. Applicant was represented at trial by Melissa J. Kimbrough, Esquire, 1720 Main Street, Suite 106, Columbia, SC 29201 and Cam Littlejohn, Esquire, 1720 Main Street, Suite 202, Columbia, SC 29201.

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Respectfully submitted,

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BY: Emily C. Paavola
ATTORNEY FOR APPLICANT

January 11, 2011

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LEXINGTON, SC
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COPY

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON KEVIN J. MERCER, #6021 Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 09-CP-32-5465 **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Third Amended Application for Post-Conviction Relief, was served by first class United States mail, postage prepaid, this 12th day of January, 2011, upon the following:

Alphonso Simon, Jr.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

Jill A. Rider

Jill A. Rider

PD

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LEXINGTON, SC

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF LEXINGTON)	2011 JAN 31 P 1:01
Kevin Mercer, #6021,)	C/A No. 2009-CP-32-5465
)	BETH A. CARRIG CLERK OF COURT LEXINGTON S.C.
Applicant,)	
v.)	**RETURN TO THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
)	
The State of South Carolina,)	**(Capital Case)**
)	
Respondent.)	

Respondent, above-named, here by make a Return to the third amended application for post-conviction relief ("APCR"), filed by Kevin Mercer ("Applicant") on January 12, 2010. This APCR stems from a murder conviction and death sentence.

Respondents respectfully request pursuant to South Carolina Code of Laws, Section 17-27-160(C), that this Court set a scheduling hearing with the parties within thirty (30) days to set any evidentiary hearing that may be necessary within one-hundred and eighty (180) days from that date. Respondents also would request a hearing on the motions to dismiss and for summary judgment in the instant action.

I. Procedural History

During the February 2003 term of the Lexington County Court of General Sessions, the Lexington County Grand Jury indicted Applicant, Kevin Mercer, for murder, armed robbery, possession of a firearm while in the commission of a violent crime, and criminal conspiracy (2003-GS-32-409). **{R. 2729-36}**. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation.

The trial judge in this case was the Honorable John Few. Applicant was represented at the trial level by Cameron B. Littlejohn, Jr., Esquire, and Melissa J.

Kimbrough, Esquire. Eleventh Circuit Solicitor Donald V. Myers, Esquire, Assistant Solicitor S. Rick Hubbard, III, Esquire, Assistant Solicitor D. Shawn Graham, Esquire, and Assistant Solicitor Marion Moses, Esquire prosecuted the case for the State.

Jury selection took place from April 10 through April 13, 2006. Trial began before Judge Few and a jury on April 17, 2006, and on April 19, 2006, Applicant's jury convicted him of all charges. **{R. 1708-09}.**

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on April 20, 2006. Judge Few submitted the following aggravating factor to the jury:

> Murder was committed while in the commission of robbery while armed with a deadly weapon.

The following mitigating factors were submitted to the jury:

> (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.
>
> (2) The capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired.
>
> (3) The age or mentality of the Defendant at the time of the crime.

On April 22, 2006, Applicant's jury found the aggravating factor and recommended a sentence of death. **{R. 2431-34}.** Judge Few then sentenced Applicant to death for murder, thirty (30) years for armed robbery consecutive to the sentence Applicant was serving for ABIK, and five (5) years consecutive for possession of a weapon. **{R. 2434-35}.**

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on April 24, 2006. On appeal, Applicant was represented by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission

on Indigent Defense, Division of Appellate Defense, and Melissa Jane Reed Kimbrough, Esquire. By Order of the South Carolina Supreme Court filed July 10, 2006, Applicant's case was remanded back to the Honorable John C. Few, Circuit Court Judge, to hear Applicant's motion for a new trial based on after discovered evidence. In an Order filed September 26, 2006, Judge Few denied the Motion for a New Trial Based on After-Discovered Evidence. A timely Notice of Appeal was filed on Applicant's behalf on October 4, 2006. On June 26, 2008, Dudek and Kimbrough filed with the state supreme court the Final Brief of Appellant, in which they asserted the following issues on behalf of Applicant:

> (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.
>
> (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.
>
> (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 objection that this was psychiatric testimony went to the weight and not the admissibility of the expert's opinion.

> (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 excusing this qualified juror for cause.
>
> (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.
>
> (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 st ate failed to investigate Thompson and fully ignored his role in the crime. Further, the court erroneously excluded this evidence as inadmissible evidence of third-party guilt.

The State, through Senior Assistant Attorney General S. Creighton Waters, Esquire, filed its Final Brief of Respondent on June 24, 2008. Applicant, through Mr. Dudek and Ms. Kimbrough, filed his Final Reply Brief of Appellant on June 26, 2008.

Oral argument in the case was held before the state supreme court on October 7, 2008. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on January 12, 2009. State v. Mercer, 381 S.C. 149, 672 S.E.2d 556 (2009). Counsel for Applicant filed a Petition for Rehearing on January 27, 2009. The petition for rehearing was denied by the South Carolina Supreme Court on February 19, 2009. The Remittitur was also issued on February 19, 2009.

On March 18, 2009, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court.

Applicant, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated May 20, 2009. The State, through Assistant Attorney General Waters, filed its Brief in Opposition to the Petition for Writ of Certiorari on June 10, 2009. The United States Supreme Court denied the petition for writ of certiorari by order dated October 5, 2009.

Applicant filed a second Petition for Stay of Execution. The State filed a letter in response to the Petition for Stay of Execution on October 15, 2009. By Order filed November 4, 2009, the Supreme Court of South Carolina granted Applicant's Petition for Stay of Execution. In the Order, the South Carolina Supreme Court appointed the Honorable James R. Barber, III, Circuit Court Judge, to hear this post-conviction relief action. An appointment of counsel hearing was held by this Court on November 24, 2009. Applicant was present, and he was represented at the hearing by Robert M. Dudek, Esquire, Deputy Chief Attorney for Capital Appeals with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, and Elizabeth Franklin-Best, Esquire, Assistant Appellate Defender with the Commission on Indigent Defense, Division of Appellate Defense. At the hearing, the State was represented by Senior Assistant Attorney General S. Creighton Waters, Esquire, and Assistant Attorney General Alphonso Simon, Jr., Esquire. Applicant, through Mr. Dudek, filed his initial Application for Post-Conviction Relief on December 4, 2009. By Order of this Court filed December 9, 2009, Emily C. Paavola, Esquire, and Jason Paul Peavy, Esquire, were appointed as counsel for Applicant.

Attached herewith and incorporated herein by reference are the following documents:[1]

(1) Record on Appeal, containing six (6) volumes;

(2) Final Brief of Appellant;

(3) Final Brief of Respondent;

(4) Final Reply Brief of Appellant;

(5) State v. Kevin Mercer, SC S.Ct. Opinion No. 26582, filed January 12, 2009, with corrective note dated January 23, 2009;

(6) Petition for Rehearing;

(7) Order Denying Petition for Rehearing;

(8) Petition for Writ of Certiorari to the Supreme Court of South Carolina;

(9) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;

II.

Statement of Facts

Applicant was convicted and sentenced for murdering a highly decorated soldier in the parking lot of the soldier's Columbia-area apartment complex, in the process of stealing the soldier's SUV.

A. State's evidence in the guilt phase

On May 16, 2002, the night he was murdered, Army Sgt. Tracy Davis attended a softball game with his roommate, Clifton Magwood, who was also a sergeant and recruiter like Tracy. After the game, Tracy drove himself home in his white Lincoln Navigator.

[1] Respondent is only sending the attachments to the Clerk of Court. Counsel for Applicant were mailed copies of these attachments on January 20, 2010.

Meanwhile, Clifton had already arrived back at their apartment and lay down at about 11 p.m. to watch a movie. Suddenly, he heard a commotion outside and Tracy's voice saying, "I'll give it to you". Clifton looked out the window to see Tracy being robbed a heavy set broad shouldered black male about 5'11 to 6' tall, wearing a dark outfit and dark hat. This man had what looked to be a gun in his hand. **{R. 1316-29; 1334-38; 1346}.**

Clifton immediately called 911 and ran upstairs to Tracy's room to look for a pistol. Clifton could not find any bullets for the gun, and as he was coming back downstairs -- still on the phone with 911 -- he heard a gunshot. Clifton ran outside in time to see Tracy's Navigator speeding away and Tracy lying in the brush with a gunshot wound to the back of his head. Officers and EMS responded to the scene, but there was nothing they could do. Clifton gave them a description of Tracy's white Navigator with a Masonic symbol on the rear. **{R. 1299-1301; 1308-09; 1329-30; 1340-45; 1353; 1359-62; 1576-80}.**

Meanwhile, Lexington County Sheriff's Deputy Stazer was out on I-20 when he received the BOLO on Tracy's SUV. At about 11:46 p.m., he saw a white Navigator with a Masonic emblem traveling westbound. Stazer pulled the SUV, and approached its two male occupants from the passenger side. After Stazer asked for a driver's license, proof of insurance, and registration, the driver asked if he did anything wrong. Stazer told him to produce the requested documents, but after looking around in the cabin, the driver could only find a yellow Pulliam Ford receipt. The driver claimed the SUV belonged to his brother, but dispatch advised Stazer that the name on the receipt matched the victim's. Deputy Stazer's stop then became a felony one. **{R. 1313; 1379-89}.**

Stazer ordered the occupants from the car at gunpoint, and as the passenger got out, a baggie of fourteen .357 bullets and one black knit glove fell from the pants leg. Underneath the driver's seat, Stazer found a .357 revolver. The driver proved to be Applicant, who was wearing a dark jean outfit. The passenger proved to be Marcus Thompson, who was a good bit smaller and more slender than Applicant. Thompson was wearing a dark shirt over a white one, with the white shirt was clearly visible at the neck. Late, three more gloves were found in Thompson's pants after they were logged into the evidence room. **{R. 1390-95; 1403-07; 1412-16; 1451}.**

The revolver found underneath Applicant's seat had one fired casing and five unfired cartridges. This gun was conclusively matched to the bullet to the back of the head that killed Tracy. **{R. 1469-78; 1568}.**

The State also called Applicant's cellmate in pre-trial lockup, who testified that Applicant bragged about committing the murder. Applicant told the cellmate that a guy had come to him looking for a SUV, or a truck, and Applicant told him he knew where one was. They went to the apartment complex, and when Tracy arrived in the Navigator they approached him and demanded his keys. Applicant said he made Tracy get on his knees, and as Applicant and Thompson jumped in the SUV, Applicant turned and shot Tracy in the back of the head. Applicant related that he and Marcus were heading to Atlanta for "Freak Neak", which is a weekend long party for college and high school kids -- but they did not make it because they got a flat tire and the cops pulled them. **{R. 1544-48}.**

Applicant was tested for GSR at approximately 1:30 a.m. Two rounded lead particles were found on the back of his left palm, which is consistent with but not conclusive

of the presence of GSR. **{R. 1420; 1454-64; 1486; 1501-21}.** On his booking form, Applicant was listed as being left handed. **{R. 1540}.**

B. The defense's guilt phase case

The defense first called an officer to testify police searched a car belonging to Applicant found at an Economy Inn near I-20. **{R. 1585-87}.** Next, the defense called a private forensic expert to testify that he would expect higher levels of GSR on someone who fired a .357 revolver. The expert testified that a GSR transfer was possible if an officer touched his weapon and then cuffed a suspect, but admitted on cross that such a transfer was highly unlikely. **{R. 1611-26}.** An evidence custodian testified that police logged in a pair of gloves found in pants belonging to Thompson. **{1629-30}.** Applicant called his mother, who claimed he was right-handed. **{R. 1637-38}.**

C. The State's reply case

Deputy Stazer testified in reply that he had not fired his weapon since qualification in May of 2001, that he cleaned his gun right after, that he never fired his gun from that time until the incident but cleaned his gun regularly, and that he cleaned his cuffs after his cuffs after every arrest with a sanitizing spray. **{R. 1640-43}.**

D. The State's penalty phase case

In the penalty phase, the State began by introducing Applicant's fairly extensive record of driving violations and suspensions. **{R. 1735-43}.** Next, the State called a former Richland officer who caught Applicant engaging in auto tampering. **{R. 1745-47}.** Another Richland officer described responding to a civil disturbance, and then pulling over a car that matched the description given. Applicant was inside, along with five ounces of marijuana

and a .38 revolver – leading to his conviction for possession of marijuana with intent to distribute. **{R. 1748-52}**. A third Richland officer testified about Applicant's convictions for second degree burglary and strong arm robbery in 2001. **{R. 1753-55}**. The victim of that crime testified Applicant was part of a group of men that broke into her house while her grandchildren were there, pulled her out of the bath, and demanded money while holding a shotgun to her head. **{R. 1757-58}**. Yet another Richland officer testified about pulling a car Applicant was driving over in 2001, only to find a pistol after Applicant reached down for it between his legs. The officer was so concerned he purposefully left his fingerprints on the trunk of Applicant's car in case something happened. Applicant thought the whole thing was funny, laughing throughout his arrest. **{R. 1776-85}**. The backup officer also testified as to this event. **{R. 1789-91}**.

The next group of witnesses testified to Applicant's misbehavior and disciplinary infractions while in the Richland County Detention Center. **{R. 1761-75}**. A Richland County records custodian testified as to the dates of Applicant's four stints in their jail. **{R. 1793-94}**.

Various members of probation offices testified to Applicant's violation of his probation conditions and positive tests for cocaine and marijuana, to the point that his probation was revoked and he received three years and six months. **{R. 1795-1813}**.

What followed was a slew of witnesses from the Lexington County Detention Center as to Applicant's disciplinary issues to the point that even LCDC eventually sent Applicant to SCDC for safekeeping prior to trial. This list of offenses included: (1) placing a green leafy substance in his mouth and swallowing it during a surprise shakedown **{R. 1821-23}**;

(2) tapping a window to display his erect penis to a female staff member **{R. 1824-29}**; (3) overturning a food cart and dumping 30 gallons of tea because he had been put in confinement allegedly without an explanation **{R. 1830-35}**; (4) refusing direct orders to stay in his cell when on confinement **{R. 1837-40}**; (5) stealing medications from the nurse's cart **{R. 1841-44}**; (6) ingesting pills and then telling officers he was going to die for what he had done anyway **{R. 1855-57}**; (7) refusing a direct order to go back in his cell after recreation time had ended **{R. 1865-67}**; (8) removing bolts from a bunk and slamming it into the wall to create a six-inch hole as part of an escape plan **{R. 1869-79}**; (9) hiding a razor wrapped in toilet paper in a light fixture **{R. 1881-83}**; (10) creating a disturbance in his cell after which a shank was discovered within **{R. 1895-97}**; (11) violating mail rules **{R. 1899-1904}**; (12) inciting a fight and possessing a weapon **{R. 1887-92}**; (13) possessing contraband for which he was sentenced to 60 days disciplinary detention **{R. 1985}**; (14) slipping a note to a female officer as she passed his cell in which he propositioned her and offered to be her "secret friend" and "personal slave" **{R. 1987-1992}**; and (15) being the only occupant in a cell where officers noticed the light fixture cover was broken, and a two to three-inch piece of plastic was missing that could be used as a weapon **{R. 1993-99}**. When he returned from SCDC's safekeeper status, Applicant had to be permanently segregated for officer safety, due to all his infractions. He also had to be placed in full restraints for 72 hours because there was nothing else the officers could do with Applicant. **{R. 1999-2000}**.

Finally, the State presented LCDC officers who testified about an incident in which Applicant's roommate approached guards and told them there was a fight in the recreation

yard. When officers went to check it out, they saw the roommate run in from the yard towards the bathroom, with Applicant in hot pursuit, holding something in his hand and amidst cries of "he's got a shank!" The two inmates fought in the bathroom, and as they refused to comply with instructions to stop, other fights broke out among the inmates watching. In addition to various jailhouse infractions, Applicant was convicted for this incident of assault and battery with intent to kill ("ABIK"), for which he received twelve years, and carrying a weapon by an inmate, for which he received five years. The roommate had facial lacerations from the fight, and testified Applicant was attacking him with two shanks made from toothbrush handles and razor blades. **{R. 2004-36}**. The roommate also noted that Applicant told him one night that he did not shoot the officer who pulled him because it was the "cop's lucky day." **{R. 2038-39}**.

The State called an officer to testify as to a Wal-Mart receipt and items Applicant purchased shortly before the crime, including a dark hat and visor, as well as to introduce photographs of the victim at the crime scene. **{R. 2043-52}**. The pathologist more clearly described the wound that killed Tracy. **{R. 2053-66}**.

The State concluded with some victim impact witnesses, who testified about Tracy's military career; his deep relationship with his daughter Tay and his mother; his strong friendship with his fellow soldiers and their families; his meticulous devotion to his military duties and responsibilities; his military career, which was on the "fast track"; his posthumous promotion to Master Sergeant, for which he had been selected shortly before his murder; the naming of the award for leadership at the recruiter instruction school after Tracy; his involvement and good works in the community with the Masonic Order; and his

efforts in starting up a youth mentoring program – the center of which was named for Tracy in his honor. **{R. 2067-2133}.**

E. Defense penalty phase case

The defense began with psychiatrist Dr. Donna Schwartz-Watts. She testified: (1) Applicant had a long history of asthma, but also a large number of somatic complaints for such a young man, which may be manifestations of anxiety **{R. 2145-47}**; (2) Applicant changed schools a lot, had terrible grades, a diagnosed learning disability, and a low IQ with poor verbal skills **{R. 2146-48}**; (3) Applicant had a diagnosis of oppositional defiant disorder as a child, meaning he had problems with authority, and also had mixed developmental delay disorder **{R. 2149-51}**; (4) while Applicant was not very forthcoming during their interviews and more concerned with his somatic problems rather than the big picture of what he was facing, Applicant did say he witnessed as a child his father assault his mother, and violence in the area he grew up **{R. 2152-54}**; (5) Applicant claimed a substance abuse history, including cocaine, marijuana, alcohol, huffing freon, and hallucinogens like angel dust, and his drug use increased after his grandmother died a year prior to the murder of Tracy **{R. 2154-55}**; (6) she ordered neuropsychological testing on Applicant given his drug history and involvement in a car wreck, but could not complete the testing as Applicant's effort was too variable **{R. 2155-56}**; (7) his mother used Dexatrim in the first two months of her pregnancy **{R. 2158-59}**; (8) his mother would come home and find marks on Applicant's arms and was concerned he was being abused by his father, and Applicant told another psychologist that he had been sexually abused **{R. 2158-59}**; (9) one his sister hit him hard with a frying pan **{R. 2160}**; (10) Applicant's mother really

helped him with school and he was able to graduate 180th of a class of 181 despite his learning disability, but his lack of success there meant school was not a safe haven from chaos at home **{R. 2160-2162}**; (11) there is a family history of depression, anxiety, and substance abuse **{R. 2162-63}**; (12) Applicant's wife said he frequently awoke with nightmares, which is a symptom of post-traumatic stress disorder (PTSD) **{R. 2163-65}**; (13) Applicant had diagnoses of PTSD, substance abuse, a reading disorder, and a personality disorder with antisocial traits **{R. 2165-68; 2187}**; and (13) that all of these things contributed to Applicant's "horrible judgment" **{R. 2168-69}**.

The defense next called Dr. Marti Loring, a clinical social worker who was qualified as an expert on PTSD, trauma, and abuse. **{R. 2193}** Dr. Loring generally described the symptoms and characteristics of PTSD and testified: (1) Applicant has PTSD **{R. 2195}**; (2) Applicant's father would drink, come home, and beat Applicant's mother, during which Applicant would try to protect her **{R. 2203}**; (3) Applicant got severe beatings that were longer than his other brother, because for a time Applicant's father thought Applicant was someone else's biological son **{R. 2203-06}**; (4) Applicant's mother would beat him as well **{R. 2204-06}**; (5) part of his childhood was spent in squalid conditions in a Philadelphia home with holes, pigeons, and cats **{R. 2206}**; (6) the family had to leave Philadelphia for its safety after Applicant's older brother identified some thugs who robbed him **{R. 2207}**; (7) he has difficulty concentrating and had trouble in school despite his efforts, given his reading disability **{R. 2207-08; 2213}**; (8) he started to decline after a number of family deaths in 2001 **{R. 2210; 2217-18}**; (9) he was raped when he was young by an uncle **{R. 2213}**; (10) he had an imaginary friend named Pyro **{R. 2214}**; he had untreated

depression and anxiety that led to substance abuse **{R. 2215-16}**; and (11) his antisocial traits were in large measure learned from the difficult environment in which he was raised **{R. 2218-19}**. As Dr. Schwartz-Watts had done, Dr. Loring agreed there was no connection between Applicant's PTSD and the murder of Tracey Davis. **{R. 2223}**.

The defense had earlier called Dr. Alexander Morton, a psychopharmacologist, who described Applicant's self-reported use of alcohol, marijuana, cocaine, and other drugs such as hallucinogens. Dr. Morton opined this drug use caused psychiatric problems, and stated: (1) a drug such as cocaine so stimulates the brain that it becomes a basic need; (2) Applicant would use drugs to diminish the constant anxiety and other symptoms of PTSD; (3) Applicant first used marijuana at age nine and then moved on to various legal substances as well as hard drugs; and (4) symptoms that could have resulted from Applicant's PTSD and substance abuse include increased anxiety, poor judgment, restlessness, agitation, irritability, and decreased inhibitions. **{R. 1906-48}**. On cross, Morton noted that he was a pharmacist and could not diagnose, that Applicant reported far more drug use to the defense experts than he earlier did during his state ordered evaluations, that Applicant reported drug use only that morning and not the evening of the crime, and that while people off drugs should get better, Applicant's ABIK took place after he had been in the system two years. **{R. 1948-49; 1961-67; 1972-74}**.

The defense called former warden James Aiken, who testified that SCDC's security was so infallible that it could safely manage someone with the disruptive behavior patterns of Applicant. Aiken did not believe Applicant would be a predatory type of prisoner, even though Applicant had attacked another inmate and cut his face with a weapon – because

a predator would have cut the inmate's throat, and extreme force was not required to regain control. **{R. 2234-40}**. Aiken stated that SCDC had all the equipment, training, and personnel needed to control Applicant in the setting. **{R. 2241}**. Even though under this Court's precedent the State cannot cross on the adequacy of SCDC's security measures despite Aiken's testimony as to their infallibility, Aiken then detailed with specificity the security measures available to deal with a number of potential problems in prison, and opined Applicant could be safely contained without any unusual risk to staff, other inmates, or the community (which of course, can only relate to the *general* adequacy of SCDC's security measures to prevent escape attempts). **{R. 2242-43}**. Finally, over the solicitor's adamant objection that it related to inmates other than Applicant, Aiken testified that inmates typically cannot keep up with disruptive behavior in prison because they eventually "burn out" as they get older. **{R. 2245-48}**.

Neurologist Dr. John Steedman was the next witness for the defense. Dr. Steedman examined Applicant in the jail, and found: (1) that he had a reflex disparity when tapping his biceps and triceps that indicated some sort of interruption in the pathways of the brain **{R. 2268-70}**; (2) his IQ testing, while not qualifying as mentally retarded, was in the range of a learning disorder **{R. 2270-72}**; (3) he received supplemental security income at a young age due to this disability **{R. 2271-72}**; (4) his drug use would affect his judgment and lower his functioning **{R. 2273}**; (5) there was a questionable abnormality on a "spect scan" of the subfrontal cortex, but that the radiologist thought the significance was questionable and not indicative of a severe abnormality **{R. 2274; 2294-96}**; (6) Applicant had a disability in terms of his functioning, as well as anxiety disorders and PTSD **{R.**

2297-98}; and (7) there was a cumulative effect on Applicant of the brain dysfunction, PTSD, and substance abuse **{R. 2298}**. On cross, Dr. Steedman admitted Applicant's MRI was normal, and that the "questionable abnormality was not the proximate cause of the murder, but could be a contributing factor to poor judgment." **{R. 2308-09}**.

Retired high school coach Charles Mancuso coached Applicant in football during high school. He stated Applicant was easily influenced by peers, and they had to keep things simple since he was in special needs classes. However, Applicant was a hard worker and "outstanding student." **{R. 2313-16}**.

Next was Applicant's younger sister, who stated that her brother was always there for her, that her father had anger problems, and that the family moved south to escape bad conditions. **{R. 2320-23}**. Applicant's other sister testified Applicant was picked on by other kids, that the family moved because of the bad environment, that there was violence between her parents, and that Applicant "caught" more from his parents than the others. **{R. 2323-27}**. Applicant's wife stated he was "the best male role model [she] had ever met in [her] life," and was her protector and friend. After displaying some family photographs, she noted that Applicant began to "shut down" after his grandmother died in 2001. **{R. 2327-32}**. Applicant's mother testified, contending that the family had a difficult home life with her husband's anger and abuse, on top of bad schools and a poor environment. She stated he had problems as an infant and she had taken diet pills during her pregnancy because she did not know she was expecting. She described the effects of Applicant's learning disability, and his difficulties in school, with his peers, and in trying to find employment. She also displayed some family photos, and described Applicant's love for

his family. **{R. 2332-2351}.** Finally, Applicant's father testified, admitting he was responsible for anger and violence in the home, but stating that was how he grew up and he did not know any better. He denied ever drinking, though. **{R. 2351-58}.**

III.

Allegations in Third Amended Application

Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, $8 3 and 14 of the South Carolina constitution - during the guilt-or-innocence phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See Strickland v. Washington, 466 U.S. 668 (1984).

10(a): Trial counsel's acts or omissions included:

(1) Counsel failed to impeach the State's witness, Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State. (Trial Tr. 1542-1 555).

(2) Counsel failed to move pre-trial for gunshot residue testing to be conducted on the gloves found in possession of Applicant's co-defendant, Marcus Thompson.

(3) Counsel failed to secure the assistance and testimony of an expert in eyewitness identification.

9(b): Applicant was denied the right to effective assistance of counsel -guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, $5 3 and 14 of the South Carolina constitution - during the sentencing phase of his capital trial when trial counsel committed the acts or omissions set forth below in section 10(b). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See Strickland v. Washington, 466 U.S. 668 (1984).

10(b): Trial counsel's acts or omissions included:

(1) Counsel failed to present available evidence that more than one perpetrator was present at the scene of the crime when the shooting occurred.

(2) Counsel failed to object to the State's improper cross examination of Dr. Steedman (See Tennard v. Dretke, 124 S.Ct. 2562, 2572-73 (2004); see also, Skipper v. South Carolina, 106 S.Ct. 1669, 1673 (1986)) and improper statements in closing argument. (See Tenard, 124 S.Ct. 2562, 2572-73 (2004); see also, State v. Davis, 112 S.E.2d 633, 635 (1961)).

(3) Counsel failed to uncover and present all available evidence of Applicant's mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen. Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning. Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage. Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

(4) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular. (Tr. 2078-83, 2101). This testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial. Counsel further failed to object to inflammatory and prejudicial evidence concerning the victim's funeral, including the introduction of a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral. (Tr. pp. 2116-29,2118-19,2393). This evidence was calculated to inflame the passions and prejudice of the jury and counsel's failure to object was unreasonable and prejudicial. Finally, counsel failed to object when the trial judge cried in front of the jury during the funeral video. Counsel's failure to object was unreasonable and prejudicial. Sapp v. South Carolina, 2006-CP-08-2204, 44-47 (S.C. Court of Common Pleas) (citing Van Dohlen v. State, 360 S.C. 598, 612(2004)).

(5) Counsel failed to ask their expert witnesses to prepare reports even though counsel was aware that the State would impeach the credibility of their expert witnesses without such reports.

(6) Counsel failed to prepare their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision. Instead, counsel's experts consistently told the jury that their opinions had nothing to do with the crime.

(7) Counsel unreasonably waived the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether or not the State had proven an aggravating factor and whether or not the State had proven that Applicant was the shooter. State v. Stewart, 283 S.C. 104, 320 S.E.2d 447 (1984).

9(c) & 10(c): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the State's inflammatory and prejudicial presentation of victim impact evidence - which included a video set to music that was shown at the victim's memorial and testimony concerning an army "roll call" that took place during the victim's funeral (Tr. pp. 21 16-29, 21 18-19, 2393) - and by the fact that the trial judge cried in front of the jury during this presentation.

9 & 10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution when the State suppressed evidence that was both exculpatory and material to Applicant's guilt or punishment prior to the hearing on Applicant's motion for new trial. See Brady v. Maryland, 373 U.S. 83, 87 (1963). Moreover, Applicant's motion for new trial was denied based on the State's presentation of false, misleading or inaccurate evidence. See Napue v. Illinois, 360 U.S. 264 (1959); Brady v. Maryland, 373 U.S. 83 (1963); Darden v. Wainwright, 477 U.S. 168 (1986).

9 & 10(e): Applicant was denied the right to effective assistance of appellate counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§3 and 14 of the South Carolina constitution - during the appellate proceedings when appellate counsel failed to raise on appeal the trial court's error in qualifying jurors Deborah Lucas and Phillip Lofollette and in disqualifying juror Michael Sponhour. Appellate counsel's performance was both unreasonable and prejudicial as outlined below. See Strickland v. Washington, 466 U.S. 668 (1984).

9 &: 10(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded. Because Applicant has significantly sub-average intellectual functioning, existing concurrently with deficits in adaptive functioning, both which began before he was eighteen years old, he is ineligible for capital punishment. Atkins v. Virginia, 536 U.S. 306 (2002); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003).

A. General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598-99 (4th Cir. 1996). The Court should "decline to allow an

ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

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

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333, 504 S.E.2d at 823 (quoting Strickland). Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well

within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

Ground 9(c)(1): Ineffective assistance of counsel in guilt phase; Counsel failed to impeach the State's witness, Terry Brown, with evidence of personal bias and animosity against Applicant due to a physical altercation that Brown and Applicant had been involved in prior to Brown's offer to testify on behalf of the State. (Trial Tr. 1542-1555).

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in not impeaching Terry Brown during the guilt phase of his trial with evidence he had a personal bias against Applicant. Nor can Applicant establish he was prejudiced. As a result, this claim should be dismissed.

Underlying facts: Terry Brown was one of Applicant's cell mates at the Lexington County Detention Center. (R. 1543). During the guilt phase of Petitioner's trial, Brown testified that while at the Lexington County Detention Center, Applicant told him about the murder. According to Brown, Mercer told him that on the night of the murder he went with another guy looking for a truck. Mercer and the other guy drove around. They later parked in a parking lot in an apartment complex. When the person with the truck (i.e. the victim, Tracy Davis) arrived, Mercer and the other guy approached the victim and asked for the keys. (R. 1544). Mercer told Brown that the victim gave him the keys to the truck, and Mercer told the guy to get down on his knees. Mercer stated the other guy got into the passenger's side of the truck. Shortly thereafter, Mercer turned around and shot the victim in the head and then got into the truck. (R. 1544, 1546).

Brown noted that Mercer indicated he drove either a Bonneville or a Cadillac to the apartment complex. (R. 1545). Brown also indicated that Applicant stated he was the only one with a weapon at the scene. (R. 1545). Brown testified that Applicant told him they were heading to Atlanta for "Freak Neak," a large weekend party for high school and college students. (R. 1546). Brown also indicated Applicant told him that he did not make it to Atlanta because of a flat tire. (R. 1546-47). According to Brown, Applicant asserted the police stopped him shortly after the flat tire. (R. 1547).

During cross examination, defense counsel asked Brown about his prior convictions. (R. 1550-51). Brown testified during cross examination that the conversation he had with Applicant occurred in December 2003. (R. 1551). Brown admitted he did not report the conversation to one of the corrections officers or anyone else. Further, Brown admitted he did not take any notes about the conversation at the time. He agreed that it was not until February 2006 that he told an investigator about the conversation. He testified that he did not report the conversation until someone asked him about it. (R. 1554). Brown noted that his testimony was that Applicant made the victim kneel, and that Applicant shot the victim while he was on his knees. (R. 1554). Brown also agreed that Applicant indicated he had a flat tire that evening. (R. 1554). Brown also acknowledged he had talked with other inmates about other people's cases. (R. 1555).

During the sentencing phase, Brown testified he was attacked by Petitioner while at the Lexington County Detention Center. The attack was the basis for Applicant's conviction for assault and battery with intent to kill.

Respondent submits Applicant cannot show that counsel was deficient in not cross-examining Brown on any alleged bias resulting from the fact Applicant had attacked Brown

prior to his attack. "In hindsight, there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would past muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Here, counsel vigorously cross-examined Brown. Further, the record reflects that counsel had a clear plan for his cross-examination. Counsel was able to establish that Brown's version of Applicant's story did not match the evidence of the crime. Counsel also impeached Applicant using his prior convictions. Counsel established Brown made no effort to report his conversation with Applicant in a timely fashion, and that Brown had no notes for a conversation that occurred two years prior to his testimony at trial. In all, Applicant cannot show that counsel was deficient. Counsel's cross-examination was reasonable. Applicant also cannot show that he was prejudiced by counsel not impeaching Brown on the prior conflict he had with Applicant.

Ground 9(a)(2): Ineffective assistance of counsel for failing to move pre-trial for gunshot residue testing be conducted on gloves found in possession of Marcus Thompson

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in having the co-defendant's gloves tested for gunshot residue. Nor can Applicant establish he was prejudiced. As a result, this claim should be dismissed.

Underlying facts: At trial, Dennis Stazer, the officer who stopped Applicant and his co-defendant on the highway, testified that when he pulled Applicant's co-defendant, Marcus Thompson, out of the car, gloves and a bag of shells fell out of Thompson's pants'

leg. (R. 1392). During cross, Stazer indicated the glove was black knit. (R. 1403). He turned it into evidence. (R. 1407). Stazer did not find any other gloves on Thompson during the patdown. (R. 1407).

Jennifer Stoner, the SLED analyst who analyzed the gunshot residue tests conducted on Applicant and Thompson testified that she did not receive any gloves for testing. (R. 1537-38). Jeffrey Hollifield, the defense expert on gunshot residue analysis, testified cloth gloves can be tested for gunshot residue. (R. 1624). Candy Kyzer, an evidence custodian, testified that gloves were retrieved from Marcus Thompson's pants after he was booked at the Lexington County Detention Center. (R. 1627-30). After arguments regarding the relevance of the admission of the gloves, the defense entered the gloves retrieved during the investigation into evidence as Defense Exhibit 4. (R. 1631-32).

During closing arguments, Mr. Littlejohn argued the State could not establish that Applicant was the one who pulled the trigger because they did not analyze the gloves found on Marcus Thompson. (R. 1677, 1678, 1679-81).

At the motion for new trial hearing, counsel requested the gloves be tested. Defense counsel noted that they were requesting permission to have the gloves of Applicant's co-defendant, Marcus Thompson, tested for gunshot residue. (R. p. 2686). Counsel presented testimony from Kevin Fuller, a former cell mate of Mr. Thompson who claimed that Thompson admitted to shooting and killing Sgt. Davis. According to Fuller's testimony, Thompson indicated that he and Applicant had been shooting a gun all day. (R. p. 2629), Further, Fuller stated that Thompson admitted to shooting Davis behind the ear, and Thompson bragged that not getting caught because no one tested the inside of the

gloves. (R. 2630). Fuller noted that Thompson had indicated he had been wearing the gloves turned inside outwards all day. (R. 2634).

Marcus Thompson also testified at the hearing. He testified that he did not participate in the murder. (R. 2605). He also stated that he did not tell Fuller that he shot Sgt. Davis, or that he was wearing knit gloves turned inside out when he killed Sgt. Davis. (R. 2607). Thompson admitted to handling the gun after the shooting. (R. 2612). Thompson noted that he was wearing gloves when he picked up the gun because he did not want to leave his fingerprints on the gun. (R. 2612).

The trial court denied defense counsel's request for testing the gloves for gunshot residue. (R. 2726).

Respondent submits Applicant cannot establish counsel was deficient in not requesting that the co-defendant's gloves be tested for gunshot residue. The record reflects that counsel had a strategic reason for not having the gloves tested. Counsel argued that the State could not establish beyond a reasonable doubt that Mercer was the one who shot the victim because the State failed to test Thompson's gloves for gunshot residue. Since the gloves were not tested, counsel could assert this argument without any concerns regarding whether gunshot residue was actually present on the gloves. Respondent submits counsel made a reasonable strategic decision in not requesting the gloves be tested. Counsel reasoned it was possible gunshot residue would not be found on the gloves. If no gunshot residue was found on the gloves, counsel's argument that Thompson was the shooter would have been severely hampered. Thus, in light of the risks of being limited in argument as a result of the gunshot residue analysis, counsel determined it was more advantageous to the defense to not have the gloves tested. Since

counsel's decision was reasonable, Applicant cannot show counsel was deficient in this regard.

Further, Applicant cannot establish he was prejudiced as a result of counsel's decision not to have Thompson's gloves tested for gunshot residue. First, SLED's recent testing on the gloves indicate no gunshot residue was present on the gloves. Second, even if gunshot residue was present, such results would not have led to a different result at trial. A positive result would not have been conclusive on the issue of whether Thompson was the shooter. The four gloves recovered from Thompson were stored with a fifth glove recovered during the investigation. There was possible contamination as a result. Also, Thompson admitted to handling the gun at one point after Applicant picked him up in the Navigator. Finally, there was also testimony that indicated Applicant and Thompson were both firing the gun earlier in the day, and Thompson was allegedly wearing the gloves at that time. In all, there were several explanations for why gunshot residue could have been found on the gloves. As a result, this claim for post-conviction relief should be denied and dismissed.

Ground 9(a)(3): Ineffective assistance of counsel for not securing the assistance and testimony of an expert in eyewitness identification.

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in not securing the assistance and testimony of an eyewitness identification expert. Nor can Applicant establish he was prejudiced. As a result, this claim should be dismissed.

Underlying facts: During the guilt phase, the victim's roommate, Clifton Magwood, testified that shortly before the shooting, he heard sounds of a disturbance or argument

outside, and he thought he heard the victim's voice. (R. 1333). That led Magwood to look outside through his bedroom window. (R. 1333). Magwood testified:

> I seen a -- my roommate as he looked like he was being taken against his will to the back of the vehicle by a male, heavy set, anywhere from 5'11" to 6 feet tall, broad shoulders, had on a dark outfit, could be jean or denim or some type of dark outfit with a dark hat. He had his hand up, what appeared to be a weapon to his hand, walking the roommate to the back of the vehicle against his will.

(R. 1334). He further described the person he saw through his window as being pretty large, anywhere from 5'11" and 6'2" tall, and dark complexion. (R. 1337). Magwood indicated the man was between 215 and 225 pounds. The man was also wearing dark, loose fitting clothing, maybe some form of denim or jeans. (R. 1337). Magwood also noted the man was wearing a dark baseball cap. (R. 1338). During cross-examination, Mr. Littlejohn extensively questioned Magwood about the circumstances around his viewing of the confrontation between the victim and his assailant. (R. 1345-52, 1355).

Respondent submits Applicant cannot show that counsel was deficient in not retaining an eyewitness identification expert in this case. First, no eyewitness identification was made in this case. (See R. 1295). Since there was no eyewitness identification, counsel would not have been able to present testimony from an expert in eyewitness identification because such testimony would have been irrelevant in this case. Furthermore, counsel's handling of the description made by Magwood was reasonable. Applicant also cannot show that he was prejudiced by counsel not retaining and presenting an expert in eyewitness identification. He cannot show that the result at trial would have been different had such an expert been called to testify. As a result, this claim should be denied and dismissed.

Ground 10(b)(1): Ineffective assistance of counsel during the sentencing phase for not presenting available evidence that more than one perpetrator was present at the scene of the crime when the shooting occurred.

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in not presenting evidence that more than one perpetrator was at the scene when the shooting occurred. Nor can Applicant establish he was prejudiced. As a result, this claim should be dismissed.

Respondent submits Applicant cannot establish counsel was deficient in not presenting available evidence that more than one perpetrator was present at the scene when the shooting occurred. There was very limited documentation that two perpetrators were at the apartment complex during the carjacking. The newspaper reports and press releases made within the days immediately following the crime would not have been admissible to establish there was a second perpetrator at the scene. Also, the statement of Neysa Williams, who was talking with the victim on the phone at the time, would not have supported this assertion. Williams was not at the scene when the crime occurred. The statement made by another resident of the apartment complex only indicated she heard two car doors close. She also did not see a second perpetrator at the scene. In all, there was only tenuous evidence that a second perpetrator was at the scene. It was not unreasonable for counsel not to present this evidence or submit an argument based upon this evidence.

Applicant also cannot show that he was prejudiced. All of the testimony and evidence from the guilt phase of the trial carried over into the sentencing phase. (R. 1733). During the guilt phase, Deputy Stazer's testimony indicated that he recalled being informed there were two suspects involved in the carjacking. (R. 1382, 1384). That testimony was

heard by the jury during the guilt phase, and was information the jury could consider during the sentencing phase. Further, even if any of the evidence would have been presented, Applicant cannot establish that it would have resulted in a different sentence. None of the evidence Applicant claims should have been presented indicates that Applicant was not the person who fired the fatal shot. As a result, this claim for relief should be denied and dismissed.

Ground 10(b)(2): Ineffective assistance of counsel for not objecting to the State's alleged improper cross examination of Dr. Steedman and alleged improper statements in closing argument

Respondent submits this claim is without merit. Applicant cannot establish counsel was deficient in not objecting to the State's cross-examination of Dr. Steedman or to the State's closing argument. Further, Applicant cannot show that he was prejudiced by counsel not objecting. As a result, this claim should be denied and dismissed.

Underlying facts: At trial, Dr. Steedman was not allowed to testify regarding a specific finding he made regarding the SPECT scan done on Applicant. During Dr. Steedman's cross-examination, the State repeatedly noted in its questions that the radiologist's impression of the scan was that there was a questionable abnormality. (See R. 2307, 2309-10). During the closing arguments, the State again referred to the findings in the SPECT scan as reflecting questionable abnormalities. (R. 2379-80). Applicant appears to assert that these questions and argument were improper in light of the trial court's limitation upon Dr. Steedman's testimony.

This claim is without merit. In addressing the admissibility of Dr. Steedman's testimony regarding the SPECT scan, the South Carolina Supreme Court found that the trial court abused its discretion in not admitting Dr. Steedman's testimony. Mercer, 381

S.C. 149, 160, 672 S.E.2d 556, 561 (2009). In reviewing Dr. Steedman's testimony on direct appeal, the South Carolina Supreme Court found that the trial court's error in not admitting the testimony was harmless.

> When the entirety of the record is considered, the exclusion of Dr. Steedman's proffered testimony of an abnormality juxtaposed to the radiologist's notation of a "questionable abnormality" resulted in no prejudice to Mercer. Despite the erroneous ruling, a review of the record demonstrates that Dr. Steedman testified at length concerning Mercer's cognitive deficiencies. Dr. Steedman's unchallenged testimony included reference to the SPECT Scan results as "confirmatory" of Mercer's learning disorder. More to the point, the same evidence the State successfully and erroneously challenged-the SPECT Scan abnormality-was already in evidence without objection.
>
> Another defense expert previously testified that the SPECT Scan revealed an abnormality. Dr. Donna Schwartz-Watts, a defense psychiatrist, testified that she "ordered what's called a SPECT Scan. And what a SPECT Scan is, this is one of the newer tests in medicine and it shows brain function.... But what it does, it's a ... picture of how your brain functions, and that test came back abnormal. There's a ... small area that's not normal on there...." Later, as Dr. Schwartz-Watts began to sum up her testimony, she again talked about the SPECT Scan. Referring to Mercer, she said that "it's already a bad brain in the sense that he's got a learning disability and ... we even know that on a SPECT Scan there's an abnormality." Thus, the very "SPECT Scan abnormality" testimony Mercer sought to admit through Dr. Steedman was presented to the jury without objection through Dr. Schwartz-Watts.

Mercer, 381 at 149, 161-2, 672 S.E.2d at 562-3. Further, in addressing Dr. Steedman's psychiatric testimony, the South Carolina Supreme Court found

> [t]he excluded evidence was presented to the jury through other witnesses, especially Dr. Schwartz-Watts, without objection. Even defense counsel acknowledged that the proffered psychiatric opinion testimony of Dr. Steedman "certainly ... mirrors [and] dove-tail[s]" with Dr. Schwartz-Watts. As a result, Mercer sustained no prejudice from the exclusion of this cumulative evidence. State v. Graham, 314 S.C. 383, 386, 444 S.E.2d 525, 527 (1994) (noting that a harmless error analysis depends upon a host of factors, one of which is whether the excluded evidence was cumulative).

Id. at 163, 672 S.E.2d at 563.

The South Carolina Supreme Court reviewed the proffered testimony, and found that Dr. Steedman's proffered testimony regarding the results of his analysis of the SPECT scan was cumulative to Dr. Schwartz-Watts' testimony at trial. In light of the fact that Dr. Schwartz-Watts testified before Dr. Steedman, and the SPECT scan information was presented to the jury, the State's cross-examination of Dr. Steedman and the State's closing argument were not improper. The issues raised by the SPECT scan were in evidence. Thus, this case is clearly distinguishable from Tennard v. Dretke, 542 U.S. 274, 124 S. Ct. 2562 (2004), and Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669,(U.S.S.C. 1986). As a result, Applicant cannot show that counsel was deficient in this regard. Furthermore, Applicant cannot show that he was prejudiced as a result of counsel not objecting to either the cross-examination or the closing argument. This claim should therefore be denied and dismissed with prejudice.

Ground 9(b)(3): Ineffective assistance of counsel in investigating mental retardation claim, providing social history records to DDSN, investigating and presenting all available evidence of neurological damage, and preparing lay witnesses to ask the jury for mercy.

Respondent submits that Applicant cannot establish he is entitled to relief upon these claims. First, Applicant cannot show that counsel was deficient in their actions relating to these claims. Further, Applicant cannot show that he was prejudiced as a result. These claims should therefore be denied and dismissed.

(A) Counsel's failure to uncover and present all available evidence of mental retardation and/or low intellectual functioning and deficits in adaptive behavior prior to the age of eighteen.

In this claim, Applicant specifically asserts that trial counsel was ineffective in not obtaining his special education records from the City of Philadelphia School District.

Respondent submits this claim is without merit. First, Applicant cannot show that counsel was deficient in their investigation. Counsel conducted a thorough investigation into Applicant's background. Through this investigation, the defense was able to present at trial substantial information regarding Applicant's background, including: Applicant had a low IQ, Applicant suffered from a significant learning disability, Applicant was picked on as a child, Applicant was reading at a 4th grade level when he was in the 11th grade; and Applicant was granted Social Security disability as a child. Counsel also further sought to attain other evidence of mental retardation and/or low intellectual functioning through testing. However, Applicant's failure to cooperate during the testing foreclosed that line of investigation. In all, Respondent submits Applicant could not show counsel was deficient in this regard. See Wiggins v. Smith, 123 S.Ct. 2527 (2003) ("In assessing the reasonableness of an attorney's presentation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further"). Furthermore, Applicant cannot show that he was prejudiced.

(B) Counsel failed to provide the Department of Disabilities and Special Needs with all available social history records which would have assisted in an accurate determination of Applicant's intellectual functioning.

This claim is without merit. First, Applicant cannot show that counsel was deficient in this regard. While the defense could have provided more documentation to DDSN, or requested a reassessment after providing more documentation, counsel instead chose to investigate into matters regarding Applicant's intellectual functioning with their own experts. The defense retained Dr. Tora Brawley, a neuropsychologist; Dr. Donna Schwartz-Watts, an forensic psychiatrist; Dr. Alexander Morton, a psychopharmacologist; Dr. Marti Loring,

a social worker; and Dr. John Steedman, a neurologist. Applicant cannot show that counsel's decision to rely upon their experts was unreasonable.

Applicant also cannot show that he was prejudiced as a result of counsel not providing the South Carolina Department of Disabilities and Special Needs all available social history records. Specifically, Respondent submits Applicant cannot show that the result of the initial assessment by DDSN would have been different with additional records. DDSN found there was not sufficient evidence to warrant further examination of Applicant for mental retardation. In light of Applicant's IQ score on the WAIS-R when he was sixteen, the documentation that was provided to DDSN by the State for Applicant's examination in February 2006, and the report's assessment of Applicant's functioning during his structured interview, Applicant cannot establish more documentation would have led to a different result. As a result, this claim for relief should be denied and dismissed.

(C) Counsel failed to thoroughly investigate and present all available evidence of Applicant's neurological damage.

First, Applicant's claim is insufficient as he does not set forth with particularity exactly what evidence regarding Applicant's neurological counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").[2]

[2] Rule 12(e), SCRCP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the

Furthermore, counsel did present evidence of Applicant's neurological damage through the testimony of Dr. Donna Schwartz-Watts and partially through Dr. John Steedman. Thus, Respondent submits Applicant can show neither deficiency or prejudice to support this claim.

(D) Counsel failed to prepare its sentencing-phase lay witnesses to ask the jury for mercy.

Respondent submits Applicant cannot show that counsel was deficient in this regard. The record reflects that the defense attempted to show

Further, Applicant cannot show that Applicant was prejudiced in this regard. Respondent submits that the testimony will show that any plea for mercy by Applicant's family members would not have led to a different result in sentencing. As a result, this claim for relief should be denied and dismissed.

Ground 9(b)(4): Ineffective assistance of counsel in handling victim impact evidence.

Respondent submits Applicant cannot show that counsel was deficient in their handling of the matters relating to victim impact evidence at trial. Further, Applicant cannot show that he was prejudiced as a result of counsel's handling of the victim impact evidence.

(A) Failure to object to victim impact testimony regarding effect of victim's death on the United States Army and various members of the U.S. Army.

This claim is without merit. Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on the United States Army generally and on various members of the U.S. Army in particular. First, the first portion of the

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preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

transcript challenged by Applicant in this claim presented in R. 2078-83 were properly admitted at trial. This was the testimony of Command Sergeant Major Martin Wells, U.S. Army. Much of his testimony explained the various medals and ribbons that were earned by the victim prior to his death. This was properly admitted victim impact testimony. See Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated."). State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (adopting Payne); see generally State v. Hughey, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000) overruled on other grounds by Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009)("Victim impact evidence is admissible in the sentencing phase to demonstrate the 'uniqueness' of the victim and the specific harm committed by the defendant."). Similarly, Clifton Magwood's brief discussion[3] of the reasoning why Fort Jackson would host the memorial service was properly admissible. Thus, counsel could not be found deficient.

Respondent also submits that Applicant cannot show that he was prejudiced by counsel not objecting to the testimony. As a result, this claim should be denied and dismissed.

(B): Failure to object to introduction of video shown at victim's memorial service and testimony concerning U.S. Army "roll call" that took place during the victim's funeral.

[3]There was only one question and answer regarding why Fort Jackson would have hosted the memorial service. (See R. 2101).

This claim is without merit. Respondent submits the video shown at the victim's memorial service and the testimony regarding the "roll call" was admissible as victim impact evidence under Payne. Thus, for reasons similar to those stated in response to subsection (A) of this ground, Respondent submits this claim should be denied and dismissed.

(C): Failure to object to trial judge allegedly crying during the funeral video

This claim is also without merit. Respondent submits Applicant cannot show that counsel was deficient. There is no credible evidence to support this claim. Furthermore, Applicant cannot show that he was prejudiced. Even if the trial judge had an emotional response during the funeral video, it would not have impacted upon the jury's decision in this case. At the beginning of the jury charge in the sentencing phase, the trial court instructed the jury as follows:

> Now, as I explained to you earlier in the first phase of the trial, only the jury can make the findings of fact in this case and I am not permitted to indicate to you how I might feel about the facts. So if I have said anything or done anything during hte course of this phase of hte trial that might lead you to believe that I have an opinion about the facts or about what the sentence should be, then you should disregard that.

(R. 2409-10). Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999). Applicant has presented no basis for finding the jury did not follow this instruction. Thus, Applicant cannot show he was prejudiced. As a result, this claim should be denied and dismissed.

Ground 9(b)(5): Ineffective assistance of counsel for not asking their expert witnesses to prepare reports.

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in not having their expert witnesses draft reports. Further, Applicant

cannot show he was prejudiced by the fact some of his experts did not prepare written reports.

Underlying facts: Prior to trial, there was a discussion on the record between defense counsel and the solicitors trying the case regarding the defense's experts' opinions. (R. 1175-79). During that conversation, it was noted that Dr. Schwartz-Watts, the forensic psychiatrist retained by the defense, had not drafted a written report. It was also noted that the neurologist had not had an opportunity to draft a report because he was still examining the SPECT scans. (R. 1177-78).

During the sentencing phase, Dr. Schwartz-Watts was cross-examined on the fact she did not draft a written report. (R. 2169-73).

Applicant cannot establish counsel was deficient in not having its experts drafting written reports. Respondent submits that counsel made a reasonable strategic decision in not asking for the reports as a means of limiting the State's ability to cross-examine the experts. Respondent also submits Applicant cannot show that he was prejudiced.

Ground 9(b)(6): Ineffective assistance of counsel for not preparing their sentencing-phase expert witnesses to explain how their opinions had any bearing on the jury's decision.

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in preparing their experts to explain how their opinions had any bearing on the jury's decision. Respondent submits the experts' testimony was consistent with the defense's theme throughout the trial that Applicant was not involved in the carjacking. The experts' testimony was consistent with the theme. Furthermore, Applicant cannot show he was prejudiced. Respondent submits Applicant will not be able to establish the sentencing phase expert witnesses could have provided different testimony

in this regard, or that different testimony would have led to a different result in sentencing.

Ground 9(b)(7): Ineffective assistance of counsel for waiving the trial judge's proposed charge that the jury could not consider prior bad acts when determining whether the State had proven an aggravating circumstance, and that the State had proven Applicant was the shooter.

Respondent submits this claim is without merit. Applicant cannot show that trial counsel was deficient in waiving the proposed charge. Nor can Applicant establish he was prejudiced. As a result, this claim should be dismissed.

Underlying facts: In giving the jury charge in the sentencing phase, the trial court did not give a Stewart charge. State v. Stewart, 283 S.C. 104, 107-08, 320 S.E.2d 447, 450 (1984). A Stewart charge instructs the jury that prior convictions and evidence of prior bad acts can not be used to establish an aggravating circumstance. Id. at 107-08, 320 S.E.2d at 450. After the jury charge, the solicitor brought the omission to the trial court's attention. (R. 2242). The trial court asked defense counsel if they wanted the jury to receive a Stewart charge. (R. 2423). It allowed defense counsel to consult with Applicant about the matter. (R. 2424). After some further discussion, the trial court also indicated it would also charge the jury that it could not consider Applicant's criminal record in deciding whether Applicant was in fact the shooter. (R. 2425). Defense counsel declined. Mr. Littlejohn specifically noted that the defense did not believe any of Applicant's prior crimes could even bear on whether Applicant was the triggerman. (R. 2426). Both trial counsel indicated to the trial court they thought Applicant would be more prejudiced from giving the charge separately than if the charge was not given. (R. 2428-29). Applicant also informed the trial court that he had discussed the matter with counsel, and he was fine with the decision. (R. 2429).

Respondent submits Applicant cannot establish counsel was deficient in not presenting available evidence that more than one perpetrator was present at the scene when the shooting occurred. The record clearly reflects trial counsel's decision was the result of a reasonable strategic decision. Further, Applicant cannot show that he was prejudiced. As noted by trial counsel during the discussion at trial, none of Applicant's prior crimes or prior bad acts were similar to the murder in this case. As a result, this claim for relief should be denied and dismissed with prejudice.

Ground 9(c): Applicant's Sixth, Eighth and Fourteenth Amendment rights were violated by the State's inflammatory and prejudicial presentation of victim impact evidence.

These allegations are procedurally barred because they could have been raised at trial and on direct appeal.

S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Therefore, this ground is not appropriate for PCR.

Furthermore, for the reasons underlying Respondent's response to Ground 9(b)(4), Respondent submits these claims are without merit. As a result, this ground should be

denied and dismissed.

Ground 9(d): Brady violation/Napue claim based upon presentation during Motion for New Trial hearing.

Respondent submits Applicant cannot establish by a preponderance of the evidence that the State withheld any exculpatory or material evidence prior to the motion for new trial hearing. Further, Respondent submits Applicant cannot show that the State presented false or misleading testimony at the motion for new trial hearing. Since Applicant cannot meet his burden in establishing he is entitled to relief upon these claims, Ground 9(d) should be denied and dismissed.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Giglio v. U.S., 405 U.S. 150, 153 (1972) (quoted in Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006)). A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue

v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Further, due process is denied if the government knowingly uses perjured testimony against the accused to obtain a conviction. See Napue, 360 U.S. at 269, 79 S.Ct. At 1177. The government does not have to solicit the false evidence; it is enough if the government allows the evidence to go uncorrected when it surfaces. Id. A defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. See Dansby v. United States, 291 F.Supp. 790, 793 (S.D.N.Y.1968). Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony. See Overton v. United States, 450 F.2d 919, 920 (5th Cir.1971).

In this claim, it is Respondent's understanding that Applicant is asserting that the State presented false testimony from Timothy Johnston, one of Marcus Thompson's (Applicant's co-defendant) cellmates from the Lexington County Detention Center. Applicant asserts Johnston lied when he testified that he did not hear Thompson tell Kevin Fuller that Thompson was the one who fired the fatal shot. Further, Applicant asserts that Johnston falsely testified in order to obtain assistance on his pending charges. Respondent submits the evidence will not support this allegation.

Ground 9(e): Ineffective assistance of appellate counsel

Respondent submits Applicant cannot establish appellate counsel was deficient in not raising three juror related claims in Applicant's direct appeal. Further, Applicant cannot show that he was prejudiced by appellate counsel not raising these claims. As a result, this ground should be denied and dismissed.

In this ground, Applicant asserts appellate counsel failed to raise on appeal the trial court's error in qualifying jurors Deborah Lucas and Phillip Lofollette and in disqualifying juror Michael Sponhour. Appellate counsel's performance was both unreasonable and prejudicial as outlined below. See Strickland v. Washington, 466 U.S. 668 (1984).

These claims are without merit. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable

probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

> In a capital case, the proper standard in determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990) (citing Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985)); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996),cert. denied 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. State v. Green, supra. The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as explained to him. Id.

State v. Bennett, 328 S.C. 251, 256-57, 493 S.E.2d 845, 848 (1997).

First, any claim relating to the jurors Deborah Lucas and Phillip Lofollette were procedurally barred from appellate review. "[A]ny claim that a jury was not impartial must focus on the jurors who ultimately sat at trial." State v. Tucker, 324 S.C. 155, 162-63, 478 S.E.2d 260, 264 (1996)(citing Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273(1988)).

Both juror Lucas and Lofollette were struck by the defense during the jury strike. (R. 1258, 1260). Only one regular juror was seated after the defense exhausted its peremptory strikes: Vicky Mills. (R. 1262). She was not challenged by the defense during either the voir dire process or during the jury strike. (R. 784-801, 1262-63). Thus, any appellate challenge to either juror Lucas or juror Lofollette could not be raised on appeal.

Even if a challenge could have been raised on appeal against either of the two jurors Applicant asserts were improperly qualified, Respondent submits such a challenge would not have been successful. A review of the transcript of the full voir dire for both jurors indicate the trial court's finding they were qualified was supported by the record.

Similarly, Applicant's claim that appellate counsel was ineffective for not asserting juror Sponhour was improperly disqualified is also without merit. A review of the record of his voir dire supports the trial court's bases for dismissing juror Sponhour. In all, Applicant cannot establish appellate counsel was ineffective. As a result, this ground should be denied and dismissed.

Ground 9(f): Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is mentally retarded.

Respondent submits Applicant cannot establish that he is mentally retarded. As a result, this ground should be denied and dismissed.

S.C. Code §16-3-20(C)(b)(10) defines mental retardation as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." '[T]he trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution,

after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence." Franklin v. Maynard, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003).

Respondent submits Applicant cannot meet its burden of establishing that he suffers from mental retardation.

Respondent also submits this claim is procedurally barred. S.C. Code Ann. § 17-27-20(b) (1986) specifically provides that the remedy of Post-Conviction Relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The South Carolina Supreme Court has consistently and repeatedly held that issues that either were or could have been raised at trial and on direct appeal may not be raised in PCR. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979). Therefore, this ground is not appropriate for PCR.

Applicant's trial occurred after the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 306 (2002) and after the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). The appropriate procedure for raising this claim would have been at trial. Applicant waived his challenge to mental retardation at trial. Accordingly, this claim for relief is not appropriate for post-conviction relief.

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the third Amended Application for Post-Conviction Relief should be denied and dismissed.

Respectfully submitted,

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January 31, 2011.

FILED
2011 JAN 31 P 1:01
BETTIA. CARRIGG
CLERK OF COURT
LEXINGTON SC

COPY

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Return to the Third Amended Application for Post-Conviction Relief*** by hand delivery at the Lexington County Courthouse to:

Emily Paavola, Esquire

Jason Peavy, Esquire

This 31st day of January, 2011.

ALPHONSO SIMON, JR.

FILED
2011 JAN 31 P 1:01
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) 2009-CP-32-05465

KEVIN MERCER
APPLICANT
vs.
STATE OF SOUTH CAROLINA
RESPONDENT

TRANSCRIPT OF RECORD
VOLUME 1

January 31, 2011
Lexington, South Carolina

B E F O R E:

THE HONORABLE JAMES R. BARBER, JUDGE.

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INDEX

WITNESSES:	PAGE
DIANE MERCER	
Direct Examination by Ms. Paavola	6
Cross-Examination by Mr. Simon	16
Redirect Examination by Ms. Paavola	26
Recross-Examination by Mr. Simon	28
LEROY MERCER	
Direct Examination by Ms. Paavola	29
Cross-Examination by Mr. Simon	33
CHARLES MACALUSO	
Direct Examination by Mr. Peavy	41
Cross-Examination by Mr. Simon	51
Redirect Examination by Mr. Peavy	61
NAOMI STACKHOUSE	
Direct Examination by Ms. Paavola	64
Cross-Examination by Mr. Simon	81
Redirect Examination by Ms. Paavola	95
Recross-Examination by Mr. Simon	96
DR. BRAD FISHER	
Direct Examination by Ms. Paavola	97
Cross-Examination by Mr. Simon	141
Redirect Examination by Ms. Paavola	204
Recross-Examination by Mr. Simon	218
CERTIFICATE OF REPORTER	222

EXHIBITS

		ID	EVD
Applicant's Exhibits No. 1-10	Exhibits in Deposition of Melissa Armstrong	4	5
Exhibits No. 11-12	Affidavits of: Dr. Schwartz-Watts, Kathryn Cooke, Theresa Overton (withdrawn), Linda McCombs, Dr. Albert Humphrey, Cassandra Brown, Ebony Mercer Sharper, Iesha Mercer Rose	4	
Exhibit No. 13	Dr. Fisher CV	97	104
Exhibit No. 14	Special Ed. records	97	107
Exhibit No. 15	Definition of MR	97	
Exhibit No. 16	IQ chart	97	
Exhibit No. 17	Dr. Fisher report	97	130

(WHEREUPON, Applicant's Exhibits Nos. 1-12 were marked for identification only.)

THE COURT: All right. We're here in the matter of Kevin Mercer versus the State of South Carolina on Mr. Mercer's application for post-conviction relief.

We've scheduled it for all week, but I had a pretrial conference with the attorneys and they indicate they believe it's unlikely we'll go all week, but it will possibly get into Wednesday. We have plenty of time if we need to, and we'll take up whatever we need to take up.

Counsel, are you all ready to go forward?

MR. PEAVY: We are, Your Honor.

THE COURT: Do you all want to say anything before we start with calling any witnesses?

MS. PAAVOLA: No, Your Honor.

We do have -- we would move at this time to admit the original deposition of Mrs. Armstrong and the original affidavits that were filed with our notice of intent to rely on the affidavits.

THE COURT: First of all, any objection to the deposition?

MR. SIMON: No, Your Honor.

THE COURT: You all indicated you might have some concerns or objections to some of the affidavits. I think we addressed that.

Rather than deal with that at this point, why don't we see whether there's some way that you all can deal with maybe having those affiants made available in some manner to satisfy the State's concerns, either through deposition or allow them to decide what it is they ultimately want to do with respect to their objections.

I think they thought some of your affidavits might be more than what they turned out to be, but why don't we hold that in abeyance and let you all figure out what you might want to do with respect to the sisters of Mr. Mercer and the folks from the Philadelphia school district.

MS. PAAVOLA: That's fine, Your Honor. We'll be happy to make them available for deposition.

THE COURT: We'll take that up prior to our recessing this week.

MS. PAAVOLA: All right. And Ms. Kimbrough's deposition has ten exhibits of the applicant attached. Mr. Simon and I have agreed that we'll move those into the record as well and we'll begin marking our exhibits from that point forward for the purposes of this hearing.

(WHEREUPON, Applicant's Exhibits Nos. 1-10 were admitted into evidence.)

THE COURT: All right. Okay.

MS. PAAVOLA: The applicant calls Ms. Diane

Mercer.

DIANE MERCER, after being duly sworn, testified as follows:

THE COURT: Tell us your full name, please.

THE WITNESS: Diane Mercer.

DIRECT EXAMINATION

BY MS. PAAVOLA:

Q Good morning, Ms. Mercer. Could you please just tell the Court who you are and how you know Mr. Mercer.

A Diane Mercer, and I'm Kevin Mercer's mother.

Q Do you have any other children?

A Yes, I do. I have three others: Eric Mercer, Iesha Rose, and Ebony Sharper.

Q Could you tell us how far apart your children are in age? Who's the oldest and how far apart are they?

A Eric is the oldest, he's 34. And Kevin is next. Kevin is 11 months three weeks different from Eric. Iesha is a year younger than Eric, and Ebony is two and a half years younger.

Q All right. Thank you. I'd like to ask you some questions about Kevin as a child.

When Kevin was growing up, did you notice any significant differences between him and your other children in terms of when he was able to achieve developmental milestones?

A Okay. Yes. With Eric -- with Kevin, I actually bought a book when I had Eric, so -- you know, like guidelines, how a child develops. Eric was right on target with a lot of things, even sometime before age.

Kevin was so far behind. Like to use an example, walking, he did not start walking with two feet, you know, like one feet and the next, until he was like two and a half years old. Potty training, that was around about two and a half. He still wore Pampers like for -- I would say about two and a half years. It was very difficult training him and getting him to walk.

Q What about educational things, such as colors, reading? Was he slower than your other children with those things as well?

A Definitely.

In kindergarten, actually he got left down in kindergarten.

He had a very difficult time understanding shapes, colors, and the ABCs. You could say it to him, he'd look at you like he understood, but he didn't. And it was -- it just took awhile for him to understand the ABCs. He would get really frustrated after awhile when he would start out singing it with you, but then he'd stop midstream because he didn't understand it.

Or the colors, you could show it to him and

again he'd get frustrated because you'd say the colors or the shape, "What shape is this?" and, you know, he said, "I said it already," you know, but he just wouldn't repeat it. So it's just a lot of time I spent with him.

Q Okay. And he had particular trouble with reading you said?

A Oh, yeah. Oh, yeah.

With him I mainly bought what they called Hooked on Phonics for him because the other children were excelling very well and I tried to get him to -- like the syllables, tried to help him to understand that, so we got Hooked on Phonics. He lost interest in that because it was too much for him to retain.

Q All right. What about things like numbers, counting, and that sort of thing, did he have any difficulty with that?

A The same thing. Almost any task Kevin would do having to do with counting, reading, or numbers, again very difficult. You could tell he tried so very hard to learn, but -- and he really tried, but it was like there was a block there and he could not retain it.

And again, I spent a lot of time with him, more than the other children because, you know, he just couldn't get it. And I didn't understand it. Early on I didn't understand it.

Q What about things like counting money and making change, did he have difficulty with those tasks?
A Oh, yeah. Oh, yeah. I remember times that I would give him money or either we'd go to the store at an early age where I would try to get them to count it, Kevin and Eric, and he wouldn't count his. Eric would count his, Kevin would put his right in his pocket. You know, he wouldn't -- and I was having to take it out and try to go over some things or just go over -- you know, dollars he was okay with because they were dollars, but if you'd break it down, you know, like a dollar's worth of change, it was very, very difficult.
Q How about when you gave Kevin instructions, if you told him the steps to do something, did he have difficulty understanding or following those instructions?
A You know, you'd tell him to go in the bathroom and maybe wash up or whatever and he would be in there playing in the water most of the time, you know, or just wouldn't go and do what he needed to do. You'd have to -- you know, Kevin was one you had to stay behind to keep him focused on the task of what he's doing.
Q What kind of things did you do to help focus him on tasks or instructions?
A A lot of repeating, a lot of standing right there to make sure he did it, talking to him, just a lot of

talking, you know.

Q What was Kevin's reaction? How did he respond when he wasn't able to understand something or accomplish a task that he was trying to do?

A There were times -- mainly going back with the ABCs, he'd get frustrated, he'd cry, and he'd say, "I can't do it," and I'd always tell him, "Can't don't live here," so you can't say you can't do it. So -- or, you know, if you tell him something again, he'll look at you, like, yeah, you know, he'll say with his mouth, I got it, but then he'd have that blank look like, what are you really talking about, but his mouth will say, I have it, but you can look at him and tell that he didn't.

Q I'd like to ask you some questions about Kevin's performance in school. I think you already mentioned he repeated kindergarten; is that right?

A Uh-huh.

Q What was the reason that he had to repeat kindergarten?

A He could not grasp like, quote, unquote, a normal child would; again the ABCs, the colors. He could not seem to distinguish the shapes; he could not distinguish them like, you know, your average child at his age. So, of course, they told him they had to leave him back because of that, he did not understand.

Q Did he repeat any other grades other than kindergarten that you know of?

A No, he didn't. From there he was in special ed, so no.

Q When was he placed in special ed?

A I had him tested. I realized the struggle that he was doing and I know that I -- all that I was trying and as much time as I was spending wasn't doing any good. So at eight years old I had him tested. And after he was tested, they said he was mildly mentally retarded and the next step was to put him in special ed.

Q All right. So from then on he was in special ed?

A Special ed until -- yeah.

Q Did you -- I know you said you spent a lot of time with him. Did you spend any time helping him with his homework assignments or school work?

A Yes, I did. I did.

Q And how did that generally go?

A Again, most of the time I can remember with Kev, it was always a challenge. It's again spending the time with him. I ended up spending so much more time with him that the other children kind of got jealous because, you know, I know I needed that attention or time with him. It was just a chore.

It was actually a chore to stay there and keep

him focused. You know, you just had to really get an eye-to-eye thing with him most of the time to keep him focused, because if he turned away, it was like, you know, he really wasn't getting it, so you had to really focus with him.

Q What kinds of things did you do to help him with his homework?

A Well, I'd get flash cards. Again, like I said, I did the Hooked on Phonics hoping that he would understand how to break down the words. Mainly flash cards.

Q Did you ever do his homework for him?

A Oh, yeah. Yeah, I did a lot of his homework for him.

Q And why did you do that?

A Because, you know, I know that -- I know he really was struggling so hard and he used to say, "Mom, why can't I be like Iesha and Eric? Why I got to be like this?" And so I knew he was having difficulties so there was times I did his homework for him.

Q What about friends in school? Did Kevin have many friends in school?

A Kevin is known to be very friendly. I call him Smilely because -- he called everybody his friend.

They wasn't his friends, though. They would pick on him so. He attracted people because I guess he smiled all the time.

But he called people his friends, like I said, but most of them I wouldn't call friends because his friends -- he'd call -- like I said, the ones who would beat him up or he'd come home one day and he had a big hickey on his head, blood, coming from school. I asked him what happened and he said, "Mom, my friend." I said, "Who did that to you?" He said, "My friend did that. My friend was hitting on me and beating me," or whatever, you know, "did this." And I said, "Kevin, that's not your friend." I said, "A friend don't hit you like that. A friend wouldn't make you hurt like that."

And I said, "Did you hit him back?" I said, "I know Mommy told you not to fight, but did you hit him back?" And he said, "No, Mommy, I can't hit my friend. That's my friend." And he'd really get adamant if you tell him it wasn't his friend, so no.

Q Did you ever see Kevin trying to fit in with other kids? Did he do specific things, did you ever see him do, to fit in?

A A follower. He was -- you know, he just wanted to be a part of. He just -- I don't know if he knew something was wrong. I never really told him. I just told him he was special, you know, he learned different. But he wanted to be like the other kids, you know, go out and play with the other kids and talk like the other kids or

whatever, but, you know, he just wanted to be a part of.

Q Did you ever send Kevin out of the house to run errands for you by himself?

A No. Almost 95 percent of the time or more Kevin and Eric were like peas in a pod, they were together. And one of the reasons why I know I did that because, you know, I didn't want Kevin going out there and he wouldn't know how to get back home. So Eric was really good, so they'd hang together a lot.

Q As Kevin got older, did he ever -- I understand he lived with you when he was a child. When he got older, did he ever live independently that you know of for any significant period of time?

A One week.

Q When was that?

A I think Kevin was -- I think he was 19. I can't remember. I think he was 19 years old and he moved out in the apartment area where his father lived. And I laughed at that because he called me and asked me about boiling water, how do you boil water. And I said, "What are you cooking?" He said, "I'm trying to cook some macaroni and cheese." And I said, "You'd better not cook that if you don't know how to boil the water." So, you know.

Q And this was an apartment you said with his father?

A No, he didn't live with his father. It was an

apartment that his father helped him get.
Q Okay. Now, I understand that you testified at Kevin's trial in 2006. Before you testified, did you have any meetings or preparation with Kevin's trial attorney?
A We had meetings, yeah.
Q During any of those meetings, did his attorneys ever tell you that when you testified you would be permitted to ask the jury to give Kevin mercy?
A Never.
Q If they had told you that you'd be allowed to do that, would you have been willing to do that?
A Without a doubt.
Q Were you in the courtroom for the duration of his trial?
A Uh-huh.
Q After you testified in the penalty phase of the proceedings, were you present when the State offered testimony about the victim's funeral video?
A Yes.
Q Do you recall seeing a video that was played for the jury from the victim's funeral?
A Yes.
Q Were you able to view the trial judge when the video was played?
A Yes.

Q And what was his reaction?
A He was crying.
Q Did you see him crying?
A Yes, I did.
Q Did you see actual tears?
A I didn't see the tears, but you visibly know. Just like you can see me, you don't see my tears, you could visibly see he was crying.
Q And how did you know he was crying?
A His eyes was red and they surely wasn't red when we started out, but, you know, you could see the emotions. I mean, he looked down like this and you could -- you know, you knew he was crying. It wasn't -- you knew he was crying. It was just obvious.

MS. PAAVOLA: All right. Thank you, Ms. Mercer. That's all the question I have.

You can stay right there. Mr. Simon may have some questions for you.

CROSS-EXAMINATION

BY MR. SIMON:
Q Good morning, Ms. Mercer.
A Good morning.
Q I just have a few questions for you.

Growing up, did Kevin have any problems dressing himself after he got past a certain age?

A After a certain age as he got older, no.
Q And what age would that have been?
A When he started dressing himself? You know, I don't remember.

When did he start dressing himself? That's a good question. I don't remember exactly when he started dressing himself.

Q Now, in your household, did you handle most of the cooking? When he was growing up did you handle most of the cooking?
A Yes, I did.
Q Did you ever give him an opportunity to learn how to cook?
A I -- when I felt comfortable with Kevin is when I noticed other things that he couldn't handle well. I would let him take out -- I'd let him take the muffin out of the pan, you know, not the hot pan, but like the muffin you'd buy in the paper -- you know, the muffin in a bag, you know, he'd take that out and put it in there.

I think because I'd already came to the conclusion there was certain things I couldn't trust him to do, like with the other children. The other children, I let them stir the pot, you know. They take something -- the oldest son would take something out of the oven, but Kevin would take it out the bag. That was his job.

Q So you never actually gave him an opportunity to do things like stirring the pot or anything like that?
A No, I was afraid to give him the opportunity because, again, from what I gathered earlier, some of the things I was not comfortable with.
Q Was Mr. Mercer -- let me ask you this question. When he was -- once he got older and like he was in high school, did he have any girlfriends?
A Let's see. There was someone when he was about 14 he liked. There was a girl he liked, yes.
Q And would he talk with her on the telephone?
A Yeah, I believe he did talk to her on the telephone.
Q And would he take her out on dates or anything?
A No, no.
Q Would you allow that?
A At 14, no.
Q How about when he was getting older, like I guess 15, 16?
A He's -- as far as going on dates -- well, I had a rule at 16. So at 16 -- he didn't go on dates. He liked girls, of course, but he didn't go out on dates.
Q Let me take this -- I know at one point in time you all lived in Philadelphia, correct?
A Uh-huh.
Q And you all left because of a situation involving --

it was a situation involving the police?
A Uh-huh.
THE COURT: I need you to say yes.
THE WITNESS: Yes. Okay. Yes.
THE COURT: The court reporter needs it.
THE WITNESS: Okay.
BY MR. SIMON:
Q Can you remember how old Kevin was when that occurred?
A Maybe 15.
Q He was in high school at the time?
A He has in high school.
Q And he was actually going to Overbrook High School; is that correct?
A Overbrook, uh-huh.
Q Now, at the time before you all moved, you were living in a pretty rough neighborhood?
A It wasn't considered rough, no.
Q Okay.
A It wasn't considered rough. Although when we moved, things -- we realized -- we thought we were moving at Overbrook, but it got bad around that area. It wasn't rough initially.
Q Okay. But I guess earlier on, then, did you live in -- in your testimony at trial, there were points in

time that you lived in rough neighborhoods in Philadelphia, correct?

A Yeah, uh-huh.

Q Now, when you moved down to Columbia, what kind of neighborhood did you live in there?

A I think it was a pretty decent neighborhood.

Q And Kevin would have been 14, 15 at that time?

A Fifteen, 16, somewhere like that.

Q When you lived in Philadelphia, did Kevin have an opportunity to play football?

A No.

Q Were there any football teams that he could have joined or anything up there?

A No. The Philadelphia high schools, they don't have it like this here, no.

Q So when he started playing football at Columbia High that would have been the first opportunity he would have ever had to play football, correct?

A Uh-huh.

THE COURT: Is that a yes?

THE WITNESS: Yes. I'm sorry, yes.

BY MR. SIMON:

Q Now, you said that Kevin, he was tested several times while he was in school, correct?

A He was in school? No. He was tested once when I

took him to have him tested when he was eight years old, and with the test, they came back with the conclusion of him being mildly mentally retarded. But in school, he had IEPs in school. That was just the program.

Q Okay. You say he was tested once when he was eight. Do you recall where that test was taken?

A It was in Philadelphia somewhere. I don't remember that name. I don't remember.

Q Would it have been something like the Institute for Learning or something?

A Something like that.

Q And that was the one time you recall taking him to get tested?

A Yeah, that was the time I took him, yes.

Q And you don't recall if he was tested by the schools any time after that?

A I really can't remember. I know a lot was going on. I just don't remember him being tested. He may have, I just don't remember that.

Q Do you recall what the recommendations were for how Kevin would best learn after that test?

A Being placed in special ed and he would have to have IEPs, being placed in special ed.

Q Now, in this case have you met with a Dr. Fisher?

A Yes.

Q And do you recall when you had that meeting?
A Yesterday, day before yesterday. Yesterday.
Q Okay. Have you talked to him on the phone at any point in time?
A I have.
Q And was it about Kevin?
A He just asked me questions like you are about, you know, when was he tested.
Q Did he explain to you why he was talking to you about Kevin?
A Trying to find out what's really, you know, to find out the actual -- what's going on with Kevin as far as his being mildly mentally retarded.
Q So he informed you that he was looking to find out that Kevin was retarded?
A Yeah, he was checking him out, he was looking at -- because the last case they did not talk about it, so he was going to look into it.

MR. SIMON: Just a moment, Your Honor.

BY MR. SIMON:
Q Just a few more questions.

While you were still in Philadelphia, you did apply for Social Security for Kevin, correct?
A Uh-huh, yes, yes.
Q And he was granted Social Security, correct?

A Yes.
Q Do you recall the basis for the granting of Social Security?
A Because I took the same documents saying he was mildly mentally retarded and gave it to them and that's why they gave it to him.
Q Okay. So you don't recall it being because he had oppositional defiant disorder?
A No, that was never said. I never heard of that.
Q Okay. Do you recall taking him to a psychologist there to have him tested before you got the Social Security?
A I don't recall it. If it was something that I was required to do then I'm sure I did, but I don't recall that. I just don't remember that.
Q Okay. And when you moved down to Columbia did you have to do anything to maintain the Social Security checks coming?
A Did I do anything to maintain it?
Q Yes. Like did you have to do any kind of re-applications or anything?
A No, just transfer. You just let them know I moved down here and they transferred it.
Q Now, could you kind of walk us through Kevin's work history?

First, let me ask you, it's my understanding he graduated from -- he got a special education certificate from high school in May of 1996, correct?

A Uh-huh, yes.

Q And did he get a -- what did he do after that? Did he try to go -- let me take a step back.

It's my understanding Kevin tried to do a number of different jobs?

A Yes.

Q At one point in time he tried to become an electrician, correct?

A Now, that I don't remember.

Q You don't remember?

A Not about an electrician, no.

Q Okay. At one point in time he wanted to try to become a barber? Do you recall that?

A Yes.

Q Do you recall when that was?

A That was when he was older than maybe 21. I guess something like that.

Q Twenty-one, at that point in time? And at one point in time he did construction work?

A Yes.

Q Do you recall when he would have done that?

A Gosh, maybe about, I guess, he was 22. He was about

22, I guess.

Q And he held a number of different odds-and-ends jobs, correct?

A Yes.

Q Like he would work sometimes for a fast-food restaurant for awhile?

A Yes.

Q Sometimes he would work for Labor Ready, doing temporary work?

A Yes.

Q I believe at one point in time he worked for a car rental place?

A I'm not aware of the car rental place.

Q Okay. When -- how old was Kevin when he left your house?

A Kevin was about 18, 19.

Q So would that have been like around 1996? Do you recall what year?

A No. The first time he left was when he left to move out in an apartment where his father was. He stayed a week and then he came back home.

Q And then when was the next time he left, when was that?

A When he actually met his wife and they moved in together. I don't know, maybe 22, 23, something like

that. I don't know. I don't know. Somewhere around there.

Q And after he moved out did he stay in constant communication with you?

A We talked. I mean, I didn't talk to him every day, but we did talk. He had a new life and a new love in his life, so I didn't hear much from him.

Q Okay. But that would be over the telephone?

A Over the telephone, yeah.

Q And Kevin, he did get his driver's license, correct?

A Yes, he did.

Q And do you recall -- before he got his beginner's permit, do you recall how many times he had to take the test?

A I don't remember how many times, I want to say it was definitely more than two times, but I don't remember because I know -- I remember him having problems with, I think, the oral -- yeah, I think he did the oral, but I can't remember.

MR. SIMON: I think that's it.

THE COURT: Okay. Anything?

MS. PAAVOLA: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. PAAVOLA:

Q Ms. Mercer, Mr. Simon asked you about Kevin's work

history.
A Uh-huh.
Q And you said you were familiar with some of his jobs, some you weren't, but for the ones that you were aware of, do you know if any of those jobs required a written application?
A No. Well, the one for PBX -- no, and I mention the PBX because I had talked to someone about getting him a job there, so I think it was just the fact that he had to go and sign his name, I don't remember any applications.
Q Can you explain what the PBX job was?
A That was at Fort Jackson. He was -- after he got out of high school I was talking to him, you know, about trying to do something to get some kind of trade for it, you know, so he can have a trade and they had Voc Rehab that I entered him into, which he did not complete that, but in the interim while he was in Voc Rehab, maybe the first or second week, however long he was there, maybe two weeks, I had already started talking to someone about a job and they just told me to take him over there and that's how he got the job. To my knowledge it wasn't an application.
Q All right. And if I understand your testimony, Kevin lived with you until that time that he move out and lived one week in the apartment that his father helped him get?

A Yes.
Q And after that he moved back in with you and stayed there until he moved in with his wife; is that right?
A Yes.
MS. PAAVOLA: Thank you. No further questions.
THE COURT: All right. Anything further?
MR. SIMON: Just one follow-up question.

RECROSS-EXAMINATION

BY MR. SIMON:
Q Ms. Mercer, did any of your other children stay with you after they graduated from high school?
A Yes.
Q How many of them?
A Well, all of them.
Q How long did they stay?
A Eric, he left out I think he was like 19. Iesha stayed for awhile. She stayed until she was about 20 or something like that. Same thing for Ebony. They all kind of went out, you know, and then they had an apartment at one point, but came back. This is into their twenties. But after high school, like I say, Kevin went and came back.
Q But they all stayed around for awhile?
A Yeah, they stayed around for a bit.
Q And you all are a close-knit family, correct?

A Uh-huh.
Q And that was not a problem, that everybody was kind of staying around for awhile because you all enjoyed each other's company and everything, right?
A Uh-huh, yes.
MR. SIMON: Okay. No further questions.
MS. PAAVOLA: No questions, Your Honor.
THE COURT: Thank you, ma'am. You may step down.
MS. PAAVOLA: The applicant calls Leroy Mercer.
LEROY MERCER, after being duly sworn, testified as follows:
THE COURT: State your full name, please.
THE WITNESS: Leroy Mercer.
THE COURT: All right.

DIRECT EXAMINATION

BY MS. PAAVOLA:
Q Good morning, Mr. Mercer.
A Good morning.
Q Could you just please tell us who you are and how you know Kevin Mercer?
A My name is Leroy Mercer, and I'm Kevin's father.
Q All right. And can you tell us what Kevin was like as a kid?
A Well, he was fun, you know, laughed a lot, smiled

like the wife was saying, friendly. But he was really slow in a lot of things, most things that I encountered with him. But, he was, you know, okay, okay child.

I had a little difficulty trying to raise him, you know, because I was the discipline one, you know, to discipline him like that. And he and I, we was okay, but I had to get on him sometimes, but most of the time he was with his mother.

Q All right. And what kinds of things was he slow with?

A Well, sports because that's what I was into and he always would have a difficult time playing whatever sports we were playing, catching or baseball or mostly basketball. You know, very difficult learning the rules and regulations of the game. And I would, like, try to teach him, you know, help him out and he really never got it, you know, wouldn't play it normal just like anybody else would, you know, he would always turn basketball into football, you know, pushing, holding, stuff like that, so, you know.

Q Now, I understand you yourself were a pretty good basketball player; is that right?

A Yeah.

Q So that was important to you?

A Very.

Q Did you work with him very much to try to teach him and explain to him what the rules were?
A Yes.
Q And was he able to understand those?
A Somewhat. He never grasp -- he never got it.
Q Did he ever become a member of a basketball team in school?
A Well, he tried out for it and he didn't make it, so that kind of got him down to being a water boy.
Q Now, I understand you worked quite a bit when Kevin was a child?
A Yes, I was a workaholic.
Q So when you spent time with him, what kind of things did you mostly do?
A He wasn't for a lot of games as far as card games or anything like that, but my thing was sports, outside, and anything outside I had time to do because I worked a lot. I had two jobs, you know, and I didn't really have a lot of time with them like I wanted to be, but, whenever I did, you know, we would play basketball, baseball, catching, stuff like that.
Q And how did Kevin's ability to learn those games compare to your other children?
A Not very well. He just didn't come up to the standard.

Q How did you interpret that from Kevin and how did you see his inability to learn those games at first?
A Well, he tried very hard, I know he was trying, but at first I didn't quite know what was going on with him, you know, seems like he just couldn't catch on. You could show him and show him and show him, and he just couldn't get it. It frustrated me, you know, I would get angry at him a lot of times because I really didn't know what he was going through at the time, so that's how he and I was at the time.
Q So you thought he was being bad, basically?
A That's what I thought, yeah.
Q Later did you realize that that wasn't the case?
A Yes, that's when my ex-wife had him tested, you know. Then I knew then, but still I tried to help him as much as I could, but he still never really caught on.
Q Once you figured out that he wasn't just being bad, did you change the way you dealt with him and taught him things?
A Yes.
Q What did you need to do to change?
A Slow down with him, you know, just kind of let him do his thing, you know, and say "You're doing a good job," and this and that and to try to encourage him.
Q Did you ever try to teach Kevin to tie a tie at one

point?
A Yes.
Q When was that?
A About ten, nine or ten, something like that.
Q Was he ever able to learn that?
A No.
Q I understand you testified at Kevin's trial in 2006. Before you testified, did you have any meetings or preparation with Kevin's trial attorneys?
A Yes.
Q During any of those meetings, did they tell you that when you testified you would be permitted to ask the jury to give Kevin mercy?
A No.
Q If they had told you that you could do that, would you have been willing to do that?
A Sure I would have.

MS. PAAVOLA: Thank you, Mr. Mercer.

THE WITNESS: You're welcome.

CROSS-EXAMINATION

BY MR. SIMON:
Q Good morning, Mr. Mercer.
A Good morning, sir.
Q I just have a few questions for you.

Now, you're saying that Kevin had a difficult

time grasping how to play different sports?
A Yes.
Q Most of the time when you're instructing him or trying to teach him how to play, was it just basically you were just telling him how to play?
A No, hands-on.
Q Hands-on? Okay.
Was there a point in time where you all kind of had a -- butted-heads on different things?
A Yes.
Q And at any point in time did it become physical between the two of you?
A No, never. Well -- no, no, not with my hand or nothing like that. I used to take my belt off at him, you know, yeah, yes, I did.
Q At any point in time did Kevin just stand up to you?
A No, because at that time, you know, he knew not to do that. At that time, no.
Q How about as he got older?
A Once. One time there was a little incident, you know. I guess he just act like he wanted to do it. He never really did it, you know. He kind of act like he wanted to stand up to me, but he couldn't win, you know. He backed down.
Q Now, you said that -- you stated earlier that after

he got tested that's when you started changing your approach with him?

A Yes.

Q And so that would have been around when he was eight or nine?

A Yes.

Q And I guess after that did you all develop a better relationship?

A Yes, very much.

Q Okay. Now, do you recall Kevin going out with folks when he was growing up?

A No, I can't recall that. That's something I know for sure. I never seen him with a girl or nothing like that.

Q Let me ask you about you all's family life. You all a pretty close-knit family?

A Yes.

Q Kids hung out all the time?

A Well, when you say "hang out," what you mean?

Q I guess when they would go out and play, did they all go out together?

A Yes.

Q And they watched out for one another?

A Yes.

Q Now, at home, did you ever do any of the cooking or the cleaning?

A Oh, yeah.
Q When you were doing some of the cooking did you ever let any of the kids assist you?
A No, nobody but me.
Q How about with the cleaning?
A Yes. Oh, yeah, definitely. I always taught them to clean up their rooms, you know, sweep, mop. Cleaning was my thing, too. I had two jobs and one job was cleaning. I worked at the hospital and another job I had, so, yes, a lot. I stayed on them with cleaning.
Q And you stayed on Kevin with cleaning, too?
A All of them.
Q All of them?
A Yeah, all four of them.
Q Now, you describe that when Kevin was around ten you tried to teach him how to tie a tie?
A Yes.
Q And did you do the same thing with Eric?
A Yeah, but he caught on.
Q He caught on?
A Yeah.
Q Now, were there points in time when you were in and out of the home?
A Yes.
Q And that would be because you and your wife were

having difficult times?
A Exactly.
Q When you were out, did you see the -- stay in contact with the kids?
A Yes.
Q And as a whole, how did they seem to take it?
A Well, they really didn't like the idea that she and I wasn't together, but they accepted it, you know. I wasn't gone very long, it was under a year. It was never over a year. It was over a few months, then I'd come back. It happened three or four times.
Q Now, you all moved down from Philadelphia to Columbia when Kevin was in high school?
A Yes.
Q And after he finished high school you were still around the household, correct?
A Yes.
Q Did you do anything to help assist Kevin in finding a job?
A No.
Q Did you help him try to figure out some kind of trade he could do or anything?
A Not at that time. He was out of the house at that time, or I wasn't there one, one of the two.
Q In terms of his education, did you get involved with

that?
A Yeah, I helped him with his homework a lot of times.
Q And he would try really hard with his homework, wouldn't he, when you were helping him?
A He was what?
Q Was he trying really hard when you were helping him?
A Oh, yeah, he was trying real hard.
Q And I guess when he first moved out of the family household, you helped him get an apartment?
A No, I never was involved in that.
Q You're not involved in that. Okay.

Do you recall when he left home?

A About 20, 19, 21, somewhere along in there.
Q Would that have been around like -- would all of your kids stick around for awhile?
A Yeah. I think he left first, I think, then Eric close behind him.
Q Was part of that because you all were just trying to help all your kids get on their feet before they left home, would that have played into it?
A I don't know. I think they just kind of like wanted go out on their own, I guess, you know. We couldn't keep hold of them. I mean, they was old enough to make their own decision, you know, at that time, so they went on. But they would sometimes come back and go again.

Q Now, sometime recently did you have a conversation with a Dr. Fisher?
A Yes.
Q Do you recall when that conversation was?
A Last week I think it was.
Q Last week?
A Yeah.
Q What did you all talk about?
A Wasn't very long. He was just asking me a few questions, what he was like, and what he could do, what he could not do. It was short, real short, about five minutes.
Q And in terms of -- and I apologize for just kind of bouncing all over the place.
A It's okay.
Q When you lived up in Philadelphia, Kevin didn't have an opportunity to play football, correct?
A Not in Philadelphia.
Q And he tried out when you all moved down here?
A Yeah.
Q He would have been what, in tenth grade by that point?
A I don't know how old he was. I don't know how old he was at the time.
Q When he tried out, was he trying out for the varsity

squad or JV or do you recall how that all worked out?

A It was one of the two.

Q And I guess on weekends would you go out with him and try to --

A Oh, yeah. We all went to events that they have, practice sometime, you know, the games. I did that with all my kids.

MR. SIMON: Just a moment's indulgence, Your Honor.

(Pause.)

MR. SIMON: No further questions.

THE COURT: All right.

MS. PAAVOLA: No questions, Your Honor.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

MR. PEAVY: Your Honor, at this point the applicant would call Charles Macaluso.

CHARLES MACALUSO, after being duly sworn, testified as follows:

THE COURT: Tell us your full name, if you would, please, sir.

THE WITNESS: Charles Macaluso.

MR. PEAVY: Would you spell that for the court reporter, please, sir?

THE WITNESS: M-A-C-A-L-U-S-O.

MR. PEAVY: May it please the Court, Your Honor.

THE COURT: Yes, sir. You may be seated.

DIRECT EXAMINATION

BY MR. PEAVY:

Q Good morning, Mr. Macaluso.

A Good morning.

Q I'm Jason, we met yesterday.

A Yes, sir.

Q Could you please tell me a little bit about yourself and where you're currently employed?

A I was a teacher and coach and a minister for 33 years. I'm presently retired.

A little bit about myself, I was -- served 15 years on the board of directors for the South Carolina Coaches Association and I was president of that organization. I also served on the executive committee of the High School League. Had the opportunity to coach the Shrine Bowl and the North-South All Star games.

Near the end of my career I was fortunate enough to be honored to be selected in the Coaches Hall of Fame and also Strength Coaches Hall of Fame. I feel like I was able to help a lot of young people along the way, influence their lives throughout my career through these avenues.

Q Okay. You said you retired. Did you retire in about

2002 or so?

A 2002, correct.

Q Okay. And prior to 2002, for those 33 years did you -- you were a coach and did you also have to be some type of a teacher as well as a coach?

A Yes, I was a teacher and, of course, administrator in different ways also.

Q What type of courses or curriculum would you teach in your capacity?

A Basically, I taught physical conditioning, which is basically weight lifting, and mainly that was for the athletes.

Q Okay. And did you ever have an opportunity to get to know or teach or coach Mr. Kevin Mercer?

A Correct. For two years, actually two and a half years I worked with Kevin and he was in my classes and I was able to work with him.

Q You said you worked with him. Does that mean in the capacity as a student-teacher as well as a coach and member of the team?

A Both, correct.

Q Okay. So he was a member of the football team as well as a weight-lifting student?

A One of the requirements to be a member of the team you had to be in the classes, correct.

Q Okay. Now, when you -- you were at Columbia High?
A Yes, sir.
Q And that's a public high school here in Richland County?
A Yes, sir, uh-huh.
Q When you are a student at Columbia High, do you have to try out for that football team or how -- can you explain that process for us?
A Basically, we have some requirements for the players: They need to work in the off season in our programs and also during the season they're required to participate in classes, weight-lifting classes, but you also must maintain a certain grade point average in order to play according to the High School League rules.
Q Uh-huh.
A And at that time District 1 employed a C average in order to participate. But if you have an IEP -- are you familiar with IEP, which is Individualized Educational Plan -- then if you meet your IEP, you are eligible to participate in athletics.
Q Okay. Well, we'll delve into the IEP and the educational requirements in a few minutes, but --
A Okay.
Q -- let's focus right now, if it's okay with you --
A Sure.

Q -- just on -- if I'm a student athlete or I want to be a student athlete at Columbia High School and I try out for the program and I do your weight-lifting programs and things like that, am I going to be cut from the program or the team?

A You know, I always had a policy that we always kept everybody. There's always a place for kids and we feel like we're helping them as much as they're helping the team.

Q Okay. Now, you said that you had an opportunity to work with Kevin for about two, two and a half years, and that was in the mid-nineties?

A '94-'95, '95-'96, in those areas, those dates.

Q Okay. And so Kevin made the football team at Columbia High in those years. And based upon what you saw from Kevin when he was trying out, what position did you originally assign him to?

A Well, we tried him first as an offensive lineman, which requires a lot of memorization, a lot of plays, a lot of rules and regulations, assignments, who to block and how to block, and he had struggled with that somewhat and so we moved him from that position to a defensive position.

Q Okay. So originally he was an offensive lineman. And just for the sake of the record, offensive linemen

need to -- they need to memorize things?

A Correct, quite a bit.

Q Such as blocking schemes?

A Plays and blocking assignments and --

Q Holding requirements and things like that?

A Sure. Technique and a lot of stuff like that.

Q Okay. And based upon what you observed from Kevin was he able to grasp those concepts?

A He struggled with it, yes.

Q He struggled with it. And can you provide us with any examples of what you mean by "he would struggle with it"?

A Maybe he would not remember his plays, or remember the assignments or, you know, and we just felt like he would do a better job with us on defense and help us out more, which he did.

Q Okay. And so you mentioned just a minute ago that you then changed him to defensive lineman or defensive position?

A Correct.

Q And why was that?

A Because it's not as much memorization, although he did struggle sometimes with that as far as, you know, the stunts and stuff like that, but he still was a very good player for us and a hard worker.

Q Okay. Now, you mentioned that he still had some struggles. And forgive me, I'm not a football player so I'm just kind of going blind here, but as a defensive lineman was it essentially your job to be in a specific place on a given play?

A Correct. You kind of have one territory you had to cover and anybody that comes in that territory you naturally would tackle them or it's your responsibility to make sure nobody comes in that particular area.

Q Okay. Based upon what you observed or what you can recall, did Kevin ever have problems with the memorization of some of his responsibilities?

A Well, sometimes he'd jump offsides and sometimes he might go the wrong way -- he'd go right when he was supposed to go left -- and, of course, kids are cruel, too, and sometimes the kids would get on him, you know, sometimes --

Q What do you mean by that?

A I think it was some kind of word like "brain-lock" a kid would call him sometimes in which it was offensive in my thinking and, of course, I would get on the kids, but I just kind of remember that from back in those years.

Q Okay. Well, as a result of these struggles that he was having, did you have to take any type of additional corrective action or instruction with Kevin?

A A lot of repetition, yes.
Q All right. Did you ever have to say "place him over here, this is your responsibility"?
A Sometimes. Sometimes we would do that, yeah.
Q Okay. Well, based upon, you know, 33 years of what you did dealing with these kids and things like that, did you notice whether it took additional instructions for Kevin as opposed to other of his teammates or children of similar age?
A Yes, it did. And, I'll be honest with you, it did, and he was willing to put forth that effort with the additional work.
Q Now, one thing that just popped in my head, when dealing with Kevin, would you have considered him to have been a follower?
A By all means he was definitely a follower. He would sometimes follow for good and sometimes for bad.
Q Let's take the bad first. Give me an example of what he would do.
A One of his friends would not dress out for weight lifting or something, he would follow in that case and he wouldn't dress out, too, and he was influenced by other kids very strongly.
Q Okay. So one kid decided, Hey, I'm not dressing out for weight lifting today?

A Exactly.
Q Okay. And what about for the good?
A Well, he would follow people that would give great effort on the field and he would do the same.
Q So somebody was staying out and doing extra drills?
A Sure.
Q Okay. Do you recall an incident where you caught Mr. Mercer sitting in the locker room kind of hiding?
A Several times. Several times he would kind of skip out of his resource room, which he would go for extra help, and he would stay down in the locker rooms and, you know, that's really kind of the only bad thing I can recall him doing is he was very proud and he didn't want anybody to know he was in the special classes. Consequently, he would stay down there to avoid having to go to certain classes that he felt uncomfortable with. And we did correct that, though, but I still vividly remember that happening several times.
Q Okay. Now, you mentioned these special classes and we kind of go back to that IEP program that you were talking about.

It's my understanding from your testimony that, you know, the average student at Columbia High back then had to maintain essentially a 2.0 average?
A Correct.

Q Now, if you were -- a student who had an IEP, or an Individualized Educational Plan or Program?

A Correct. Either one, yeah. Program, yeah.

Q We'll call it IEP.

A Okay.

Q If you got an IEP plan, it's essentially more of a meets goals, does not meet goals, or pass/fail kind of a situation?

A Correct. It's set up by school psychologists, speech therapists, occupational therapists, and some teachers. They set goals for the student to meet. And if he doesn't meet the goals he would not be eligible. And, of course, he had to meet his goals and I feel like did he because he did get a certificate.

Q Okay. Well, if he wouldn't have met his goals he wouldn't have played for you, would he?

A Correct.

Q Now, let me ask you a little bit about -- you were -- a couple of years ago I believe you were -- participated in the actual trial of this matter?

A Yes.

Q Okay. And you testified at that trial; is that correct?

A Yes, I did. And I wouldn't have testified if I had not contacted Kevin's defense attorney. I read about the

situation in the paper and the trial's coming up, so I called because I just felt like Kevin was influenced by somebody to do whatever he did and I just don't think he --

MR. SIMON: Objection. Speculation.

THE COURT: I'm going to allow him to testify on the basis of why he testified. It's not necessarily the truth of the matter. Go ahead.

THE WITNESS: Well, the truth of the matter is I wanted to testify to help Kevin. And the reason I say that -- and that's the reason I contacted the attorney, to testify.

BY MR. PEAVY:

Q So let me get this straight. You read about Kevin's case in the paper; is that right?

A Correct.

Q And you reached out to his trial counsel?

A Correct.

Q No one reached out to you?

A Exactly.

Q You never heard from an investigator or anything of that nature?

A No.

Q All right. Now, did you ever have an opportunity to meet with Kevin's trial attorney?

A No, I didn't. I came on the stand cold.
Q Okay. So totally cold, never went over what we've gone over today?
A No, no.
Q Did they ask you any questions outside the doors, like outside in the lobby area?
A I think there was a few things and I can't remember what it was. It was nothing significant, though.
Q Nothing like what we've talked about here today?
A Correct. Exactly.
Q Okay.
A And I was wondering, can I -- I don't know if I can say this, Counselor. I was wondering why none of this was brought up in that first trial. I was disappointed.

MR. PEAVY: Okay. Beg the Court's indulgence for a second, Your Honor.

(Pause.)

MR. PEAVY: Your Honor, at this point we tender the witness.

And answer any questions that Mr. Simon may have, okay, sir?

THE WITNESS: Yes, sir.

CROSS-EXAMINATION

BY MR. SIMON:

Q Good morning. I just want to make sure I say your

last name right. It's Macaluso?
A Macaluso, yes.
Q Now, you say you're a coach for a long time?
A Correct.
Q What classes when you have football?
A When I went there I think it was -- we were 0 and 33 when I took the job, so we came a long way. So when I went there it was like a 3-A classification and then I think we dropped down a classification to 2-A classification. There are four classifications, 4-A, 3-A, 2-A, and A, of course.
Q So when Mr. Mercer was there was it a 3-A or 2-A; do you recall?
A I believe it was 2-A.
Q And did you all have a JV team?
A Yes.
Q And at any point in time was Mr. Mercer on that JV team?
A You know, we all practiced together for the most part. Sometimes he might have played in JV games when he first started -- junior varsity games when he first started, but he was quickly moved to varsity.
Q Now, when Mr. Mercer came out for football, did he indicate if he had any prior experience with playing?
A I'm trying to remember that. We used to take -- what

we've always done is take people where they are and try to move them forward from that point, so it really didn't make any difference.

Q But now -- you coached for awhile. When kids come in and they have played before --

A Uh-huh. He was very limited on his experience, put it that way.

Q And would that have played into his ability to know what he would need to do as an offensive lineman if he hadn't played before?

A You know, we took a lot of pride in teaching kids and we assumed everybody was starting from point zero, and that would hurt somewhat, but that wouldn't be the determining factor.

Q Well, let me ask you this -- and part of this is because I just kind of remember like when I first went out -- there are a lot of things --

A Offensive lineman, I'm sure.

Q Actually, yeah.

There are a lot of different things that an offensive lineman has to learn?

A Correct.

Q He has to learn proper stance?

A Correct.

Q You have to know -- if you have plays, you have to

learn the timing?

A Correct.

Q You have to -- need to know the plays?

A Correct.

Q You need to know like if you would lean forward maybe if it's a running play; would that be correct?

A We try to keep them balanced all the time, but you're close. Good. You're doing good.

Q And you have to remember who you would have to block?

A Correct.

Q And that could change depending on what kind of defense the other side would run, correct?

A Yeah. We had something we called "rules," and it would apply to any defense, and you had to memorize those rules, which is part of memorization, and you had to apply those rules every play, so it's a lot of memorization in my system in particular.

Q And so there would be a lot of memorization just for somebody learning how to play the offensive line?

A Correct.

Q And that's whether -- and if you've never played before it might take a little longer to learn that kind of thing, correct?

A Yes, you'd be correct, but not in every case, though.

Q Now, when Mr. Mercer played for you, how long did he

play on the offensive line before you moved him up to defense?

A You know, I required our players to play a little bit of both ways because we'd never know when -- he was a backup offensive lineman so we try to teach them both offense and defense, and we found out that he was having a hard time with the offense, so we just kept him on defense basically, as a defensive specialist, in which he did a good job.

Q So he was actually learning both sides of the ball at the time?

A Trying to, yes.

Q And again, this was his first experience playing football?

A I think it was, yes.

Q And you said you taught him -- you taught his classes on physical conditioning, P.E., weight lifting?

A Correct.

Q You didn't have any involvement with any of his other classes, academic classes, did you?

A No, I didn't. He was in resource classes and, no, I didn't. I checked on him quite regular, like I did all my players, and we had grade sheets they had to turn in every so often and we could see the progress going on in the classrooms so we felt comfortable that he was doing what

he was supposed to in his classes.
Q Did you ever talk with any of his special-ed teachers about ways to help him learn in terms of playing football?
A Actually, one of his teachers was an assistant coach.
Q Okay. And did that assistant coach assist Kevin on the field?
A Yes, he did.
Q Now, you testified earlier that for players that are in IEP they have to maintain that program to be able to play, correct?
A If you have IEP you have to meet your IEPs in order to be eligible to play, whereas if you were not in -- if you do not have IEP and you were in regular classes, you had to have a C average, so it was not punishing anybody -- the rules were not punishing anybody for being in special-ed classes and allowing everybody to participate, which that was our goal.
Q And at no point in time while he was playing football did he miss any time because he wasn't meeting expectations of his IEP?
A Not at all.
Q Now, you talked about sometimes the kids would be kind of cruel to Kevin, calling him different names. Was he the only football player that would be picked on?
A Kids are cruel, you know, and they joke with each

other and it was -- no, he wasn't the only one. I'm sure there's other times that kids were cruel to other people, but I can just remember that particular time that kids called and used that unflattering phrase, I guess you would say.

Q And would you say Kevin had friends on the football team?

A Oh, yes, by all means. The kids really liked Kevin and Kevin cared about the kids on the team. We were very close. We had football camps where we stayed weeks in the gym and you become close as a group and that's the reason I felt like I know Kevin very well.

Q And you testified earlier Kevin gave great effort when he was playing?

A Yes, he did.

Q And that's one of the things you look for when you have kids coming out to play, you like guys that give good effort?

A Sure. Everybody does, yes. I mean, you -- just like anybody gives great effort in any job they do, like you give great effort in your job, we like that.

Q And after Kevin graduated did you stay in contact with him?

A No, not really. I moved on. In 1998 I moved to Fairfield Central and so I was kind of in another part of

the county. I was in another county, really.
Q And so you weren't with Columbia High when it came time for his trial?
A No, I wasn't. I left coming out of 1998.
Q And, I guess, since the trial have you maintained any contact with Kevin?
A No, I haven't. I haven't. I've been negligent in that fact. I still care about him because I know he's a good person.
Q When you got in contact with defense counsel for trial, was the trial going on at the time?
A No, it was before it started.
Q Do you recall how long before it started?
A It wasn't very long; a couple of days, I guess. I can't remember exactly the time frame on that, but I know it was me initiating the call to find out who the attorney was handling the defense was to get in contact with their office.
Q Have you had any other former players get in trouble with the law?
A I'm sure some minor things, but nothing that stands out, no.
Q Nothing that made the papers that caught your attention?
A Correct.

Q Did you have any contact with a Dr. Fisher?
A I spoke with him on the phone.
Q How long ago would that have been?
A I guess maybe a week ago.
Q Do you recall how long that conversation lasted?
A I would say it lasted probably eight or nine minutes.
Q And what did you all talk about?
A Basically the same thing we're talking about in here, how I knew Kevin and my relationship with Kevin.
Q And when he called you, did he tell you why he was calling?
A Yes, he did.
Q What did he tell you?
A That he was writing a report on Kevin.

MR. SIMON: Just one moment, Your Honor.

(Pause.)

BY MR. SIMON:
Q Now, you believe Kevin's a good kid, right?
A Yes, I do.
Q Before trial you hadn't had any contact with him after you left in 1998, correct?
A Well, you know, Kevin is a good kid. He's easily influenced by other people, I'll put it that way.
Q But the fact that he was involved in a robbery, wouldn't that have changed your opinion of him?

A No, I'd still say he's easily influenced to do that, he wouldn't have done it on his own.
Q If he kept a gun under the seat of his car, would that have changed your opinion of him?
A No, I don't think it would. I think a lot of people make silly choices, bad choices, and that's a bad choice that he made, but, no, I'd still say he's a good kid.
Q And what if he was found in possession of drugs, wouldn't that have changed your opinion of him?
A No, I don't think it would.
Q What if he would have attacked somebody else with some sharp objects, would that have changed your opinion of him?
A I think he'd been influenced to do that.
Q And, I guess, what about taking a car, that wouldn't change your opinion of him either, would it?
A He'd been influenced to do that.
Q And shooting somebody, that wouldn't change your opinion of him?
A I think he'd been influenced to do that. I don't think he would have done any of this on his own.

MR. SIMON: Okay. No further questions, Your Honor.

THE COURT: Mr. Peavy, anything?

MR. PEAVY: Yes, sir.

REDIRECT EXAMINATION

BY MR. PEAVY:

Q Coach, I'm a little bit at a disadvantage with some of this football stuff. I didn't know Mr. Simon was an offensive lineman, too.

Let me ask you it this way: He brought up an interesting point. Have you ever had kids or students that you were coaching that were new to the game when you first got a hold of them and started molding them and started coaching them?

A Sure, all the time.

Q All the time?

A Uh-huh.

Q All right. So in comparison to those young men, those kids, was Kevin different than them in the way you had to teach Kevin?

A We had to use probably more repetition than we normally would, more repetition, and that's the only way you're going to learn in football, by doing it over and over and over again until it becomes almost automatic.

Q Okay. So you've got a kid that essentially, they're new to the game?

A Uh-huh.

Q You've got to teach them through repetition?

A Uh-huh.

Q That's the way you teach?
A Uh-huh.
Q And you had to teach Kevin the same principles of football, I guess, and you had to do it through more repetition with him versus the other kids, is that --
A Yeah, I feel like that's the way we had to do it.
Q Okay. Now, Mr. Simon brought up the fact that, you know -- and you mentioned it -- that kids can be cruel. They can use derogatory terms, they can call people names.

To your knowledge was Kevin the only one that they called "brain lock" or anything like that?
A Yeah, that was -- they -- some of the kids called him that and we discouraged that, but, you know how kids are.
Q Yes.
A I mean, if he'd jump offsides or go the wrong direction and -- which happened a good bit, then they would use that term.
Q Make fun of his intelligence?
A Right.
Q Okay. And finally, you mentioned that you tried to get a hold of the investigator or the attorneys for Kevin's trial counsel. Had they contacted you prior to trial would you have talked to them?
A Oh, by all means, yeah.
Q And you would have essentially told them what we've

discussed here today?

A And that's the main reason I wanted to come so I could help in his defense, which I didn't feel like the questions were pertinent to helping him.

MR. PEAVY: Okay. Thank you, sir.

No further questions, Your Honor.

THE COURT: Mr. Simon, anything?

MR. SIMON: May we just have a moment, Your Honor?

(Pause.)

MR. SIMON: No questions, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

Okay. We're going to take about a ten-minute break and come back.

(A break was taken.)

THE COURT: Okay. Are you all ready to call your next witness?

MS. PAAVOLA: Yes.

THE COURT: All right.

MS. PAAVOLA: The applicant calls Naomi Stackhouse.

NAOMI STACKHOUSE, after being duly sworn, testified as follows:

THE COURT: Tell us your full name, please.

THE WITNESS: Naomi Jean Stackhouse.

THE COURT: If you'd spell that, please.

THE WITNESS: N-A-O-M-I S-T-A-C-K-H-O-U-S-E.

THE COURT: All right, Counselor.

DIRECT EXAMINATION

BY MS. PAAVOLA:

Q Ms. Stackhouse, could you please explain how it is that you know Kevin Mercer?

A I met Kevin when I was 19 or 20. We were married and we have three children and we lived together for -- from the time I was 19 until 2002.

Q Okay. Could you speak up just a little bit? I'm having trouble hearing you.

A Sorry.

Q Do you recall the date that you met?

A I met Kevin March the 22nd, 1998.

Q And did you move in together some time shortly after that?

A Yes.

Q About how long was it after you met that you moved in together?

A Probably about four or five months.

Q And when did you get married?

A We got married May the 1st, 2001.

Q Do you have any children together?

A Yes, we have three.
Q Can you tell us their names and ages?
A We have our oldest son, Kevin Mercer, Jr., he is 11; we have Keyara Jeanette Mercer, she is ten; and we have Kavon Mercer, he is eight.
Q When you first met Kevin had he recently moved here from Philadelphia?
A Yes.
Q When he lived in Philadelphia do you know what his living arrangements were?
MR. SIMON: Objection. Speculation.
THE COURT: If she knows it, I'm going to let her testify.
THE WITNESS: It was -- it's rough in Philadelphia.
BY MS. PAAVOLA:
Q No, I mean, do you know who he lived with?
A Oh, who he lived with?
Q Yes.
A His grandmother.
Q And after you moved in together in 1998 until the time of Kevin's arrest for the crime at issue in this case, did the two of you live together continuously?
A Yes.
Q To your knowledge has Kevin ever lived independently

without you or another family member for any significant period?

A No.

Q All right. I would like to ask you some specific questions about your life together when you and Kevin were together.

When you first met him, did Kevin have a bank account?

A Yes.

Q Do you know how he got the bank account?

A His mother helped him get it through the SSI.

Q Did you and Kevin ever share the bank account?

A Yes.

Q How did that happen?

A Within three months of meeting Kevin we were riding in the car, I think, one day to take little Kevin to the doctor and he was like "I want to add you to the bank account and I want you to handle our finances and everything." So we went to the bank and we went inside and I asked to see the bank officer person and we went in there, she gave us some paperwork to fill out. I briefly read it to him and explained what would happen, what would occur, and then he and I both signed it.

Q Okay. And when did you say that was?

A That was within three months.

Q Within three months after you met?
A Yes.
Q So I think you said earlier you were taking little Kevin somewhere, but he was born much later than that, right?
A Yeah, he was born the next year.
Q Then after the point where you were added to Mr. Mercer's bank account, which of you handled the banking?
A I did.
Q How did Kevin receive money from the account?
A I gave it to him.
Q What form did you give it in?
A I would usually give him bills and sometimes I would -- anywheres from fifty to a hundred dollars.
Q All right. And did you explain to him what it was for, what he could use it for?
A It was just like his pocket money, whatever he wanted to use it for. He always told me to make sure that the bills were paid, make sure the kids -- we had our bills were paid, we had everything we needed and then that was just his little spending money to have, just for him to have money in his pocket.
Q All right. And he was fine with that arrangement?
A Uh-huh.

Q Did Kevin ever pay any of your bills?
A No.
Q Did you ever see him balance the checkbook?
A No.
Q Why were you the only person in the marriage who handled the finances?
A Because the day that Kevin and I went to the bank when he took the paperwork first, I saw how frustrated he got because he didn't understand what those forms meant and what it said and he just real quick slid it to me and was like "You handle this," and so from that moment on I started covering for him, I took care of everything, so I didn't upset him or see him get frustrated like that again.
Q Did you ever see Kevin pay for anything at a store?
A Most of the time I was with him. There may have been one incident where I sent him to the store, but for him actually to go and do it, no, I handled it.
Q All right. So there may have been some times when you sent him to the store. Can you give us any examples of how that worked out?
A The first time I tried to send Kevin to the store I sent him to get the baby's formula and he came -- he got lost and he called me frantic, panicked, you know, "Naomi, I'm not sure how to get home." He was just all upset, he

was so frustrated and I could hear it in his voice. And he didn't get home, it was like an hour and a half and I know the store wasn't that far, it was maybe around the corner a couple of times, something like that, but he got confused and he called me and I directed him back home and when he came back home he didn't have the right formula. It wasn't the right name brand, it wasn't anything, so I said, "Okay, it's okay, Kevin. Just stay here, I'll go get it."

Q Had you explained to him before he went to the store what exactly it was you wanted him to get?

A I did, I wrote it on a piece of paper.

Q Did you show it to him?

A I did.

Q When you were together was Kevin ever employed?

A Yes.

Q What kind of jobs did he have?

A He worked at McDonald's. He worked at Bi-Lo, Wal-Mart. He worked at Triangle Rental place.

Q Did he ever work for Labor Ready?

A Yes, and Labor Ready.

Q What kind of work did he do at those places?

A Most of it was like stocking and at Labor Ready it was like construction, like cleaning up, you know, easy stuff that he would be able to do without showing anybody

what he really couldn't do.

Q You said he did some stocking. Did he have any trouble with those tasks?

A He had a couple of friends that worked there with him, so he would have to have people show him and tell him. Like if it was a yellow box of Cheerios, somebody would go say "Oh, it's over there," but Kevin might would go to the other aisle or he would say like "This is yellow, so match yellow with this yellow and look for the name brand," and like sometimes I think the stuff, it runs together for him.

Q You said he worked at Labor Ready. Can you explain a little bit more about how that worked?

A Labor Ready was where like I packed his lunches for him and I would take him to work and drop him off and they would -- a big van would pick up the guys. It was where a lot of guys with disabilities, that's where they all usually would kind of work because they would give them job assignments that really were minimal tasks. You didn't have to focus a lot. You didn't have a lot of details and stuff that you had to do. If somebody would say "Just go put that in a trash can," you could find a trash can and put it in the trash. You know, it wasn't nothing heavy, nothing serious.

Q How long did he generally have these kinds of jobs?

A He would try, he would try to keep them as long as he could until he would get frustrated and say "I just can't do it. I try."

At McDonald's I think he -- Labor Ready, he lasted longer, like maybe six months up to almost a year, something like that. That was the longest one that he had.

The other jobs, he had them for a little while, but he just couldn't do them. And like the one at McDonald's, he was so upset when he came home. He was like, "Naomi, the supervisor just yelled at me. I didn't do this right, I didn't do that right." You know, he was like, "And I thought I was." To him, he honestly thought he was doing what was right, but it was wrong and so they sent him home.

Q All right. So did they fire him from that job?

A Yeah.

Q Did any of the jobs that he had when you were together require written applications?

A Yes.

Q How did he go about getting and completing those applications?

A I would let him go in and he would go in and I'd tell him what to say and he would ask for the application and then we would take the application back home and I would

fill them out for him.

Q To your knowledge had Kevin ever applied for a job in which he completed the formal application entirely on his own?

A No.

Q After you and Kevin met did he ever attend any classes or school?

A Yes, we went to Midlands Tech together.

Q What was he studying at Midlands Tech?

A He was in the vocational part of it where like he was trying to learn the trade for electrician or there was one more -- I can't remember what the other -- it was electrician/something else.

Q Okay. And how long did he go there?

A I think he lasted about a semester, a semester and a half.

Q And what kind of -- did he ever have homework for those classes that he brought home?

A Yes.

Q And how did he go about completing that homework?

A We would, you know, go to something else. We would come home together and when we would sit down to do our work, I would sit at the table next to him and while I was doing my work, I would also try to help him do his. I would read his paragraphs and stuff to him and I would try

to break it down for him to understand. I would like try to dissect it and try to make it as less complicated because like to him, when he would see a big paragraph it's like, you know, he would freeze up. And I think as time went on, he became more receptive to allowing me -- to trust me enough to help him, that I wasn't out to hurt him, I was there to help him because I wanted him to succeed in life.

Q Did he take classes as well at a trucking school for some period of time?

A Yes, he went to a trucking school in Pelion. He lasted three weeks there.

Q What kinds of things was he supposed to be learning at the trucking school?

A At the trucking school he had two different types of tests. He had one where he had to like go point to a part, like on the truck, and you had to tell what it was. And then he had a written one. And I think, there again, I helped him do his work, more so less at that one, it was more comprehensive, so I really did all the work for that one.

And he would try, he would try so hard. He would try to say that, you know, he would try to learn them and I would show him the parts in the book, but it just all ran together, it didn't make sense to him and he

was just like "I can't do this, I can't." And he would get frustrated and he would start to cry and then I would just say "Okay, it's okay. I'll take care of you. It's okay. It's all right. You don't have to worry about it. You tried."

My main thing was with him. I tried to help him. I wanted him to at least try so that I could see that he was trying to put the effort.

Q When you lived together, did he ever prepare food for himself or your family?

A Yes, he tried to.

Q Did he try often or was it one particular time?

A There was one particular incident that I can remember. It was Mother's Day of -- it was May 10th, 2002. I was pregnant with our third child and I was sick that day. I was really out of it, so he told me to go upstairs and lay down and he would take care of the kids. And so it was about -- I think I slept like four, four and a half hours that day and he sent little Kevin upstairs to wake me up, but I didn't get up, I kind of played asleep and so then I remember hearing little Kevin say "Daddy, mommy won't wake up." And so then Kevin came upstairs to get me and he was like "Come on, I cooked dinner." And I kind of looked at him and I said, "You cooked dinner?" I said, "Okay." So then we came back downstairs and we sat

down to the table. He had candles lit and the table was set and him and the children were there and we said our grace and he went to cut the food. He tried to cook Swedish meatballs and pasta noodles. It was in a frozen thing. And it was frozen, it was not cooked. He thought that it only took 30 minutes to cook it when actually if he would have taken the -- if he could have, you know, understood the directions and read them clearly that it made sense to him, it took way longer than that.

Q Other than that one instance, did he cook on any regular basis at home?

A He tried to, but when it came to making -- I tried to teach him small things. Eventually, he did learn how to boil water.

When I was in the kitchen I would try to-- he would be right there with me. But most of the time Kevin's cover, because he didn't really want me to know because I think he was afraid I would have left him, and his cover was "I'll take care of the kids." But through the different examples through our lives, you don't be with somebody that many years and not start to notice something.

But even though I noticed that he had those difficulties and the things that are wrong with him, I still loved him and he needed me. He needed somebody to

take care of him, not just throw him out there and not care. And so I made a choice, I made a vow to stay with him and take care of him because I knew that's what he needed.

Q When Kevin would say "I'll deal with the kids" while you were doing a chore, what kind of things did he do with the kids?

A It was mostly he would get down with them on the floor. It was like he was just a big kid himself.

Q Did he ever do things like change their diapers or make formula, that sort of thing?

A He tried one time to change the baby's diaper. And he, of course, every time he would try, it didn't work. Until several times after he completely -- I mean, really, I literally had to take Kevin -- his hands and I put mine on his and we took the baby, we laid the baby down and I taught him how to change the baby's diaper.

Q Did he have any difficulties with other household chores, things around the house?

A There was -- Saturday morning was like our cleaning day, so he was like "I want to try the laundry." He went to get the clothes in the basket and he went into the laundry room and he overflowed the washer.

Q Okay. Do you know why that happened?

A What happened was he did not take the time or

sometimes I would think he would be watching me, but really Kevin would be, you know, just staring off, you know, and he apologized. He was so upset that he did it and he walked outside and sat on the porch and he cried and he cried. And I went out there and I said to him "Kevin, it's okay. You are trying and I see you trying. I'm not going to leave you because you overflow a washer. Yes, it's a big mess, and, yes, we have to clean it up, but, Kevin, it's the fact that I know that you're trying. It's not like you don't want to just do it, you don't want to help me. You try."

He did anything in the house. He would try to help me do it because we had children. We had two children and he already knew the pressure that I had on me. I handled all of our finances, all the shopping, everything, but I had him with me and his cover was for it when people saw us, it was the children, he had the children with him, so you wouldn't be able to tell that my husband couldn't do anything.

My husband looks normal, yes, but on the inside he is not. He cannot function the way we function, and I learned that very quickly.

Q When you were together did you and Kevin ever own a camera?

A Yes.

Q What kind of camera was it?
A We had the big old Polaroid camera where the picture automatically came out.
Q All right. And did Kevin have some trouble operating that camera?
A It was Keyara's birthday, I believe her first one. It was before, we were getting ready for everybody to come and he was trying to load the camera to put the film in there and he couldn't figure out how to do it. He couldn't get it to work and I remember him getting so frustrated that he threw the camera down.
Q Did you do other things for Kevin like call in his prescriptions for him to get them for him?
A That was another big thing. He was having, I think, a real bad asthma attack one day and he was like "I need my medicine, I need my medicine." And I was like, "Well Kevin, call your medicine in," you know. I was doing something with the kids and I said, "All you have to do," I gave him the directions and I told him what to do and he was like "I can't do it. You just do it." And I said, "Okay. All right." So I put the baby down and I proceeded to call in his medicine and then I went and I picked the medicine up.
Q Did you do things for him like pack a suitcase for him when you were traveling?

A Yes.
Q Did you help him manage his time, keep appointments and schedules and that sort of thing?
A Yes.
Q Did he do any of that on his own?
A No.
Q You talked a little bit about this already, but are there any other specific things that he would do to try and hide his difficulties?
A He would more so kind of stay to himself. A lot of times he would rather stay inside the house, really not go out in public. Like if we went to restaurants and stuff like that, we would get the food and go back home. I think that his cover was "If people didn't see me, nobody can know what's wrong with me."
Q Did you do things to help him cover for these difficulties?
A I did. I covered for him.
Q Okay. So I understand you testified at Kevin's trial in 2006?
A Yes.
Q Were you ever asked by Kevin's trial attorney before his trial happened about any of these kinds of limitations that we've been discussing today?
A No.

Q Did you meet with them to prepare your testimony?
A We had meetings. They kind of like briefed us about each step, what would happen going on along, but nothing to the extent, no.
Q But if they had asked you about any of these things we've talked about today --
A Yeah, I could have --
Q -- you could have talked about those things?
A Yes.
Q Did they ever explain to you that when you testify, you would be able to ask the jury to give Kevin mercy?
A No.
Q If they had told you that you could do that, would you have been willing to ask the jury?
A Definitely.
Q Were you present during the trial when the video from the victim's funeral was played for the jury?
A Yes, I was.
Q Were you able to see the judge at this time?
A Yes, I was.
Q What was his reaction during the video?
A The judge was like this (indicating) and his head was down like this (indicating) and he was crying.
Q Did you observe any of the jurors at that time?
A There were two jurors that were crying.

Q Do you remember if they were male or female?
A They were two females.
MS. PAAVOLA: All right. Thank you, Ms. Stackhouse.
THE WITNESS: You're welcome.
THE COURT: All right. Mr. Simon.

CROSS-EXAMINATION

BY MR. SIMON:
Q Good morning, Ms. Stackhouse.
A Good morning.
Q Are you still married to Mr. Mercer?
A No, I'm not.
Q When did you all get divorced?
A 2008.
Q Okay. But you all had three kids together?
A Yes.
Q And you all still have a pretty special relationship because of those three kids, correct?
A Yes.
Q When you first met Mr. Mercer, what was the dating process like for you all?
A It was excellent.
Q Talk on the phone a lot?
A No. We spent a lot of time together. I was always with him.

Q Going out on dates and everything?
A Yeah.
Q Would he come pick you up and you all go off somewhere?
A No, I picked him up.
Q You picked him up, okay.
At his trial, you testified?
A I did.
Q And during your testimony, do you recall saying that Mr. Mercer was a good provider?
A Yes.
Q And you said your children never went without?
A Yes.
Q You said he was the best role model ever?
A Yes.
Q You also indicated that kind of changed after his grandmother died?
A Yes.
Q And after that -- first you all went up to Philadelphia when she died, correct?
A Yes.
Q Do you recall when that was?
A She died January 1st either 2001 or 2002, I'm not sure of the year.
Q Okay. And you all spent three weeks up there?

A We did.
Q And when you all came back, Mr. Mercer, he started -- he wasn't staying around as much, correct?
A He would -- got up with some friends and, yeah, they would come and pick him up and he was gone sometimes.
Q Now, while you all were married, he did have other friends, correct?
A Uh-huh.
Q And he would go hang out with them on occasion?
A Sometimes. He mostly spent a lot of time with my two brother-in-laws and my family.
Q Now, you all have a close family?
A Definitely.
Q And were you close with his family?
A Yes.
Q All the brothers -- I guess his brother and his two sisters?
A Yes.
Q His mom and dad?
A Yes.
Q And were his, I guess, his brother and sisters, were they still kind of around his parent's house a good bit?
A They would come and visit, yeah. I know the two girls stayed longer, you know, because they were girls and Ebony was young. Eb was still in her teenage years. Eric

was gone. Eric wasn't there yet. Eric had his own family.

Q Now, earlier you talked about some of the jobs that Mr. Mercer had?

A Yes.

Q I believe you described one of those jobs, I guess it was the Bi-Lo job with the stocking?

A Uh-huh.

Q Did you actually go to work with Kevin sometimes to see what he did?

A Yes.

Q And which jobs did you go to?

A I went with him to the one at Bi-Lo, the one at Triangle Rental Car.

Q And did you observe him working while he was there or did you just go visit?

A No, I would stay with him throughout the day. They just wouldn't see me. I would sit in the car and if I -- most of the time when you stay with somebody as long and you start realizing the disabilities and the different handicaps that Kevin had, I could usually start to see before Kevin would get upset or frustrated when he couldn't do something and that is when I would get out of the car and tell him "Go in and tell them, come on, you need to go home, you're not feeling well."

Q Now, you understand Mr. Mercer, he's been diagnosed with learning disabilities before, correct?

A Yeah.

Q Did you all ever go try to seek some help to, I guess, finding ways to help him learn how to do certain things?

A Back early on I did try to go to, I think it's the Midlands Vocational off of Farrow Road. They gave him some counseling, wanted to put him on a bunch of medicine. I said, "No," and I took him back home after we went through the sessions and stuff and I continued to care for him and take care of him.

Q So other than that, no other attempts at trying to get --

A Other than that, I didn't know what else to try to do. I did try to talk to the social worker at SSI, but every time we tried to go through them to get some kind of help, because when I would talk to other family members they would tell me, you know, try to do such and such, and I did everything everybody tried to tell me to do. And I couldn't get any further help until this situation occurred and then doctors and stuff, they were able to get that kind of stuff. I tried everything. Every avenue that I tried I got smacked right back down.

Q Now, can you give me a little bit more insight on the

timing of his different jobs? I know you said he had several. Do you recall which one came first?

A The two McDonald's jobs because he tried to work at the one off of Harbison Boulevard and the one off of Lake Murray Boulevard. Those were the first ones.

Q And then would he have gone to, I guess, Bi-Lo?

A Yeah, that was the next one. The last one was Labor Ready.

Q Now, take a step back. You said that at one point in time he took a class at Midlands Tech while you were in school there?

A Uh-huh.

Q Do you recall when that was?

A That was back in 1998 when we first met. We were both going to school. I was in school, he was in school, too.

Q You said he took a class to try to become an electrician?

A Yes.

Q Did he take any other classes after that?

A He took -- he was in the remedial classes, the lowest level there. I think it was like 032, I believe is the lowest level. That's what he was in. I mean very, very remedial basic stuff.

Q In terms of Mr. Mercer getting jobs, when he finished

high school, he finished with a special education certificate, right?

A Uh-huh.

THE COURT: Is that "yes"?

THE WITNESS: Yes. I'm sorry.

BY MR. SIMON:

Q So would you say that that would have limited his job opportunities?

A Yes, I think that played a big part of it.

Q And he wouldn't qualify for some of the other jobs above what he was applying for, would he?

A Right.

Q But he still tried to find ways of bettering himself by taking the electrician class?

A Yes.

Q And also going to trucking school?

A Yes.

Q Now, in terms of, I guess, when you were explaining when he was doing his homework, you would say that once he got to a -- reached a certain frustration point, you would go in and start helping?

A Yes. Most of the time we like -- our house, the way it was built, I could see out through the other rooms, he would be at the kitchen table downstairs, so if I was doing something else or he would call me, "Naomi," I would

come because I knew that meant he's having trouble without making him have to say it to me.

Q You would just go ahead and intervene?

A Yes.

Q In terms of preparing the meals in your home, when you cooked, would you allow Kevin to help you?

A Yes.

Q And what kind of things would you allow him to do?

A Like I could tell Kevin get me a certain pot, pan, the silverware, he could set the table.

When cooking-wise, I never let him do the stuff like dealing with the oven because I was always afraid that because of his limitations, I was scared that maybe one day, by accident, not meaning to, it's not his fault, would have set a fire so I just -- that kind of stuff. But I always had him standing beside me so that he could watch me so that, you know, he could say "Well, I see how she's doing it."

But then when I would try to -- like with the cornbread, I think there was an incident with the cornbread. He tried to, you know, mix it up and I told him the certain amounts I measured, I wrote it down on the piece of paper, I did it two different ways to try to see if he would be able to do it. I told him by my mouth and then I wrote it down out on a piece of paper to see which

one he did better with and which one he could actually kind of do.

Both of them he didn't do. Like following my directions he didn't do, he forgot a step or left out a step or whatever. He just didn't comprehend whatever I told him.

When I wrote it on the piece of paper I wrote it out and he saw that big paragraph and it was like "No, that's okay. Let me go, I'll play with the kids. You can go ahead and do this." I said, "Okay. It's fine. Thank you for trying to help me."

Q So it wouldn't be a situation where you'd just oversee him trying to cook a meal or anything, it would be where you were just kind of giving him tasks; is that what you're saying?

A Like -- hold on. What do you mean? Did he ever cook a full course meal? Is that what you mean?

Q I guess what I'm wondering is, did you ever -- instead of giving him the directions, did you ever just kind of let him start a meal and you're just watching him do it?

A Yeah. Like one morning breakfast.

Q And he was able to make those kind of breakfasts, right?

A No.

Q He wasn't?
A No.
Q In preparation for his trial, did you ever talk to a Dr. Loring?
A Yes, I believe so.
Q And how about a Dr. Schwartz-Watts?
A Yes.
Q Would you have talked to Paige Tarr?
A Yes.
Q And Mrs. Graham, did you ever talk to her, too?
A Yes.
Q Now, you said that there would be times that Kevin would take care of the kids?
A Uh-huh.
Q And you were comfortable with that?
A Yes.
Q And none of your kids got injured while in his care or anything, did they?
A Never.
Q After your laundry incident with the overflowing washer, did you let him do laundry any more?
A No.
Q Was that the first time he attempted to do laundry?
A Yes.
Q But before you all moved in together did you spend

time at his parents' house with him?
A Yes.
Q Would you see what kind of chores and stuff he would do there?
A No. I wasn't dating him. I didn't date him until I was like 19, 20, so he wasn't -- I believe at that time he was staying in a hotel when I first met him.
Q Okay. So he wasn't staying at his parents' house when you first met him?
A Unh-unh.
Q In your early dating, where was he staying?
A At the hotel. He had just came back from Philadelphia.
Q And, I guess, how long had he stayed in the hotel before you all moved in together?
A Maybe about a couple of months.
Q And when you moved in together, did you just move in to your place or did you go out together and find your own place or how did that work?
A We moved in -- my mother lived in a split-level house and she give us the bottom half. It was our own. We had our own insurance, everything. It was our own little efficiency. We had use of the kitchen and stuff like that.
Q Okay. You talked about Mr. Mercer changing the baby,

the experience you had with teaching him how to change the baby diaper?

A Yes.

Q After that was he able to change the baby's diaper on his own?

A He opted not to.

MR. SIMON: Just a moment, Your Honor.

(Pause.)

BY MR. SIMON:

Q I just have a few more questions.

When you would go with Mr. Mercer to work, who was taking care of the children?

A They would be with me.

Q So you would just have your whole family just at his job?

A I would have them in the buggy like I was going grocery shopping.

Q I just want to take a step back. You said you had assisted him with his school work?

A Yes.

Q And did he do all right in his classes?

A No, he struggled.

Q But that's with you doing his school work?

A I didn't say I did all of it. He could write it. I just gave him the answers and I told him how to -- I tried

to teach him how to read his paragraphs. I tried to teach him how to break the things down to be less complicated so it wasn't so frightening for him when he would try to tackle it.

I tried to go different avenues. I tried to teach him everything I knew to teach him to help him, but he needed more help than that. He needed professional help to help him learn.

But I would have to say that, you know, for the time that he did try to live in society by himself, he tried, but he needs somebody to take care of him.

And that was where I came into play and I made a vow to him and I told him as things started occurring in our relationship, I said I had to be careful because he's a man and one of the things -- my first instances that I knew something was wrong with him, no African-American man is going to add a female to his bank account within three months. They just don't do that. And so I was like -- I questioned it to myself, but him, I knew then he needed me. And even when he went to try to -- he slid the paperwork, he was like "you do it" and I was like "Okay. It's okay. I got it." And I remember him going out, and he went out and sat in the car until I finished handling the business. That is how our life was.

And I was okay with that because I loved him. I

was willing to help him try to fit in and cover it up as much as I could because it's not easy.

I'm the mother of his children, his wife. I tried to help him and make him fit into society because I knew he wanted to be -- he wanted to be like any other normal man.

I never wanted to make him feel less of a man. I never wanted to make him feel like he couldn't take care of his family. I covered for him at anything I tried to do to help make it easier for him to try to function.

Q Okay. So you did that, you agreed to sign on to his bank account after three months?

A Uh-huh.

Q You all had that kind of relationship that early on, correct? I mean, based on your descriptions here.

A We were just dating at that time, yes.

Q And was this before or after you moved in together?

A This was before.

Q How long before?

A I want to say within three months of me starting to date him and spend time with him he added me to that bank account, because after that we found out I was pregnant and we moved in my mom's house.

Q Basically you saw your role was to cover for Kevin; is that -- would that be a fair assessment of what you're

saying?
A Yeah, I guess so.
MR. SIMON: I have no further questions.
THE COURT: Anything?
REDIRECT EXAMINATION
BY MS. PAAVOLA:
Q Ms. Stackhouse, Mr. Simon asked you about your divorce from Kevin in 2008.
A Uh-huh.
Q Was that because of the circumstances that he's currently in jail?
A Yes. He told me he wanted me to go ahead and get the divorce. He didn't want to punish me and the children. And I told him I didn't want it, that I was still in love with him as I am right now. Just because I did what he told me to do, that's the only reason. Other than that, we'd still be married right now.
Q All right. Mr. Simon asked you about your testimony at Kevin's trial, about the period of time after his grandmother's death. I think you testified that really had a significant impact on him.
A Yes.
Q And he was asking you about how during that period Kevin would sometimes leave your house for some periods of time and be out with friends?

A Yes.
Q Did you know any of those friends?
A Yes.
Q Did you like them?
A There was one particular one I did not like.
Q Was Kevin able to judge who was his friend and who wasn't his friend?
A No.
Q You talked about how when you first met, he had just come back from Philadelphia and he lived for a period of time in a hotel?
A Yes.
Q Did he live there by himself?
A No, his brother Eric helped him get the hotel.

MS. PAAVOLA: Thank you. No further questions.

THE WITNESS: You're welcome.

THE COURT: Anything?

MR. SIMON: Just a couple questions, Your Honor.

RECROSS-EXAMINATION

BY MR. SIMON:
Q You say his brother Eric helped him get the hotel? Did his brother live in the hotel with him?
A Yes.

MR. SIMON: No further questions.

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

may step down.

MR. PEAVY: Your Honor, could we approach real quick?

THE COURT: Sure.

(A bench conference was held with the judge and attorneys.)

THE COURT: We're going to break for lunch. I understand the next witness is a very lengthy witness for the State, so we'll come back here in about an hour and 15 minutes. See you all then.

(A lunch break was taken.)

(WHEREUPON, Applicant's Exhibits Nos. 13-17 were marked for identification only.)

THE COURT: Are you ready to call your first witness after lunch?

MS. PAAVOLA: Yes, Your Honor.

THE COURT: All right. If you would, please.

MS. PAAVOLA: The applicant calls Dr. Brad Fisher.

DR. BRAD FISHER, after being duly sworn, testified as follows:

THE COURT: Tell us your full name, please.

THE WITNESS: Brad Fisher, F-I-S-H-E-R.

DIRECT EXAMINATION

BY MS. PAAVOLA:

Q Good afternoon, Dr. Fisher.

A Good afternoon.

Q Could you just briefly tell the Court how you're currently employed?

A I'm a clinical forensic psychologist in private practice in Chapel Hill, North Carolina.

Q Could you explain your educational background?

A Yes. I received my undergraduate cum laude from Harvard University in 1972. I did a thesis there concerning the correctional practices in that state at the time.

I received my master's degree from Southern Illinois University in 1973. The program combined their clinical psychology program with their Center for Crime and Delinquency and my thesis there was in methods for differentiating criminal types.

At that point I entered one of two programs set up in the country for training clinical correctional or clinical forensic psychologists, this was at the University of Alabama. It was funded by the Federal Law Enforcement Assistance Administration.

And I received by Ph.D. from what's called an American Psychological Association approved accredited program in 1976 with my dissertation in the prediction of dangerous behavior.

And lastly, as part of that education, I did a one-year internship as required of clinical psychologists. Mine was half with the Ohio State University Hospitals and the other half with their Department of Corrections since my degree was forensic specialization.

Q Thank you. Could you also briefly tell us about your work background?

A Yes. As an overview, I have worked since graduation for the last 33 years, I guess, in just this area and have conducted evaluations for the courts on a continuous basis, never stopped doing that. Part of it has included grants from agencies including the Federal Justice Department through the National Institute of Corrections for developing systems for evaluating prisoners, prison classification systems. That included the National Guidelines for Classification and other projects with the American Correctional Association, other groups like that.

So I've done evaluations both at the systematic level where you'd say this is a type of prisoner, or this is a category of prisoner, or this is a way to evaluate, as well as done ongoing forensic evaluations and clinical forensic evaluations for the courts.

I would note that this is included. I've had teaching appointments at Duke University, the University of North Carolina where I've lived the last 30 years, and

at the National Academy of Corrections, which is an academy in Colorado that teaches in areas of concern for the courts and for corrections.

Q Is evaluation or testing for mental retardation a part of your training as a clinical psychologist?

A Yes. Specifically as a clinical psychologist I had to have a one-year class under Dr. Mike Dinoff for just training and administration of the WAIS which is the most often given IQ test, the Wechsler Adult Intelligence Scale. It's part of training for clinical psychologists, but, it's not, for example, for psychiatrists. So this is a very important part of what we're trained to do and have classes in that specific area.

Q You're currently in private practice I think you've already said. How many mental retardation cases do you typically evaluate on average?

A I do on an average of maybe three cases a month. Have for, again, for 30 years without much difference. Of those three -- well, if you took it into two months, of those six, I would say definitely one of them is a mental retardation issue, but the issues range a lot. Some of them can include voluntariness of statements that are given, others can include dispositional alternatives that are considered, other ones include capital case consideration. So there's a lot of different ways that

mental retardation is considered by a clinical forensic psychologist. But pretty much any clinical forensic psychologist would run into those as a significant part of what they do, and I do.

Q Have you previously made evaluations in cases where you found both that the client had mental retardation and that the client did not have mental retardation?

A Yes, all the time. I would say especially since Atkins in 2002, I've done a much higher volume of them and in some cases I find the person is retarded, sometimes I find they're not retarded, and those times when they are and aren't can be different than previous findings, so it really runs the gamut and includes all of the above.

Q Have you previously been qualified as an expert in state or federal court?

A I have been qualified as an expert in approximately 30 -- or more than 30 probably now -- states and the federal court several times each year. I've never not been qualified as an expert.

Q You've never been offered and not qualified as an expert?

A Correct.

Q Okay. Do you know roughly how many times you've been qualified as an expert in court? Can you give us a ball park estimate?

A Well, I'm never good at this sort of exact number thing. I don't know how to figure it other than what I'm doing.

As I say, I'm usually involved in three cases or so every month, but maybe two of those three might result in testimony and one of them goes some other direction.

MS. PAAVOLA: Okay. Your Honor, at this time I move to qualify Dr. Fisher as an expert in mental retardation.

THE COURT: You all want to voir dire him in any way?

MS. BROWN: May we have just a moment, Your Honor?

THE COURT: Sure.

(Pause.)

MR. SIMON: Your Honor, just a couple of questions.

Dr. Fisher, you said you have been qualified a number of times. What were you qualified for when you testified in those other cases?

THE WITNESS: Most of time -- to be honest, I don't know the exact -- I don't listen when they say "This is what you're qualified for today," but I think the fair answer to your question is: Most of the time it's just as a clinical forensic psychologist.

MR. SIMON: Well, if you want to qualify him as a clinical forensic psychologist, I have no objection to that.

THE COURT: What is it you're attempting to qualify him for?

MS. PAAVOLA: I have moved to qualify him as an expert in mental retardation. If Mr. Simon wants me to specify that he's an expert in clinical psychology with an emphasis in mental retardation, that's fine. And he's testified that he has made a number of --

THE COURT: Of course, I don't know if there is a distinction. I mean, it's kind of like you qualify an orthopedic as an expert in orthopedics. Now, that doesn't -- he doesn't have to be an expert in feet. It might be that he has some area that he does more work, he might be a hand specialist or something like that, but he clearly can be -- it would go, I guess, to the weight -- whatever weight.

All right. So you're moving to qualify him as an expert, as a clinical forensic psychologist?

MS. PAAVOLA: Yes, that's fine.

THE COURT: And there's no objection?

MR. SIMON: No objection.

THE COURT: All right. I find the doctor to be qualified as an expert in the field of clinical forensic

psychology.

BY MS. PAAVOLA:

Q All right. Dr. Fisher, I'd like to hand you what's been premarked as Applicant's Exhibit No. 13 and ask you if you can identify that document as a copy of your CV.

A Yes, this is my resume or vitae.

Q Thank you. And does that document contain the work history and education information that you have just testified to?

A Yes.

MS. PAAVOLA: Your Honor, I move to admit Applicant's Exhibit No. 13.

MR. SIMON: No objection.

THE COURT: So admitted.

(WHEREUPON, Applicant's Exhibit No. 13 was admitted into evidence.)

BY MS. PAAVOLA:

Q Dr. Fisher, in this case did we ask you to evaluate Mr. Mercer with a focus on the possibility of mental retardation?

A Yes.

Q Can you tell us how you went about doing that?

A Yes. I requested and received from your office what I would describe as the normal records that we look for in these kinds of evaluations. In this case these included

his school records; his special education records from Pennsylvania; some medical records mainly just for asthma and some things like that; previous IQ tests that had been given; a newer test given this year by Dr. Grant, who I consulted with; the mental health evaluation in 2006 by the Department of Mental Health, as well as the 2006 evaluation by the Department of Developmental and Special Needs.

Then, in addition to that I interviewed -- well, I interviewed him on two occasions and gave him an evaluation, being on the 10th and 11th of January, down at the Lieber Correctional Institution, and then I spoke to or interviewed peers and family members. This includes who you've heard here today, Diane, his mother; Leroy, his father; his coach, Macaluso; his ex-wife, Naomi. And in addition, I spoke to Ms. Jefferson who was a teacher whom he had had, who didn't testify here today. I interviewed them by phone and then I sat down with them yesterday again and then I've sat here through their testimony, so I have those three avenues.

So that was the primary data and interview data and my own evaluation data and previous test scoring that I used for the opinions that I may give.

Q All right. And I just want to make sure we covered all these.

Did you also review the Social Security records?
A Yes, I did. I'm sorry if I didn't mention that.
Q I think you said school records. Does that include his school records from both Philadelphia and here in South Carolina?
A Yes.
Q And then also his special education records both from Philadelphia and here in South Carolina?
A Yes, and those I did mention.
Q All right. I'd like to show you what's been marked as Applicant's Exhibit No. 14 and ask you if you can identify that packet of documents.
A Yes. These are the special education records, including IEP information and the like, that you gave me to review.
Q Those are special education from Philadelphia?
A Yes.
Q Are these the records -- some of the records that you relied on, in part, in formulating your opinion in this case?
A They are.
MS. PAAVOLA: We would move to admit Applicant's Exhibit No. 14.
MR. SIMON: Your Honor, I object just to the lack of foundation of how he came about -- I understand

that they gave him the records, but a foundation, I request there be a foundation laid for how they received the records.

MS. PAAVOLA: Well, the foundation was already laid in the affidavit of the records custodian authenticating the records that we moved to admit this morning.

MR. SIMON: I withdraw my objection, Your Honor.

THE COURT: All right. So admitted.

(WHEREUPON, Applicant's Exhibit No. 14 was admitted into evidence.)

BY MS. PAAVOLA:

Q Okay. Dr. Fisher, could you just explain to us in broad terms what the primary focus of your evaluation was in this case?

A Yes. To determine whether or not this person carries -- is properly diagnosed as mentally retarded.

Q And did you formulate an opinion within a reasonable degree of scientific certainty in your field as to whether or not Mr. Mercer is a person who has mental retardation?

A I did.

Q What is that opinion?

A That he does.

Q All right. So I would like to break that down a little bit and have you explain how you came about

reaching that conclusion. If we could, I'd like to start with how you go about properly determining if someone has mental retardation. So could you just tell us what the test is for determining if someone has mental retardation?

A Yes. Whether it's viewed from the point of view of the -- what's called the Diagnostic and Statistical Manual, DSM-IV -- that's what we psychologists use for differential diagnosis -- or whether it's through the material developed by the American Association of Mental Retardation, more recently changed to American Association of Intellectual Disabilities, these determinations are pretty much the same. It says that there's a three-pronged approach.

The first prong is determining whether or not the person has an IQ of below 70 on an individually administered standardized IQ test -- that's the first thing -- with a plus or minus five points for what's called a "standard error." So in other words, whatever score you get, you have five points on either side where they say "well, it could be in there," where if you have some certainty in -- so you're not exactly a number, it's within a realm, so it's five points on either side.

The second thing is the determination of whether or not a person has adaptive behavior deficits. These are disabilities in adaptive behaviors in areas that are

defined by either the American Association of Mental Retardation or the DSM for psychologists, but they're all pretty much identical. Both of them give ten areas such as communication skills, independent living, et cetera. There are ten, and they are very similar to each other. More currently, the Association of Intellectual Disabilities has changed that to three, but within those three, there are pretty much the same ten. So it's -- all the definitions are the same.

The third prong is that these developed -- that these were there before the age of 18.

Q All right. And I meant -- I probably should have handed this to you earlier, but if you could take a look at what's been marked as Applicant's Exhibit No. 15. I'd like to ask you if you recognize that as an exhibit you prepared just for demonstrative purposes to talk about what the different definitions are?

A Yes. This is what I just blundered through trying to describe without the handout.

Q I'm sorry. So if I understood you correctly, there's the AAMR?

A Yes.

Q They have a definition which has three prongs that you talked about?

A It has the three prongs and it has the ten categories

within the second prong.

Q Yes. And then the DSM-IV. It's produced by the American Psychological Association; is that right?

A Yes.

Q And they have essentially the same definition?

A Yes.

Q And then recently, this is somewhat confusing, recently, the AAMR has changed its name to AAIDD, which is on the second page; is that right?

A That's correct.

Q And they have changed the definition in what way?

A Well, if I can summarize it, they took the ten and changed it to three. They call them the conceptual area, the practical area, and the social area, but within those are the ten categories that exist in the other, so, again, it's the same thing.

Q Okay. So essentially, the same three prongs, but they collapsed the categories in prong two into three instead of ten; is that right?

A Yes.

Q In order to meet the definition that has the ten categories, how many categories does a person need to have deficits in to qualify?

A Two of the ten.

Q And under the newer definition which has three

categories, how many does a person need to meet?

A One of the three.

Q And then have you also become familiar with South Carolina's statutory definition which is listed there?

A Yes. It's on the end of the second page, and, again, it's an even more concise way of saying the same thing.

Q All right. So is it your opinion that essentially all three or, I guess, four of these definitions are essentially identical?

A In my opinion, yes. I guess we could fuss about the word "identical," but they mean the same thing.

Q Okay. And I understand that today you're going to talk about -- most likely you're going to talk about the newest definition --

A Well, I --

Q -- or you may talk about one or the other --

A Exactly.

Q -- but essentially, your opinion would be the same under all of these definitions?

A Yes.

Q Okay. So now I would like to go back through each of the prongs in a little more detail. You said it was a three-prong test, and if I understood you right, prong one is called "significantly subaverage intellectual functioning"?

A Correct.
Q Can you explain what that means?
A Well, I think the simplest way to say it is -- well, there's two ways to say it. One is that it falls more than two standard deviations below the mean, but that's, you know, mathematical terms. I think an easier way of doing it is saying that it is an IQ that falls below 70, with a plus or minus five points as a standard error. Now, that's important just because a standard error says we have to give it this latitude; we can't say that someone who is 70 is not retarded and someone who is 69 is. So there's more to it than that.
Q All right. Do you know what percentage of the population falls within that range on prong one?
A Yes.
Q What percentage of the population is it?
A If you use just the number 70, it's one point something, but it gets to above two points, I think, two point something percent when you include that plus -- or five points around that score, in this case 70.
Q So roughly two percent of the population has an IQ of 75 or below; is that what you're saying?
A Correct.
Q And out of that two percentage points of people, how many of the people congregate around roughly 70 -- around

70?

A Between 70 and 75 to 85 percent. So that portion of one, two percent, 85 percent of that one or two percent are falling with scores around that 70 area. In other words, most of them, most all of them.

Q All right. So what you're saying is the overwhelming majority of people who have mental retardation fall within the range of what's known as mild mental retardation?

A Correct.

Q Can you describe some of the characteristics of people who function in that range? What kinds of things can they do?

A What kinds of things can they do. Well, that's important because they do certainly have strengths, there are strengths and weaknesses. And I think sometimes there's perceptions that they can't do anything, but these kind of people can. For example, they could have a relationship that lasts long a time. They many times do have a job. If they find the kind of job that works their limitations, they can hold that job for a very long time, they can be very good at it.

They can function in the reading or writing area at about the sixth grade level or around age 12. You have the ability -- you could get a driver's license, for example. Sometimes you'll have to take the oral test

instead of the reading test.

So they are able to do a lot of -- they're not sort of like someone who has no abilities, but they don't have a job with complex skills. They have a job that is menial labor. They don't -- they might be able to do some money counting, but they don't balance the checkbook. So that they do have skills and they may indeed have certain strengths as well as weaknesses, but -- well, that's my answer.

Q On average would a person be able to tell if someone functions in his range by -- can you tell by looking at them?

A I can't.

Q Okay. I understand that prong one, the IQ score, is measured with different kinds of instruments. Can you explain to us what that involves, what kind of instruments they are?

A Yes. Well, I can tell you what the standard is.

The standard is that they will be evaluated by an individually administered standardized test developed for intelligence testing. The primary test that does this is called the "Wechsler Adult Intelligence Scale." The second most used one is called the "Stanford-Binet Test." That's probably over 90 percent of the IQ tests that are given. There's a couple of others named "Kaufman" and

perhaps a few others in that that have been used from time to time, but it does not include -- you have, for example, they used to give tests in the Army called the "Alpha IQ Test" and there's some group tests for intelligence. These are not to be used for determining a person's IQ for the determination or not of whether a person has mental retardation.

Q Okay. Can you explain to us what the practice effect is and how it relates to the testing done for this prong of the test?

A Yes. The practice effect is a common sense concept that's been borne out by the research. It just says, if you take the test and then you took it again six months or a year later, there would be an expectation that you would score higher. They give -- if you take it again within six months they expect you to do five to six points higher, for example.

Now, this doesn't necessarily have to do with -- for example, a question on an IQ test is name four presidents. It wouldn't mean that I learned four presidents. But it has more to do with the kind of skills, like you're manipulating blocks, you're moving things around, you're doing things like that. And some of those tests are timed, but you're becoming more familiar with that, so it's not as new to you.

But, regardless, there's an acknowledged component that is not acknowledged by all psychologists I know that says if you gave the test again within a year or six months you can expect it to go up several points.

Q All right. Can you tell us what the Flynn effect is?

A Yes. The Flynn effect, I heard it described to me recently in a way that I liked where it just said, "Have you noticed that all these young kids are looking taller nowadays," that there's a change over time and people are getting taller or they're living longer. The same thing was noted in the IQ test scores. It's actually becoming more pronounced now with computers and the like, but it's been noted since, I don't know, 1930 that you have an increase in -- expected in the -- and it was noticed by a guy named Flynn who wrote about it primarily, that you have an increase in IQ of approximately a third of a point each year.

So that when you have a test that is normed, that means that's where they get the standard in the population where they say if the average person is a 100 IQ and you move forward by let's say three years, you would expect that to increase by a point, a third of point a year. So that a person who takes a test years after it's normed can be expected, just because they're living in a more modern world with more information coming at

you, to be smarter so that their IQ is going to be higher.

So to get the proper IQ, you would subtract that third of a point per year depending on when the test was normed.

Q Okay. Because IQ essentially is about how you compare to other people who have taken the same test?

A Yes. Intelligence is what intelligence tests test.

Q Okay. Now, prong two you said is deficits in adaptive behavior.

A Yes.

Q Can you just explain in sort of layman's terms what that really means?

A I think so.

Q Okay.

A The adaptive behavior, which is the second prong, looks at specific behaviors. It's not just sort of willy-nilly, but it's the ones that are described almost identically by The American Association of Mental Retardation, the DSM, and these look at things considered to be important areas of intelligence. For example, independent living skills, communication skills, functional academics, these are some of the types of behaviors, and they have ten of those.

So for the determination of whether a person is retarded or not, you're saying here's the IQ score they've

got, especially if there's any concerns about that IQ score or it's somehow ambivalent or on the border or something, you would look further at adaptive behaviors, what is their communication like, how is their money management, what about their independent living skills, what about their functional academics, so that they give you specific areas to look at and then in the end you make a determination about their adaptive behavior and then the tack-on is those adaptive behaviors before the age of 18.

So, in other words, if it just happened last year and the person is 30, that's a whole different phenomenon than someone that's had it since childhood.

Q Okay. Because prong three is onset before the age of 18?

A Correct.

Q And does that mean that you have to be diagnosed with mental retardation before the age of 18 to meet the test?

A No.

Q Does it mean that you have to have an IQ test that was administered before the age of 18 to meet the test?

A No.

Q It means you have to manifest the symptoms of the disorder before the age of 18?

A Yes. That's another reason why the adaptive behaviors are so important because almost always you can

get information about them from early years.

Q All right. I would like to back up just briefly to prong two. You're explaining the two out of ten or one out of three requirement.

So does that mean that in prong two you don't have to be impaired in all areas of your life in order to be a person with mental retardation?

A No. Well, they specifically cite two of the ten or one of the three.

Q And even within the individual categories, a person with mild mental retardation might be able to still do some things even in that category?

A Yes.

Q They just have to be impaired in that category?

A Correct.

Q Can you explain just a little bit about what the cloak of competence is?

A Yes. Well, it's a -- it's a fact. It's something that you see amongst a lot of people who either have retardation or think they do, but there's a desire to not have that be known and to be as -- you know, to not stick out like a sore thumb. And so there will be every attempt through other people they know or through their own avoidance of a lot of behaviors to not let that stand out and so to not have that be seen by others and so they'll

be -- those -- they'll put forth a lot of energy in their behaviors to avoid looking retarded or to avoid feeling slower when they are slower.

Q All right. Now that we've established what the testing is, I would like to ask you some questions specifically about your evaluation of Mr. Mercer.

You've already told us that your diagnosis is that he is a person with mental retardation.

A Yes.

Q Can you explain to us what the basis of that diagnosis is?

A Yes. First, again I will try to be as concise as possible, we're going to look at the first prong.

Q All right. Would you like me to hand you the -- let me hand you this real quick. Could you take a look at what's been marked as Applicant's Exhibit No. 16. I'd like to ask you if that is a chart of Mr. Mercer's historical IQ test results that you're about to testify to?

A Yes.

Q Would that help you explain the basis of your findings in this case?

A Yes.

Q All right. I'm sorry I interrupted you, but if you'd like to go ahead now and explain the basis.

A Okay. First, looking at the first prong, a couple of prefacing remarks. I had this data and reviewed it carefully and the first thing I noted was there is an IQ that is given of 83 on what's called a Binet L-M test when he's eight years old. I didn't know what that test was. Hadn't heard of it. Looked through literature review and as near as I could determine, it's an early version of the Stanford-Binet that really was more intended and developed for the highest end -- in other words, for people that are geniuses -- but they wanted to develop scoring that was better for the extreme, but they were looking at the high intelligence area, not low intelligence. They expected to do that, they hadn't done that yet.

Since I didn't know enough about this, I spoke to Dr. Grant who did the other testing -- I also spoke to two psychologists I know in Chapel Hill and I also spoke thirdly to Dr. Grant. He's the only one that knew about this test, but he said, "Well, nothing can be determined --

MR. SIMON: Objection. Hearsay.

MS. PAAVOLA: Well, I think he's really just explaining why he isn't relying heavily on this score and it's not really offered for the truth of the matter asserted.

THE COURT: Well, I don't know whether it's

being offered for the truth of the matter asserted. I think if this is -- that information is used in his being able to form the basis for whatever opinion he's going to offer, then hearsay is permitted in that case, so I'm going to allow him to testify and see what he says.

THE WITNESS: This test was normed in 1960 and 1972. Without knowing which norming they used, we can't know what these IQ scores mean. So as near as I could get with my talking to colleagues and researching, this is not a test that we could count on for determining IQ.

BY MS. PAAVOLA:

Q And the test was never normed, I think you said, on a population with people who had MR?

A Correct.

Q And that would be something that would be important in terms of attesting whether a person has MR as measured by that specific instrument?

A Yes.

Q All right. What about his other IQ scores?

A Now, his other IQ scores -- now I go again here to the next -- I'll just cover the next three.

These all fall into the score, 73 is a full scale, 70 is a full scale, and 74 on the middle of this page. These tests were given in 1986, 1991, and 1991. So we have those, when you consider the plus or minus, we're

right there sitting on the fence. So, to me, what that means is you have to use clinical judgment and to gather more information to go further. But there are a couple of points that are noteworthy here. The first is this: If we go back to the practice effect that we discussed earlier, especially when you see two of them given in the same year, that already reduces two of these scores to below the 70 mark.

But if we said for some reason that we weren't -- we didn't like the practice effect, or we didn't consider that valid, you would still be obligated to look at the Flynn effect.

Now, both of these tests here, based on the WISC -- that's the Wechsler Intelligence Scale for Children -- were normed in 1974. Adding a third of point per year drops these three and four points. So again you're dealing with scores that are below 70.

So again, even though they're on the fence on their own, when you add any of those things that you should add -- now, these people at the time may not have known that, Oh, the test was given six months ago, or they may not have known to add the Flynn effect. They may not have known there were other results around, but when you do, you see these falling into the sixties.

The third point, and last point I'll make here,

is that in each of these the verbal subtest in the Atkins case, the verbal tests are especially important. And furthermore, the verbal subtests are those most closely correlated with the full scale IQ. So if you're going to look at anything, you would look at the verbal subtest whether you're saying "Well, I'm concerned with Atkins issues, or whether I'm concerned with just the correlation." So regardless, these scores, even before you apply the Flynn effect or you apply the practice effect are already in the sixties.

So that is my response with those three points about these middle scores, which were sort of like the key here because these were given when he's developing at age eight and 14. Now --

Q Could I ask you just a couple of questions just to clarify? When you've been referring to the "full scale IQ," that is the column in the middle that's bold right there?

A Yes. It has FSIQ at the top.

Q And the full scale IQ is comprised of these two components --

A Correct.

Q -- the verbal and the performance?

A Correct.

Q And that's what's reported on the next two columns of

the chart?
A Yes.
Q And you mentioned that both of these -- all three of these scores are close to the 70 mark. But just to be clear, the cutoff is 75 according to your testimony earlier?
A Yes.
Q So all three of these fall below 75 even before you consider applying the Flynn effect or practice effect or any of that stuff that you just talked about?
A Yes.
Q All right. Now, what about the test that we have here listed in 1993?
A All right. The test in 1993 is -- this is -- he's given -- the reason that it has a question mark, WAIS-R, is you look in the -- it's either The Department of Mental Health report 2006, or The Department of Special Needs. I think it's the Mental Health Department report. It states that he was given a WISC, I mean a WAIS-3, and that this is not intended for someone who is 16 or lower. Well, he was 16 at that time. So I don't really know -- I mean, we assume that since we have the data here that he was given the WAIS-R, but we still don't know what's going on when you have someone else reporting "Oh, no, it was really the WAIS-3," and it shouldn't have been given to him because

he's right on that border at age 16, so I didn't know what to do with that.

You have the change noted here due to the Flynn effect that drops it somewhat, but it's still a bit of an anomaly.

Now, I repeated some of the WAIS-R, that interpretation of the test, the verbal test scores, when I went and saw him and his scores on my testing of that WAIS-R were much more consistent with the three IQs above, being in the high sixty, low seventy range. So I don't know. I don't know what to do with this, but I sort of surrounded it with as much information as I could. Hopefully, that will -- Well, hopefully that's of some use.

So I don't know how to go further than that other than, you know, sometimes if you take statistics, you say "Oh, we've got one oddball statistic," you just throw it out, but I'm saying, no, I'm not throwing it out, but you don't quite know what to do with it.

Q All right. So it was a little bit out of sync with the other scores?

A It was a lot out of sync.

Q Okay. So you re-administered some of the tests?

A Yes.

Q And those results fell more within the range of the

three that you talked about?

A Yes. Well, they were -- or they were very much like the next ones that were also given recently by Dr. Daniel Grant. Regardless, they were consistent with all the other testing. And that last one I would mention is Dr. Grant's which obviously falls right in that fence territory again.

Q Okay. And that test was a Stanford-Binet-V?

A Yes.

Q And what does that tell you, the results from that test?

A Well, it tells you the practice effect doesn't apply because it's a different test, but it's a good test, it's a fine test. And he got a 71, so I see that as sort of similar to the other scores and that we have a person that is scoring with that plus or minus five point margin of error on that fence or on that border.

Q All right. Let's talk a little bit about your assessment of prong two. What did you do to assess prong two?

A Prong two, I looked at all the historical data that I could get and I think there was a lot here because it included special tests that were given early on in childhood; special placements that were given early on; achievement scores, he never scored beyond the fourth

grade in reading level and achievement scores; grade repetition. You have all these in the school records, meaning IQ scores, the achievement scores, the IEPs, all those things that are in his history, so I looked at all of that.

In addition, I got, or arranged and then did, sitting here in testimony and interviews last night and a week or more ago, interviews with these others who have testified, that spoke to specific -- well, they spoke to who he was. I mean, and if they had told me he got an A in a class in rocket science, then that is an important piece of data. But the information was consistently in a different direction about some of the difficulties he had and the ways he tried to get around it, either through cloaking it or just other ways in life to get around it. So I tried to document that as best I could.

And then thirdly, when I was with him, I interviewed him and asked him about these kinds of information, just to see if I could get any more information from him. But essentially I looked at those sources: The school records, which had a lot. You had previous reports that were done by different agencies. You had a lot of IQ tests that were given. You had the family members, you had teachers, you had coaches, and I put all that together to do my analysis of his adjustment

difficulties.

Q All right. I'm going to ask you about some of that in more detail. But first I'd like to ask you to look at what's been marked as Applicant's Exhibit No. 17, and ask you if you can identify that as a copy of the report in which you've detailed all this information.

A Yes.

MS. PAAVOLA: Your Honor, we would move to admit Applicant's Exhibit No. 17.

MR. SIMON: Your Honor, just a couple of objections and it's just certain portions of the report. Pages 11 and 12 we would object to as hearsay. Basically, on those pages it lists the findings of Dr. Grant and Dr. Grant's not here to testify about his findings and that would be -- they're offering it for the truth of the matter asserted and we believe that that would be improper. And also to the extent that he relays the conversation that he had with --

THE COURT: Wait. Let me back up. Eleven and 12 and what else?

MR. SIMON: That would be at the bottom of page 21 through where it says "from personal interview" on page 22.

THE COURT: All right. So what's the basis of your objection, hearsay?

MR. SIMON: Yes, Your Honor.

THE COURT: What do you all want to say about that?

MS. PAAVOLA: Well, Your Honor, with regard to pages 11 and 12, those are the findings of Dr. Grant with regard to the IQ score that he just testified to. And the objection that they have about the other pages --

THE COURT: I know what it is.

MS. PAAVOLA: I'm sorry. We just think it's not really -- well, it may be hearsay, but he's allowed to rely on it to reach his opinion and he's just explaining how he came to his conclusion and what information he's relying on to make those conclusions.

THE COURT: All right. I agree with that. You can cross-examine him about it, but I think he clearly can rely on hearsay in forming whatever opinions he wishes to form. Go on.

(WHEREUPON, Applicant's Exhibit No. 17 was admitted into evidence.)

BY MS. PAAVOLA:

Q Dr. Fisher, could you explain in more detail what your findings are with regard to deficits and adaptive functioning under prong two? And if we could, I'd like to take them in order of the categories under the most recent definition, just the three-category definition.

A Yes.

Q Can you tell us --

THE COURT: Before we get into this, let me ask you a couple of questions.

You say in every circumstance you have to have an IQ of less than 70?

THE WITNESS: Yes. Sometimes they say 70 or less, but I'm saying less than 70.

THE COURT: And that's an automatic criteria for mental retardation?

THE WITNESS: Yes. You qualify for that possible diagnosis.

THE COURT: If you don't have that, you can't be mentally retarded, considered mentally retarded?

THE WITNESS: No. Because you have had findings, but now here -- I'm concerned that I'm going to say something that is a legal finding and not a psychological finding, but you have, for example, in the Atkins case, you have finding people who have scores in the eighties that are still scoring, are still considered properly diagnosed as mentally retarded.

THE COURT: Because?

THE WITNESS: I don't know. I just know that that's the finding, but I think that it's the accumulation of the other data. It was a balance -- they're balancing

the three prongs. What I do know is that they had IQs in the -- I think in one case in the nineties, but in the eighties --

THE COURT: But to meet the psychological definition you have to have an IQ of below 70?

THE WITNESS: Yes. But, again, with a plus or minus five points for margin of error.

THE COURT: Right. I understand that.

And then you have to meet one of the -- the second prong?

THE WITNESS: Yes.

THE COURT: So the first prong is absolute, at least in terms of the psychological definition?

THE WITNESS: With the caveat that I just presented, that it's a legal one, I mean, that's within the legal findings where people have been diagnosed as mentally retarded and their IQ score was 80-something.

THE COURT: All right. Sorry.

BY MS. PAAVOLA:

Q Could I follow up with just a couple of questions before we move back to prong two?

On prong one, I understand you said 70, plus or minus five, so 75?

A Right.

Q That means they have to have an IQ of 75 or below?

A Yes.
Q But my question is, when a person has a history of IQ scores and one of them is above 75, would that automatically rule out a finding of mental retardation?
A In my opinion, absolutely not.
Q And why is that?
A Because you're -- it's like anything else, you're getting additional data so that when you have -- the dots are falling every which way, you have to either take an average, or you might say we're going to throw out the highest-lowest scores. There's different ways of addressing it, but the way to not address it is to say "Well, this one finally made it, we're only counting that one." That makes no sense.
Q Okay. And the way you measure this is on an individually administered test, you already explained that?
A Correct.
Q Is it possible that when a person administers the test they can do it wrong?
A Oh, yes.
Q So if you had one score sort of outside the range, would you need to look at other things to see if that score might be right or wrong?
A Yes. I looked as much as I could in this case, but I

don't think I got a clear answer.
Q A clear answer with regard to whether that 88 score is correct or not correct?
A Right.
Q Now, you've looked at his overall history?
A I have.
Q And it's your opinion that he meets prong one; is that right?
A Yes.
Q Okay. With regard to prong two, is it your opinion that he meets the test for prong two?
A Yes.
Q Can you explain what deficits you found that he has in conceptual -- in his conception. Maybe you should first explain what conceptual skills are.
A Well, the -- conceptual is one of the three categories in the new definitions. The ten that we talked about before are subsumed within these three, but the three -- we're starting with conceptual. The conceptual, this is representative skills such as language, reading and writing, money concepts, self-direction, communication, and functional academics.

Now may I go ahead and describe how he falls within this category?
Q Yes.

A Within this category -- I cite in my report a lot, but trying to be concise and just note some of his more blatant ones -- he repeated several grades, not just kindergarten, but I believe fourth and ninth grade as well. He never scored-out of the -- higher than the fourth grade reading level.

He was placed in special education from an early age. He's tested as much as nine years below his grade level. I think -- I don't know if I mentioned the ninth grade, he failed that as well. Fourth, ninth, kindergarten. He graduated 180 out of 181.

The evaluator, I believe it was Mr. Adkinson who supplied one of the IQs, the one done -- one of the two done in 1991, notes that his verbal score -- IQ score is, in quotes, "well within the retarded expectation."

His IEP and what he was assigned to do was called "basic life skills." That's one of the things where another person might be taking a class in English or something and special education placement was putting him in a whole different direction.

If we look at some of the specific ones back in the DDSN-2006 evaluation, he wasn't oriented to date, he couldn't tell time on an analog clock, he couldn't remember anything at all after ten minutes. That's a memory test that is often given by psychologists. He

can't make money calculations, not just as I found, but as been stated here earlier today by some of the other witnesses.

Everyone describes how they had to repeat things to him. In my conversation with the mother, she described that she would actually take his face sometimes and put it right in front of these facing him.

So I've cited I think here maybe a third of the ones that I cite in my report, but I think that gives you the drift of the conceptual deficits that I either saw or heard from others.

Q All right. What about the category for social skills? Can you just briefly explain what that category includes and what your significant findings were in that category?

A Yes. The social skills are things such as responsibility, self esteem, gullibility, ability to follow rules, obeying laws, and social skills.

And again, just looking at this, not reading through all of these, but just some of the ones that struck me as being significant as I was getting them, his feelings of inadequacy and trying to just follow, get along with others because of these inadequacies was shown just from so many different directions by the different witnesses. He spoke to me in particular about the, you

know, in football where he's called "brain-lock." That was -- I thought that was vivid as an example for me.

He has a statement in the Social Security records, "When I tell him the things I want him to do or give instructions, I have to look at him directly and tell him what I want as well" -- this is the mother talking -- "as get him to repeat the instructions I have given him before I am sure he understands. If I were to tell him these same things in a casual manner without forcing, he many times won't understand me. If I'm relating basic instructions like clean the kitchen, I have to break each individual task involved."

Q Okay. And that was an example of something his mother reported to Social Security when he was a young child?

A Yes. That's in the records from the earliest records that I had reviewed.

Q What about the practical skills area? Can you just briefly tell us what that area involves and what deficits you found?

A Yes. This practical area includes: Daily living, occupational skills, self-care, home living, community use, and work.

And in that, actually going to the last one, community use and work, he took a class, part of his IEP

was that basic skills training where they tried to teach him some of those things like how to be able to use the library -- he never quite got that -- or be able to take buses, and he got started in learning that kind of thing.

But as we saw, he's never able to do something like a bank account or count money, he moves from his mother setting up the account to having Naomi set up the account and does all the money stuff for him. He had great difficulty in counting money. He couldn't cook or do laundry.

And, again, this is like I'm citing three samples from a three-page printout, but they were spoken to, I think, quite well today. They're essentially in the whole area of independent living. He does not have the skills. He has never lived independently, he's never made good use of the community, he's never held a job that has any complexity to the task involved, and he's never held a job at all anyway for a long time. So all these are in the practical skills area -- are examples of practical skill deficits that he had.

And my report was open to but did not have the opposites, like "Oh, but he had this one great job that he had for four years, or he did really well in this algebra class." All of -- open to any of the data, but I didn't find anything on the other side.

Q All right. So is it your opinion that he has deficits in all three of the areas under the 2010 test?
A Yes, but based on what I've just read out loud here.
Q And so would he also meet the test under the older definition in your opinion under prong two?
A Yes. Well, I'm more used to those because I'm older and I've been doing that for a while, and so having two out of the ten, he is much more like most all of those deficits of the ten listed, which are the same ten really. He has most of them, meaning like over five, in my opinion.
Q All right. And lastly, prong three, which is onset before age 18, do you have an opinion regarding whether Mr. Mercer meets prong three?
A He does. Well, the records are enough that shows his deficits early on. I don't think they've changed over time.
Q All right. And then lastly I'd like to ask you a few questions about the concept of malingering.

Can you explain what "malingering" is?

A Yes. Malingering is a -- well, as a forensic psychologist, a part of all the testing, since it's people who are frequently in trouble with the law, has to do with whether the person is being deceptive or otherwise trying to manipulate the situation. That's called malingering.

And there are a couple of ways of addressing it. Some people have tried to develop tests for it. I'm not a real test advocate because it just throws out a number and no one knows what it means.

But the other ways to assess it include -- or common sense ways -- is the data that the client gives you consistent over time. That's why I always do at least two interviews. You know, he tells me one thing one day, and is he telling me the same thing, and I repeat a lot of the same questions the second day.

Now, here we had records, parents, teachers, coaches. So that's the third source. If he goes "Oh, I, you know, only went to third grade," and they all say "No, he went to twelfth grade," you have another source of inconsistent data which would be more likely to indicate they're being deceptive or trying to present something that's not true.

That wasn't there. There was no differentiation between the data from any of the sources here.

There are other factors you can look at such as, did they present paradoxical symptoms. If he says, "Oh, I'm up all day long, I'm a total manic here in the jail," and then the guard says, "No, he sleeps all day long," that would be something that he's presenting that's inconsistent there. It's a paradoxical piece of

information.

And then lastly, if he presented something I would call a rare symptom, so in other words, for example, here we're looking at IQ and all of a sudden, you know, he found a way to add 16 digits quickly, or something like that, that would be presenting something that is very rare and inconsistent with the diagnosis that appears to be appropriate.

So you look at all of those, and I did look at all of those and it was my determination that he was not malingering. You have the fact that the symptoms and these issues have been there since childhood. So even if I came to the determination that he was being deceptive, you'd have to say "Well, he's been deceptive for a lifetime," which I think is unlikely.

So based on all that, I did not -- I thought the data that he was giving me was credible.

MS. PAAVOLA: All right. Thank you, Dr. Fisher.

CROSS-EXAMINATION

BY MR. SIMON:

Q Good afternoon, Dr. Fisher. How are you today?

A Good afternoon. Good.

Q All right. Just kind of to go over a little bit of some -- some of this you've already discussed.

Your undergrad's in community corrections,

correct?

A Yes. Harvard University. Social relations is what they called the field. My thesis was in community corrections in Massachusetts.

Q And when you got your master's from Southern Illinois, that was also dealing with corrections issues, correct?

A Correct. It was dealing with the classification of criminals.

Q And your Ph.D. was also dealing with corrections issues, correct? Or your dissertation for your Ph.D.?

A Yes, it was.

Q And for the early part of your career, for a good part of that career, you dealt with primarily corrections issues, correct?

A Yes. Forensic issues are all I've ever dealt with. I mean, that's where I am.

Q Now, how often have you testified within the last five years?

A Well, I gave that example of I usually have like three or more cases that come up in a month and usually of those, I testify in two. This month I'm sure I'll be testifying about two times, so that would be like 20 some odd times a year that I testify. I think that's right.

Q And how many times in that past five years have you

testified in South Carolina?

A I've testified several times in South Carolina, but I don't remember the last one and I don't think it's -- was in -- I did a case in Chester, but that was over five years ago, so probably it was over five years ago.

Q And do you remember the last time you testified in South Carolina about mental retardation?

A That case in Chester, South Carolina was about mental retardation, competency and mental retardation. Absolutely.

Q Was that a capital case?

A Yes, it was.

Q You wouldn't by any chance recall the name of the defendant in that case, would you?

A No. I mean obviously I could look it up. I just don't remember the guy's name now.

Q You say that was more than five years ago?

A I think so, yes.

Q When you testified, within the last five years, how many times have you testified on behalf of the State?

A None.

Q You've always testified on behalf of the defendant?

A Yes.

Q How many times have you been retained by the State?

A None. I'm not even sure if I can be in North

Carolina. I don't think I can be, which is where I live.
Q And when you've testified, has it just been primarily in North Carolina or where all have you testified within the last five years?
A No. As I mentioned, I've testified in approximately 30 states. I'm currently doing cases in here, Georgia, Florida, Texas -- Texas. That's an example.
Q And within the last five years, how many times have you testified about mental retardation?
A Again, I don't know exact numbers, but it does -- in one form or another, it does come up pretty often, so I would say at least certainly more than ten, maybe less than 20.

You said in the last couple of years, I think? Yeah, I think that's right.

Q Are you a board certified clinical forensic psychologist?
A Well, I'm approved by the American Psychological Association. But I don't have a board -- I'm not a diplomate, if that's what you mean. There's a thing you can get, it's called a diplomate -- I don't really know much about it.
Q And for that do you have to take an exam?
A Oh, yeah.
Q And you're not board certified?

A No.
Q Why not?
A There would be no reason. It would just be a way to throw money out the door. I don't see any need for it.

I'm not even sure I know another clinical psychologist who is.

Q You're a member of the American Psychological Association?
A Yes.
Q Do you know what their position is on adjusting scores?
A On adjusting scores?
Q Yes.
A I don't know if they've ever stated a position. Maybe if they have, I'm not aware of it.
Q And you're also a member of the North Carolina Psychological Association, correct?
A Yes.
Q Now, in being a member of the North Carolina Psychological Association, do you have to take continuing education classes?
A Yes.
Q How many do you have to take?
A I think the way it's done is credits. I have to get -- it's like 13 credits every two years and a certain

percentage of them have to be in ethical issues. I mean, you know, I do it, but I don't know the number thing.

Q And the classes you've taken, have they been dealing with mental retardation issues?

A Yes, I have done something having to deal with mental retardation. It's just a topic that comes up a lot and it has something to do with my -- it's just interesting to me.

Q And have any of those classes dealt with mental retardation issues in capital cases?

A Not that I recall.

Q Have you written any recent publications? I'm looking at your CV.

A No, I haven't. I've sort of gotten out of the business of doing that.

Q And I take it that -- do you do any -- I guess in the field of testing -- well, let me withdraw that question.

You have a Ph.D. in psychology?

A I do.

Q And you're not a medical doctor?

A I'm not a medical doctor.

Q You're not a psychiatrist?

A I'm not a psychiatrist.

Q And I want to take a step back.

Have you written any publications on diagnosing

mental retardation?

A I have done -- well, no, those are evaluations, so I'd have to say none. Not that I can recall, no.

Q And to take a step back, during your direct, you mentioned that you had -- you were involved in a study with the corrections department?

A With several studies involving the corrections department.

Q With those studies, did you actually conduct any kind of psychological exams as part of those studies?

A Yes. We do psychological testing as part of my evaluations of different correctional issues and additionally have considered specifically mental retardation issues in some of the systematic evaluations I've done.

Q How much time would you say you've spent on this case?

A A lot. I came down and visited him over a couple of days. I've done a lot of research into the literature on some of the issues of importance here. I've spoken to the family members, spoken to the coaches and the peers, met with the attorneys, sent down some of the referencing materials for some of the points I've made, been here in court.

Q Okay. Let's see if we can get some exact time. But

first you interviewed Mr. Mercer, correct?
A I did.
Q And you did that over a two-day period?
A Yeah, I interviewed him on two days. It actually was a bit longer. It was in the middle of that ice storm here.
Q On the first day, how many hours did you spend with Mr. Mercer?
A Four.
Q On the second day, how many hours did you spend with Mr. Mercer?
A Four.
Q You also conducted some interviews with family members and other people. You spoke with his mother?
A Right, I met with the family people. I met with them again yesterday. I sat through their testimony today, yes.
Q Well, prior to writing your report, how much time did you spend speaking with his mother?
A The interviews themselves were pretty short because I had developed -- there were some open-ended questions. I had to go back and develop some of the specific questions for them, so that's what took awhile, but the interviews themselves, you know, 10, 15-minute interviews.
Q And that would go for the mother; is that correct?

A Well, they were different. Like the father was pretty quick because he had not been around. The mother took quite a bit longer. Naomi was a good, long interview. The coach was pretty quick. They were different.

Q And you also spoke with Ms. Jefferson who was once his teacher in Philadelphia, correct?

A I did, yes.

Q Now, did you speak with Linda McCombs?

A I did not.

Q And do you know -- you reviewed the school records?

A I reviewed the school records, but that one for some reason is not ringing a bell with me.

Q Did you speak with Catherine Cooke?

A I did not.

Q From looking at the school records today, do you know that she -- do you recognize her name?

A No, I'm sorry, I'm just not -- that's not ringing a bell, no.

Q In looking at the school records -- actually let me take a step back.

Did you review any of the trial testimony in this case?

A I did.

Q And did you review the whole transcript?

A I did.
Q And so you understand at some point in time Mr. Mercer was -- the defense did attempt to have him tested before, correct?
A Yes.
Q And that testing was done by Tora Brawley, correct?
A Yes, I recall that name, yes.
Q Did you speak with her?
A I did not. I did not.
Q Did you speak with any of the other experts that worked on the case at trial?
A Not at trial, no. Dr. Grant from this go-round.
Q You didn't speak with his brother, Eric, did you?
A I haven't spoken with Eric. I would like to have spoken with Eric.
Q And you didn't speak with either of his sisters?
A I did not. Eric would be the one I would want.
Q Let's talk about the IQ test that had been done before in this case.

Now, the first test score, that was from the Stanford-Binet L-M form, correct?
A Right.
Q They had a score of 83?
A Correct.
Q And you said you're not familiar with that test

personally, correct?

A No. I did, you know, I did what I would consider a pretty thorough literature research, talked with Dr. Grant, talked with two of my colleagues in Chapel Hill to find out everything I could about this test and as far as you could get, it's not conclusive as to whether the results would be legitimate. It's a very rare, oddball test to have given and we don't know when the norms -- what norms they used.

Q Now, in the report of that test, do you recall if there were any other diagnoses made by the psychologist who gave the test?

A I did look through that material. I'm not recalling anything. I mean, you know, it may have said oppositional character or something like that, I don't know.

Q Do you recall if he was diagnosed with any kind of learning disabilities as a result of that test?

A Well, that wouldn't surprise me. The two often get overlapping and close to lumped together.

Q And I will probably get more to this a little bit later, but in that first test, do you recall there being a diagnosis dealing with auditory comprehensive?

A No. But again, I wouldn't be surprised. That would be -- that wouldn't have been all that important to me at that time.

Q In your report you mention that you had contacted a number of colleagues to find out if they had heard about this Stanford-Binet L-M form, correct?

A Right. Everyone's heard of the four, everyone's heard of the five, but the L-M was just an oddball. The literature I got on it suggests that it was developed for the exceptional range, the high IQ range.

Q Now, who are you asking? I know you say colleagues, but in terms of what do they do? Are they also --

A Well, Tim Hancock is one. He's a psychometrist, which means he knows all the tests and their statistics and how they are developed. He didn't know the test.

Another one is actually an attorney, Edith Georgi, in Miami, who I've worked with in other cases having to do with mental retardation. She didn't know about the test.

And Dr. Grant I'd mentioned before.

Q And then you just decided you just weren't going to use that 83, correct?

A No. I mean, I think I surrounded the issue by saying I've talked to everyone I can talked to. Dr. Grant actually knew about it. That guy knows a lot about the IQ tests and he said this one, you can't use it because we don't know how it was normed. And then I have the articles that I reported where it talks about the

development of the test for the exceptional range, the exceptionally bright range. So I think I've done a good and honest job of trying to ferret that one out.

Q That test was done by the Institute for Learning, correct?

A Yes.

Q And that wasn't the school, that was an outside agency?

A Yes, whatever that is.

Q And didn't the Institute for Learning advise that for the future Mr. Mercer receive -- have a multi-sensory approach towards learning; do you recall that?

A I don't recall, but I'm sure that is there if you're reading it.

Q Now, the second test was a WISC-R that was given November of 1986, correct?

A Yes.

Q And the verbal on that was 67, the verbal IQ score?

A Correct.

Q And the performance IQ score was 84; is that correct?

A That's correct.

Q And the full scale was 73?

A Yep.

Q And that testing was done at the Bethune School, correct?

A Yes.
Q Did you see the raw testing data for the score?
A Yes, I think so.
Q By any chance -- you wouldn't by any chance have a -- did you see the subtest scores on those?
A Yeah, I remember being provided the raw subtest scores in some of the IQ tests. I can't remember if we had it for that one specifically or not.
Q Now, in reporting the results, the psychologist who did that test -- let me show you -- I believe this is in the materials that you have -- I'm going to show you this. I understand that's in the special education records.
A Yes, and I did review this.
Q Now, on page two of that, the psychologist noted that the verbal IQ score was low because of his scores on the information and the arithmetic subtests, correct?
A Yes.
Q And that psychologist conducted some limited retesting, correct?
A Yes, that fall in the moderately retarded range.
Q And that arithmetic score in there improved from one to four, correct?
A Yes.
Q And that particular examiner found there was a strength in word comprehension?

A Yes.
Q And that examiner also found that the discrepancy between the verbal IQ and the performance IQ suggested an auditory-based learning disability, correct?
A Yes.
Q And based on your report you indicate that that is among Mr. Mercer's normal testing, correct?
A No. I mean the score, it's a full scale of 72 which falls in that fence range. I'm not sure I'm answering your question, though. I mean, I don't find that in the normal range.
Q I guess my question is: You didn't find that one to be something that would be surrounded by other factors, did you?
A Well, no. The practice effect wouldn't apply to this particular test. However, it's one where you say "Well, Atkins is more concerned with the verbal IQ issues." His verbal IQ is 67. And if you disregard that, you say his full scale IQ is 73, with a plus or minus five, that means we've got to look at this further. You don't have enough data to be conclusive here.
Q Now, when you say the plus or minus, it could be up to 78, too, correct?
A Yes, correct.
Q And I guess in reviewing the documents and doing your

interviews, you were made aware that by the time Mr. Mercer took that test he had been in six different schools, correct?

A Yes.

Q And he actually changed schools a good bit, correct?

A Correct.

Q That would have had an impact on his learning abilities, correct?

A You know, I don't know. I don't know the answer to that. You would think so, but I'm supposed to say things where there's research backup and I don't know what the answer is.

Q All right. Now, the third test was done by Overbrook High School, correct?

A Yes.

Q And that was in 1991?

A Correct.

Q He was 14?

A Yes.

Q And the report itself indicated some of the conditions regarding around when the test was taken, correct? Do you recall that?

A Yes.

Q And that was after he was actually coming back from suspension, correct?

A I'm sure that's true. I don't recall that specifically now.
Q And again in the scoring in that test -- would you like to see a copy?
A No, I think I know enough from recall. That's the one where Adkinson said his score in verbal clearly falls within the retarded range, which I cited earlier.
Q And in that test, in the subtest scores, again, the information on the arithmetic scores were low, correct?
A Yes.
Q And on this third test, both his verbal and performance IQ scores went down, correct?
A Correct.
Q Did you review the raw data for those tests?
A Yes.
Q In reviewing the raw data, did you see any reason to question any of that data?
A I don't recall having a reason to debate any of this.
Q And for the -- I want to take a step back to the Bethune test. Did you see any reason to -- did you have any qualms about the testing that was done in the second test?
A Well, you know, any time you have tests that are 30 years old and given when a person is that much younger, it's not always exactly the way you want it to be, but

it's lucky that we had prior IQ scores for this. It's a whole lot better when you have that than when you have nothing at all.

In this case we had the special education placements and the IQ scores given to make those placements from when he was eight years old. So, yeah, that's a really important set of data. Even if you could say "Well, this one was, you know, he was stressed out when he took it," or any issue like that, it's still better that we had that data generally because it's before the age of 18.

Q Now, in your general practice, do you find that someone's home environment would have an impact on their IQ scores?

A Well, I think the answer to that is it does. And, yes, I agree with the findings of psychologists that it does.

Q Now, the fourth test that was given to Mr. Mercer, that was done by the Pennsylvania Disabilities Department, correct?

A Yes.

Q It's done by Saul Barenbaum?

A Yes.

Q And that test was done less than a month after the test done by Overbrook High School, correct?

A Yes.
Q And it had a full scale score of 74?
A Right.
Q Verbal IQ score of 62?
A Uh-huh.
Q A performance IQ score of 90?
A Right.
Q And Barenbaum found that the discrepancy between the verbal and the performance IQ scores was indicative of a learning disability, correct?
A He did.
Q And he also found that the concentration of task persistence appeared good with Mr. Mercer?
A Yes.
Q And found that he was capable of carrying out simple instructions and performing at a consistent pace?
A Yes.
Q And his adaptation to stressful circumstances appeared good, correct?
A Yes.
Q And Barenbaum found he could handle, change, and avoid normal hazards and take the appropriate precautions, correct?
A Correct.
Q And Barenbaum also suggested that Mr. Mercer become

involved with some kind counseling or therapy, correct?
A Yes.
Q And that was because he was having this problem with -- identity problem because of his academic shortcomings, correct?
A Right.
Q Suggested therapy?
A Yes.
Q To your knowledge, did he ever receive any therapy?
A Not that I'm aware of.
Q Barenbaum also diagnosed Mercer with oppositional defiant disorder, correct?
A Correct.
Q And that was actually the basis for him being granted disability, correct?
A I think that's correct.
Q Could you define what oppositional defiant disorder is for us?
A It's sort of the useful -- it's an attempt to give nicer words to antisocial. It's really not a diagnosis that I've seen used. I don't think it's used anymore at all. But in its time, it was just for the kid that was giving you trouble in class, whether the problem was that they couldn't learn the material, or they could learn it and decided not to do it. So it pretty much was a blanket

diagnosis given for anyone who was taking extra teacher time.

Q And in this case, Barenbaum found that that was the basis for Mercer to receive disability?

A Right, that he was taking extra teacher time.

Q And in your review of the trial transcript, you're aware that at trial, there's testimony that he was diagnosed with traits of antisocial personality disorder, correct?

A Yes.

Q And that would also have an influence on IQ scores, correct?

A I don't think so.

Q You don't think so?

A No.

Q Now, I'm looking at the school records. It's consistently found that Mr. Mercer has a significant learning disability, correct?

A Yes.

Q And he was in special education classes?

A Correct.

Q And he was in those classes since, I believe, second grade?

A Third grade.

Q Third grade. And having a learning disability, that

can impact your IQ scores, correct?

A Well, there's been a lot of studies about whether there is an impact or not an impact between -- just the overall correlation connection between learning disability and IQ. And in my opinion they've never been able to successfully differentiate the two.

In other words, if you hear this person is mentally retarded, it probably means there are going to be learning issues going on. If you hear a person has learning issues, it probably means they are going to have some mental retardation questions around their case.

Q So you're saying there's information out there that goes both ways?

A Both ways, yes.

Q And another thing that's kind of consistent in Mr. Mercer's school records is that he has auditory processing issues, correct?

A Yes, that was in there several times.

Q And tell me if I'm incorrect in describing this, basically that means he has problems comprehending verbal instructions; is that correct?

A That's fair enough. Some people are better at visual cues, some are better at auditory cues, they learn differently, and he seemed to have some deficits in the auditory learning area.

Q And it was pretty consistent in the notes that teachers would say that they would have to repeat instructions over and over to Mr. Mercer again before he would understand it?

A That's correct. Again, I've noted that that was there to his teachers and that was there to his mother, but it also is an equally viable symptom for the behavioral developmental disabilities that we would connect with mental retardation, that "can't learn it, got to repeat it, got to put them in front of you." So here's one of those areas where I don't know how to make a total separation that works.

Q And it was recommended on a number of different occasions in those records that Mr. Mercer receive psychotherapy, correct?

A Yes.

Q And again, earlier you said you don't know if he's ever received that kind of psychotherapy?

A No, I think I asked him about that and I think he has not.

Q Now, the next IQ test score was done at the Richland One School District, correct?

A Correct.

Q And that was in 1993?

A Yes.

Q And the verbal was 81 -- the verbal IQ score was 81, correct?
A Correct.
Q The performance was 99?
A Yes.
Q And full scale was 88?
A Yes.
Q And the report indicated that Mr. Mercer was enthusiastic about the test, correct?
A I think so, yes.
Q And this test was taken not too long after he and his family moved down from Philadelphia, correct?
A Yes.
Q So this would be a new environment for him in terms of taking the test?
A Yes.
Q And he would not have been in the same type of environment where he was when taking his prior test, correct?
A Correct.
Q And again, looking back at the trial testimony and listening to the discussions about where he lived in Philadelphia up there, at trial they testified that that area's pretty rough, correct?
A Correct.

Q The different parts of Philadelphia?
A Yes.
Q And when he moved down here, it was described it wasn't as rough, right?
A Right.
Q And the tests indicated that he was getting along with his peers?
A I think so.
Q And he liked it at Columbia High?
A Yes.
Q Now, you indicated that there was some kind of discrepancy, you couldn't tell if the test that was given was the WISC-R or the WAIS-3?
A The things I pointed out about that that I hoped helped to understand it was that I believe it's in the 2006 mental health evaluation. It may be the one by the Department of Special Needs, one of those two says the test that was given was not the WAIS as reported here but was actually a WISC -- I mean was actually the Wechsler No. 3 and that it should not have been given if he were 16, which he was then. So that only left me with just some confusion.

You have the additional factors that this is a new test -- this is not the WISC, it's the WAIS -- and that there is a phenomenon -- I found some literature on

this that suggests you have a ten-point spike jump when you move at age 16, just for that age tested, from the WISC to the WAIS. They don't know how to explain it, but it just happens, that if a person is 16 and they take the WISC and then they take the WAIS, they're going to jump ten points.

And then as we mentioned earlier, you also have here the Flynn effect since the norming of that test which would have reduced it a number of points.

So all in all, the test just has a lot of stuff that leaves questions out there, plus you might have other psychologists who would just say "Well, we have so many of these that we'll just take out the extreme one and not include that data since it was such an anomaly."

Q Now, the report that was done by the school district said it was a WISC-R, correct?

A It did.

Q And it provided the subtest scores, correct?

A It did.

Q Did you check the subtest scores to see if they matched with the scores that were --

A I did it roughly. Everything looked fine.

Q So based on that document alone, by itself, you wouldn't have a reason to believe it was not -- the WAIS-R was not the test given?

A Correct. I think -- I'm pointing out all the things that just left me stumbling when I tried to get a grip on this particular one test.

Q Now, in your report you indicate that after seeing the scores, you believe that you should do some retesting, correct?

A Right.

Q And you did retesting on -- you did the information subtests again?

A I did. I did all the verbal tests; information, vocabulary, comprehension. I did arithmetic. I did -- what have I left out here? I'm leaving out at least one. But regardless, I did the verbal subtests and they just generally were coming out closer to a 70 with the prorated scoring.

Q Now, do you actually have the subtest scores with you?

A I don't. I don't have those with me, no.

Q So right now you can't tell us what those subtest scores that you found were?

A Well, they were -- I can tell you that they were relatively consistent within themselves, in other words, it wasn't like a 3-8-2, and that the consistency was consistent with an IQ score of around 70.

Q But we don't have those subtest scores here to look

at?

A I don't have those scores with me, no.

Q And when he was first given the WAIS-R, that was back in 1993, correct?

A Yes.

Q And you're giving the retest this month?

A Right.

Q That's 17 years later?

A Yes.

Q In looking at the scores from the Philadelphia test, and analyzing those scores, did you take into consideration the living environment that Mr. Mercer had based on the testimony at trial?

A I did not.

Q And from that testimony, do you recall that there was a diagnosis that he suffered from PTSD?

A Yes.

Q And that was actually testified to by at least two of the experts, correct?

A Correct.

Q And that could have an effect on IQ scores, correct? Or at least there could be a correlation between them?

A There could be a correlation, yes, but I've not seen an article that says if you have a PTSD diagnosis you can expect this kind of an IQ change.

Q Also in the testimony at trial, Dr. Loring, the social worker, she indicated there was abuse at a young age, correct?
A Yes.
Q And that included his father beating him, correct?
A Yes.
Q And there was also some indication that he may have been sexually abused by an uncle; is that correct?
A I seem to recall that, yes.
Q And those are part of the basis for the PTSD, correct?
A Correct.
Q And would you consider that those could be factors that may have affected his testing?
A No. You know, I just don't know of psychologists nor have I heard in or in any of my training had something that says if you find this level of poverty, or a diagnosis of PTSD, or even abuse, that you can expect a change in IQ score in one direction or another. That research may be there, but I'm not aware of it.
Q Now, in your report, you argue that only the verbal scores here should be considered, correct?
A No. I'm saying that the verbal scores -- the research literature considers those to be the most reliable in terms of their correlation with overall IQ.

And then secondly, some of the -- when Atkins looks at it, they say "Well, let's look at the things that relate to reasoning and comprehension and logic and memory," those are all on the verbal side. The performance side is movement of blocks and assembly of pictures and things that deal with how information comes in and goes out that are quite different.

Q Now, you just stated that when looking at Atkins' cases, it's a little different. Why? Mental retardation is mental retardation, correct?

A I think my answer to that would be qualified for this reason and I want to be clear here.

The IQ test was developed for educational purposes. That's what it was meant to do well. It has 11 subtests that are supposed to tell you about intelligence, which in turn tells you something about how they will work educationally and where they should go and where they should be placed.

It's a big leap from that to having a court decision about it that is looking really in different ways at different things. It's not looking at something that just says "Do they achieve well from this grade to the next?" It's not looking at just the educational issue, what is there. It's looking at a different set of factors, and it stands to reason that it would.

Q Now, there was a final test done in this case, correct?
A Yes.
Q And it was done by Dr. Grant?
A Yes.
Q And in that test it found he had a verbal score of 76?
A Yes.
Q And performance score of 69?
A Correct.
Q And a full scale of 71?
A Yeah.
Q Now, in his prior test his performance score has been higher, correct?
A That's correct.
Q But in this case it was lower?
A Right.
Q Would that be an indication of possible malingering on his -- on Mercer's part?
A I don't think so. I think the reason is because it's a totally different test. This is the Stanford-Binet and it's got completely different subtests. And I think where they fall as far as the ones -- I know the WAIS better and those ones you have on this verbal side, these things like comprehension, information, those types of things. It may

well be the Stanford-Binet has a completely different mix.
Q So you're not as familiar with the Stanford-Binet?
A I'm not.
Q Okay. But you would agree that this score doesn't fit with the pattern of all his earlier scores, having performance higher and verbal IQ lower, correct?
A Right, but I'm saying that that may be, what would you say like, it's because the test is different. You know, one test's performance is the other test's verbal.
Q And you don't by any chance have the subtest scores for that, do you?
A No, and I haven't seen them.
Q Okay. You just received them, the final scores?
A Exactly, yes.
Q So you never actually learned what the subtest scores were?
A The individual subtest scores, I did not.
Q And I believe we touched on this a little bit earlier. You're aware that the defense did attempt to have Mr. Mercer tested for, I guess, mental retardation while they were preparing for trial, correct?
A I'm trying to remember what they -- oh, I think that's why they did the 2006 evaluations by mental health where they said they already had the 88 score. Is that what you're referring to?

Q No, I'm referring to the defense team at trial.
A Right.
Q Do you recall reading Dr. Schwartz-Watts' testimony?
A I do, but I don't recall that part of it. I'm just not recalling that. But, yes, I did review the trial transcript. It must have slipped my mind.
Q And again, you didn't contact Dr. Brawley about the testing she attempted in this case?
A No.

THE COURT: Mr. Simon, we need to take a break. I don't know how much longer you're going to be, but are you going to be a while?

MR. SIMON: I think so, probably.

THE COURT: That's fine. It's for the court reporter. Let's take a break for 15 minutes.

Doctor, don't discuss your testimony with anybody while we're on break.

We'll come back in about 15 minutes.

(A break was taken.)

THE COURT: All right. Mr. Simon, you ready to proceed?

MR. SIMON: Yes, Your Honor.

BY MR. SIMON:

Q All right. Dr. Fisher, in the -- did you receive the test results from Dr. Grant? Do you know if he did any

tests for malingering?
A No, I don't know if he did or not.
Q And in your retest, did you do any tests for malingering, like when you did the retest without the WAIS-R?
A No, I just did an overall test for malingering and it was part of my assessment on both the days.
Q And that was just based on your observations of Mr. Mercer, correct?
A Yes, but it included those factors I -- it includes the records, it includes the statements of his family and peers. You're matching all those to see if they're consistent as a source of determination about malingering.
Q In terms of testing?
A Well, malingering generally. It would be in whatever he presents to you, whether it's in test data, or his statement about how far he went in school, or who he's married to, anything.
Q Okay. But, just specifically about the -- to read the subtest you re-gave --
A Right.
Q -- you didn't do any kind of tests for malingering on those, correct?
A No, I wouldn't know how to do that, yeah.
Q Now, when you talked with Ms. Mercer, did you

understand, I guess just in general terms, what was the purpose of y'all's conversation?

A Well, our conversation was just, I introduced myself, I'm there -- actually, I was introduced by the attorney on one case and the mitigation specialist on the other. And then they were there for some of the session and I watched them interact just to sort of gauge some of the communication skills and the like, and then they both left on separate days -- one's there one day, one's there the other day -- and then the rest of it was my conversation with him.

Q Earlier you testified about the Flynn effect, correct?

A Yes.

Q And that's just a theory, correct?

A It's pretty well acknowledged in psychology fields, yes.

Q But it's one there's been a good bit of debate about, correct?

A I think that if you had a debate, the debate would be whether it's a third of a point a year, or other people might say it's a little bit more or a little bit less. The fact that IQ is going up over time I don't think is debated in psychology fields, it's going up.

Q And so you're saying it's not something that -- the

existence of the Flynn effect is not something that's been debated, whether it's something that should be taken into consideration in terms of deciding IQ score calculations?

A Most psychologists I know take it into consideration, but I think there's debate over how much, how many points you're going to subtract for the Flynn effect.

Q Okay. So are you aware that there are articles out there that assert, that find the Flynn effect might not necessarily be the most ethical approach to dealing with scores?

A I'm not surprised. I mean, it's just like anything else in psychology, I'm sure you're going to have opinions everywhere.

Q And are you aware that there are some that call into question whether it's okay for someone reviewing somebody else's tests given by others and producing those scores?

A I think that's a valid criticism in the sense that it's not -- I disagree with it, but I can see where that came from, yes.

Q And have you heard of Leigh Hagan?

A Leigh Hagan. No, that does not ring a bell.

Q I take it you wouldn't have read any of his articles whether or not the Flynn effect should be applied to adjusting IQ scores?

A I probably have. I've read so much about the Flynn

effect -- I've read a lot about it -- but I'm not familiar with that particular author.

Q Is the Flynn effect, to your understanding, used in Social Security cases?

A Probably. I don't know.

Q How about in education cases?

A I just don't know the answer to that.

Q Do you know of the Flynn effect being used in any other situations other than in capital cases?

A Well, yes. It was developed, the whole procedure of what it is and its effect on IQ scores was developed independent of capital cases. It didn't have anything to do with capital cases.

Q And do you know if the APA has a position on the Flynn effect?

A I think you asked about that earlier, and I just don't know.

Q Are you aware that there have been studies done in other places that found that the Flynn effect may be stagnant, let's say in Scandinavia or in the United Kingdom?

A Yes, I'm aware of the studies that show that it's different in different countries that are developing differently. And I do remember specifically Norway was cited, but there was all these particulars in the research

that speak to the way different countries are developing and how that would effect the Flynn effect. If anything, it goes to show you how widely used the test is.

Q And those articles, those dealt with empirical tests that were used to make those determinations, correct?

A Yes. Well, they looked at the Flynn effect or if they're saying it's not the effect or it's less or more the effect, just in different countries and at different times.

Q They look at IQ scores at different times and compare the difference between, let's say, a test-taking place, a set of scores from 1980 to 1990 and then another set of scores from 1990 to 2000 and compare the differences, correct?

A Right. And then they would do them in different countries and the like. It's just that it's something that's been researched a lot.

Q And are you aware of any studies that have done the same kind of comparisons here?

A Not specifically. Again, I've done a lot of research on it, but I bet you'd find something there.

Q Well, let's move on to your adaptive behavior findings.

And in making those findings, your ability to make a determination is only as good as the information

you receive, correct?
A Absolutely.
Q And only as good as the accuracy of that information received as well?
A Right.
Q And it's based in part on the records, so you have to rely upon the accuracy of the folks that are taking notes and that kind of thing?
A Yes, in part on the records.
Q And also in part on the accuracy of the statements made by the people you interviewed, correct?
A Yes.
Q And so if somebody who you're interviewing has a bias, that could affect the accuracy of your determinations, correct?
A Yes, and my own interviews with them.
Q And if you have a lot of information to process, you can get a better assessment, correct?
A Yes.
Q Now, I know that some of the records here, you reviewed the Social Security records, correct?
A I did.
Q And that would include the Social Security application?
A Right.

Q And at that time when Mrs. Mercer was making that application, she was trying to have Kevin qualified for Social Security, correct?

A Yes.

Q And again with the testing that was done in there, there was the finding by Barenbaum that he had an auditory learning disability, correct?

A Yes.

Q Now, in your report, you go through a litany of different facts you believe support your findings?

A Correct.

Q You note that in the DDSN report, it's stated that Mr. Mercer didn't know what month it was?

A Right.

Q Now, in that same paragraph, didn't it also say that Mr. Mercer said he didn't have access to a calendar in the prison?

A Yes, and I think that's the same paragraph where it also says he couldn't read the analog watch.

Q And the DDSN examination was actually done on the 3rd of February, correct?

A I guess so.

Q Now, you also point to the fact that Mr. Mercer took the oral exam on the driver's test as one factor?

A Yes.

Q Now, in your discussions with him, did you have any indication that he had any problems taking the oral exam?
A No, he just said that that's the way he did it, but he didn't describe having any problems. He got his license, but then he lost it again. He lost it like four times.
Q Now, in taking the oral exam, when somebody goes and takes the oral exam, they have to basically give the person who is giving the exam some confidence that they understand the rules of the road, correct?
A I think that's fair, yes.
Q And so that's a determination that is being made by somebody else, correct?
A Correct.
Q And there's no indication that the DDSN report, which is where this statement came from, this is no indication that he took the oral exam because he couldn't read or write, was there?
A No.
Q Now, you noted also in your report that in the DDSN report they noted that he was able to register three items, but he had forgot them in ten minutes?
A Right.
Q Now, in some of the earlier testing that was done where the IQ tests were -- the prior IQ tests that were

given, they also gave similar tests about registering three items, correct? Do you recall that in any of the prior testing?

A No. The closest thing I think in the WAIS tests are the digit span which is you repeat -- you say numbers like one, three, four, seven, and have them repeat them and then say them backwards, and that's more of a short memory as opposed to remembering something ten minutes later, which is usually referred to as intermediate recall.

Q Now, you said digit span?

A Yes.

Q Now, is that on the verbal or the performance IQ?

A I think that's on performance.

Q Now, the DDSN report, they note several things about their interview with Mr. Mercer. First, they note that he knew there were 12 months in a year, correct?

A Correct.

Q And he understood the number of days in a week?

A Yes.

Q And the number of months in a year, correct?

A Yes.

Q And he also could recite both the months and the days, correct?

A Yes.

Q He knew the four seasons of the year?

A Yes.
Q He knew at the time that he was being interviewed it was winter?
A I think so, yes.
Q He was able to name five states?
A Yes.
Q He was also able to name five cities upon request?
A Yes.
Q He was also able to name two oceans upon request?
A Yes.
Q He correctly performed two-digit addition and subtraction?
A Yes.
Q He knew the four directions on a compass?
A Yes.
Q And in your report you note that Mr. Mercer had difficulties making change for a dollar. Am I correct in stating that?
A Well, that's not my finding. That was information that came to me. It definitely came from the mother. It definitely came from Naomi, and I think there's one other source. That came from at least three sources.
Q But I guess that in your report you pointed to the DDSN report stating that he did not know the number of dimes in a dollar?

A Right. Well, I know that's in there somewhere, but maybe that's not in that -- may have got the wrong report.

Q But in that same report, it did show he knew the number of quarters in a dollar?

A Oh, I'm sorry, yes.

Q And he also knew the number of nickels in a dollar, correct?

A Yes.

Q And also the number of pennies in a dollar?

A Yes.

Q He was able to accurately define the charges he was facing, correct?

A Correct.

Q He understood how those charges related to -- strike that.

He understood he was in trouble, correct?

A Yes.

Q And he recognized the charges he faced were very serious?

A Yes.

Q You talked about the fact that when he was in special education and the classes that he took at Columbia High School, you noted that he was taking basic life skills courses, correct?

A I think one of them was called "basic life skills."

Q Now, in his individualized education program, he mastered pretty much everything that he was put up against, correct? Do you recall?

A I think he got a pass in most things. There may have been a part where they gave a percentage competency, I don't really recall.

Q Now, you also had a discussion about the jobs Mr. Mercer had?

A Yes.

Q Now, in the DDSN report, didn't Mr. Mercer say that he quit a number of those jobs because he didn't make enough money?

A I'm sure that's in there.

Q And did you speak with any of his employers?

A I did not.

Q So you don't know off of -- from talking with them if he quit or was fired, do you?

A No. My opinion that states he worked jobs only for short times and that the labor there was menial and not complex is based on my interviews with him, my interviews with the family, and my interviews with his ex-wife.

Q Now, would you agree that when you have a special education certificate and not a diploma, it's harder to not get a non-menial job, isn't it?

A I don't know. I guess theoretically that sounds

right.

Q And the records that were provided, I guess, especially the Social Security records, they did indicate that the jobs he took were low paying?

A Yes, I think I had a pretty full list in my report and they all have that "low pay" sound to them like the McDonald's or the shelf stocking or the labor pool.

Q And Mr. Mercer did look into other avenues of finding more gainful employment, correct? He took classes or he took a class Midlands Tech to try to become an electrician?

A He did, but there -- I spoke to him at length about that and there was some real -- he never really got off the ground as far as understanding in that class. He dropped out of it after a short while. He didn't graduate from it. And when I talked to him, he realized he was over his head as soon as he got there.

Q But he did try, correct?

A Yes.

Q And he also attempted to become a truck driver, correct?

A Yes, he was in there for what -- she testified to that earlier.

Q And there was a point in time when he considered becoming a barber?

A Yes.
Q Now, am I correct in saying that the DDSN report, that at one point in time Mr. Mercer told them that he just chose to become a stay-at-home dad, correct?
A Yes.
Q And at the trial, his wife testified that they never went without? Do you recall reading that?
A Yes.
Q And also, she indicated that Mercer was a good provider?
A Yes, I'm sure that's in there.
Q Was there any indication that Mr. Mercer obtained money by illegal means?
A Not that I recall.
Q He graduated in -- well, he got a special education certificate in March of -- or May of 1996, correct?
A I think that's correct, yes.
Q And he was incarcerated on the convictions -- I guess on the charges that led to his convictions now in May of 2002, correct?
A Correct.
Q So that's a six-year window of where he would be expected to be working, correct?
A Yes.
Q And again, he went through a number of different jobs

in that time period, correct?
A He did, yes, quite a few.
Q And there are also times that he was incarcerated during that time period, too, correct?
A Correct.
Q And he would have been unable to work during his periods of incarceration, correct?
A Yes.
Q And did you check to see if any of the times where he left jobs, did any of those correspond to times where he would have been incarcerated?
A I did not.
Q Now, according to the documentation he provided to the Social Security Administration, he indicated that he worked for CiCi's Pizza from June 1999 to August 1999, correct? Do you recall that?
A Yes. I didn't have the dates, but I have dish washing at CiCi's Pizza, yes.
Q And are you aware of any other jobs he worked in 1999?
A I'm not sure. Mine are not dated.
Q And so do you recall that he was working for Triangle Rent-A-Car from January of 2000 to March of 2000?
A I mean, I'm sure that's right if it's in the records.
Q Okay. And do you recall if he was incarcerated

beginning on March 22nd of 2000?
A I don't recall.
Q Don't recall.
Mr. Mercer has had several convictions, correct?
A Yes.
Q He's had possession with intent to distribute; is that correct?
A I think that's correct.
Q He's had unlawful possession of a firearm; is that correct?
A I think so. Again, I'm not positive about all the ones, which are convictions or which may be pending, but I agree he has a prior history.
Q And he's pled guilty before to strong arm robbery?
A Yes.
Q And in those cases, I guess, would it be unlawful possession of a firearm, and with the strong arm robbery, those involve -- those are gun-related offenses, correct?
A Yes.
Q In the strong arm robbery, he had a shotgun, correct?
A I think that's correct. I think I recall that.
Q And for the unlawful possession of a firearm, he was driving a car and the pistol was under his seat, correct?
A Yes.
Q And it was his car; do you recall?

A That I don't recall.
Q He didn't seem to have any issues with getting a hold of these weapons, did he?
A Apparently not.
Q Now, in your report you talk about the fact that he lost his driver's license four times?
A Yes.
Q Now, the first time his driver's license was suspended, it was because he didn't have insurance on the car, correct?
A I can't remember. I just remember going through that history with both him and one family member and they talked about several times. I'm not sure of the exact number that he -- he had a license, but he kept losing it.
Q And a lot of the reasons he kept losing his license were related to either failing to pay fines or not having insurance, correct?
A Yes, that is correct.
Q And so those being the cases where he -- it could have just been a situation where he didn't have any money to pay those, correct?
A Didn't have any money or didn't understand the process for renewing the insurance.
Q Now, when he didn't have the insurance, that was in December of 1996; do you recall that?

A I don't, but I'm sure that's correct.
Q And that would have been was shortly after he received his special education certificate, correct?
A Yes, that makes sense.
Q And he would have still been living with his -- well, I guess, from the testimony you've heard both today and the testimony you read in trial, that would have been the time when he would have been living at home with his parents, correct?
A Yes.
Q Now, in your report you indicate that he says that he lost his job at Sears for not sorting quick enough, correct?
A Yes.
Q Did you verify that information with anyone other than Mr. Mercer?
A Mr. Mercer, and I'm trying to think if I talked to Naomi about that or if it was what I heard today. Let's just leave it with Mr. Mercer.
Q So you didn't contact anybody at Sears to find out if that was the case?
A I'm not recalling enough to be able to say that I did.
Q Now, when did you interview Ms. Stackhouse?
A I don't know the exact date. It was about a little

over a week ago. I interviewed all of them over a two-day period.

Q Was it an interview you did separate from the rest of family?

A Well, I've done it both ways. I've interviewed her separately and then I've interviewed her together.

Actually, when we met yesterday it wasn't together, so, yes, separately on both occasions.

Q And did you go through her trial testimony?

A I did not.

Q Do you know if she understood that this was like her talking with you was part of the evaluation for Mr. Mercer on mental retardation?

A Yes. I think that was explained both by me and with attorneys in both cases.

Q And she has three kids with Mr. Mercer, correct?

A That's correct.

Q And she testified today she still is very much in love with him, correct?

A Yes.

Q And they were married for over nine years?

A Correct.

Q And at trial she described him as her best friend?

A I think that's correct.

Q And he knew things about her that other people didn't